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## Employee Theft Investigation® A Practical Guide by J. Patrick Murphy

Regardless of the business you are in, employee theft is going to occur. Theft can be in the form of proprietary information, data, company supplies (not a pen), cash, stock manipulation, and the list is endless. However there are some common covenants that should be in place. Policy and procedure is important to running a small business or multimillion dollar corporation. They are the rules of the road. There cannot be a more important set of guidelines than how employee theft is handled within the company.

Here are some suggestions regarding employee theft awareness, investigations and prevention. All policies should be reviewed by a Human Resource professional and a Labor Attorney before implementation.

### Policy and Procedures

- HAVE a written policy regarding disciplinary action if an employee is found to be stealing.
- Clearly define what stealing is. Sure, we know it when we see it but sometimes people see it as "borrowing". An example statement in a policy would define theft as "The unauthorized removal of company assets both tangible and intangible". Notice is does not use the word theft. Theft requires intent. For termination purposes their intent is not an issue. For prosecution, it will be the crux of the allegations.
- Communicate that policy beyond new hire orientation. Posters, newsletters, and blogs can help reinforce a gentle message.
- Ensure that all levels of the company are tied to the policy including Senior Management.
- Keep in mind that precedents are set with any termination. Ensure there is consistency in the enforcement of policy.
- Management must set the tone and lead by example regarding policy. If a manager borrows a laptop so his child could do a PowerPoint presentation in class then why can't any employee do that?
- If there is not a formal department that conducts internal investigations formulate a plan (in writing) as to what initiates an investigation and who handles it.
- Have a written policy regarding searches of vehicles, personal articles like backpacks, briefcases, and backpacks.
- Have a written policy regarding refusal to allow a search.

### Searching Employees



**Warning!** The ability to search someone (anyone) is a vital right for any business but doing so should be considered very sensitive. Put yourself in the position



of the person being searched to understand the feelings of the process. There are many scenarios to justify the need for search but this discussion will focus on employees and the implementation and management of the procedure.

Bag checks are common place and should be accepted by employees if properly positioned and concerns addressed. If a company adopts a policy to require employees to submit to searches the policy and procedure should be well vetted with Human Resources, Legal, and Management. There are three provisions that should be considered when formulating policy:

1. Define "search".
2. Searches should be limited to anything outside the body. This would include purses, backpacks, brief cases, computer bags, sacks, etc. NEVER touch someone in the process. Don't frisk or have them disrobe. (yes it happens).
3. The policy is in place for all levels of employees including (especially) Management.
4. The consistency of the policy. Under what circumstances will a search be conducted.
5. Who has the authority to search.

Policies are only as good as the people implementing them. Don't assume that a written policy created is a written policy understood. Consistency in application is the key. If, for instance, there is a security person at the door and all employees are supposed to stop and open anything they are carrying then even the company President or owner should do so. There needs to be a clear definition of how a search can be conducted. Is that defined as allowing someone to dig through a handbag or does it mean merely a visual inspection is allowed. This is very important. Is a metal detector appropriate? If so how are activations handled?

Even with the best written policy, occasionally someone will refuse. These refusals do not necessarily mean they are in the act of theft but they can be volatile situations nonetheless that can escalate needlessly if handled improperly. What disciplinary action is available for an employee refusing to comply with company policy?

Unless there is a very compelling reason to not allow the employee to leave if they refuse, then allow them to leave. First, however, a possible solution is to call a supervisor to remind the employee of the policy. This action should be taken in an area that is as private as possible which could simply be off to one side. If the employee still refuses after a calm but firm discussion with a supervisor, then allow the employee to leave. The individuals attempting to perform the search should document the incident, retrieve video if available, and turn the matter over to those who make the disciplinary action. If other witnesses are available, obtain their statements as well.



What if something is actually discovered while doing the search? Is the discovery of narcotics, such as marijuana, or a firearm covered in the scope of the search? How are those to be handled? What if the search reveals something that is suspected to be of value to the company? What are the steps to be taken?

## Controls

- Audit your own policies and procedures. These should be unannounced and conducted regularly.
- Watch carefully anything that involves cash or other negotiable items. There should be a number of checks and balances to detect problems. Bank deposits are especially vulnerable.
  - How are deposits monitored? Is there a notification from the bank if a deposit is short or missing?
  - Is that notification going to someone other than the person who deposited the money?
  - Is there notification or deposit review to ensure deposits are made daily?
  - Is there a requirement that deposits be made during daylight hours only? This helps prevent employees from faking a robbery and stealing the money.
- Is trash disposal controlled? Dumpsters are great places to hide property only to come back later and take it. How do they know which trash bag it's in? They tie the knot differently.
- If a company asset is missing, such as a laptop, is there a record of the serial number and description of the device available.

## Investigation



**Warning!** Whether a professional investigative department is involved, a private investigator, or simply Management or a Supervisor, investigating an employee for any cause is very serious business. Investigators who have experience in internal matters should be the first choice to conduct the investigation. There are companies that specialize in the investigation of white collar crime that are available. Police Departments are generally not equipped to properly investigate most internal thefts because they don't have the time to learn the inner workings of a company. They are certainly a resource to be used however and will always be the conduit to prosecution..

1. Conduct an immediate and thorough investigation if you learn of a theft. Document all investigative efforts.
2. Investigations are "sexy" to others. Remind everyone interviewed, even a suspect, that the matter is confidential. Create a confidentiality agreement for signature if possible. TIP: Employees often claim defamation after investigations. Confidentiality agreements keep everyone on notice about the



sensitive nature. There's no real way to keep people from discussing the investigation but as long as the investigators and management maintain their confidentiality, the risk of a successful civil action is low. Termination should be a possible action if confidentiality is broken.

I am aware of a sexual harassment investigation where an entire department was interviewed. During the interviews, the target of the investigation's name was brought up. The target, a supervisor, was eventually fired but then brought a successful defamation suit against the company. His allegation was that people who knew nothing about the alleged activity now knew that he was being accused of sexual harassment and that his termination confirmed the allegations. Award: \$17 million.

3. Evidence is important. Company documents, witness statements, video or physical evidence must be preserved.
4. Thoroughly understand the laws regarding the use of polygraph and drug tests. The use of the polygraph is legal when investigating a loss. If there is cause to use a polygraph, my recommendation is to allow the police to do that. The employee may refuse which is their right to do so. The results of the polygraph or the refusal to submit to a polygraph are not grounds to terminate an employee. The totality of the investigation must support the allegations.

## Interview

Interview and interrogation is an acquired skill that is a mix of recognizing body language, knowing that no one admits to wrongdoing initially, being patient and knowing how and when to ask questions. There are two prominent companies that offer instruction and training on conducting these types of interviews. Wicklander & Zuluwski ([www.wz.com](http://www.wz.com)) and Reid ([www.reid.com](http://www.reid.com)). If the interviewer is not trained at the very least there should be procedures established for ground rules to guide non-investigative personnel. There are a few listed here but it should be said that regardless of skill level, extreme care is demanded of all employee interviews of this nature.

1. Interviews can be conducted with or without a witness present. Female employees should always have a female witness present. A witness should sit out of the peripheral vision of the person being interviewed. The witness should not be an active part of the interview but should take notes. If the employee diverts their attention to the witness to talk to them, simply redirect them calmly back to the interviewer.
2. Be prepared. Create an outline of how you wish to present your facts. Have your documentation and evidence prepared as well.
3. Props. Examples of props: Thick file folders with labels such as "Theft Investigation of John Doe" or video tapes with similar labels. A prop is intended to give the interviewee the impression of overwhelming evidence against them.



My recommendation: **Don't use them.** If your investigation does not have merit on its own then perhaps the decision to talk to the employee should be reconsidered. Leave the props to theater.

4. Document the start and stop time of the interview and document any offering of a break for use of a restroom or drink even if it is refused. Document the time of those offerings and acceptance/refusal.
5. Provide the employee a document stating that they acknowledge that they can stop the interview at any time and are free to leave at any time. Have them sign that document for your file.
6. Don't position yourself between the employee and the door.
7. The hardest part of an interview can be simply getting started. What do I say? If needed, write out a script and keep it handy as if you were giving a speech.
8. Be very mindful of the duration of the interview. If an admission has not been made within an hour then it is unlikely that any further discussion will bring one. It is important to understand that this does not mean there is a standard to length of interviews nor does it suggest that haste is important. Simply keep in mind that the employee should never be given the impression that they will sit there until they confess or that they do not have the option to end the interview. However, my experience of well over 1000 such interviews tells me that an hour is on the outer edge of reasonable time when interviewing someone and no admissions have been obtained.
9. There are pros and cons to taking notes. Interviewees tend to be distracted when they notice someone writing something down. During the interview try not to take too many notes. You'll come back to the admissions later.
10. Audio or video recording an interview is dangerous territory. If done, it should be with the full acknowledgement and authorization of the interviewee. I have tape recorded one interview in my career and it was a witness, not the suspect.
11. Be mindful of the lateness of the interview. Do not be the only people in the entire building at 11:00 PM.
12. Be mindful that if the employee says they have an appointment and can't stay you may have to reschedule.
13. NEVER offer to negotiate their termination or prosecution. Don't offer to not prosecute if they just "tell the truth" or if they just made payments for the loss "everything would be alright". Don't make statements implying that the investigation will make the morning news (even if it might) if they don't admit to the allegations. Don't threaten to fire them if they refuse to take a polygraph.
14. Don't allow the interviewee to steer the interview by demanding to take a polygraph. They can do that on their own if they wish but it is not their decision as it relates to company business.
15. Show me the video!! There is no obligation to show the interviewee any video evidence. Note: If you say you have it, make sure you do.
16. Employees have a very difficult time using the words "steal, theft, intentional, lied". Instead they use software descriptions such as "took, borrowed, mistake, mislead". Efforts should be made to clarify that they knew what they were doing



- was theft. While they were going to pay the money back later, they were not authorized to take the money and it did not belong to them. It is theft.
17. Expand the interview to understand where did they either learned or got the idea to do this. Many times employees are influenced when they see others do the same thing. This is especially true when they see a member of management steal.
  18. Obtain a written statement from the employee about the thefts they committed. Ask that they include implications of any other persons involved in theft. Have them be very specific about those allegations. Have them state dates, times, circumstances, and the property involved.
  19. The conclusion of the interview should result in a voluntary written statement. It should be written in the person's own handwriting and signed by the witness as well. Document the times of the beginning and ending of the writing of the statement. Obtaining a written statement is important but dictating it is leaving the door open to question as to the validity of the content. If upon completion of the statement, it is found that they left out important facts or information, they can be asked to write about that. Accept the manner in which the statement is written, bad handwriting, poor grammar, spelling and all.
  20. Finally, they do not need to be read their Miranda rights unless they are being interviewed by law enforcement.

## Termination

Terminations for theft should not be handled in a manner different from any other termination for cause. Termination is based on established policy and procedure. Sometimes, however, theft is judged on a sliding scale of value. Example: A jar was set up on a desk to collect money for a charity. An employee, needing lunch money, stole (was going to pay back the next day) \$2.00. The money was not the property of the company but the employee was terminated anyway. Theft of anything causes loss of confidence and not terminating may create a dangerous precedent.

## suspension

1. Consult with your Legal Department or Counsel regarding your investigation. Ultimately they will have to defend the actions of the company if it comes to that. Nothing can prevent someone from filing a civil suit. What is more important is that the actions are defensible in court and that the plaintiff does not prevail.
2. Consider terminating the employee for "Violation of Company Policy" versus theft. It is easier to defend as no intent is required or suggested.
3. Industries that hire young people are well aware of the parents' interest in the termination of their child. If the child is an adult (based on your State's definition of adult) then the parents do not have a right to know anything about the



employer's actions. A minor child's parent's has no "rights" as the actions taken are between employer and employee however, discretion is sometimes used and the case is discussed. What the parent knows is usually vastly different than the truth. Check with your attorney before releasing any information.

## **Prosecution**

As a percentage, few employees are actually prosecuted for theft. There are many reasons why but frankly, there may just not be enough evidence that would make a prosecutor want to take the case to trial. Prosecution rarely results in full restitution to the company and if restitution is required, it is paid back over the lifetime of their probation. A great deal of payroll is going to be used to prosecute an employee. That cost needs to be weighed. The argument is made that not prosecuting sets a bad example. The question that needs answering is who knows they were prosecuted and who knows what the outcome was. Isn't the investigation confidential?

1. While it may be more dramatic, there is no need to send someone out the door in handcuffs. In most cases, it's better to organize your investigation and take it to local law enforcement. Don't rush this part of your investigation.
2. Your case may be well documented but the prosecutor may decide to plea bargain the case to a lesser charge. It's out of your hands.
3. Your case may languish in the system because it is not a priority.
4. Losing a criminal case may give rise to a civil action based on malicious prosecution.
5. You may have a confession for \$1000 but you can only prove \$50. Charges may only be accepted on the provable \$50.00.

## **Restitution and Civil Restitution**

Restitution is an available option on any case. It is simply the employee's agreement to repay what they stole. Civil Restitution is available in most states. Civil Restitution is allowed, generally through a civil statute, that basically says a company can seek civil damages because of the time and effort required to investigate the incident. Every state that has enacted what is also known as civil demand, has a range of damages that can be sought. In Texas, for instance, damages up to \$1000 can be sought against an adult and up to \$5000 against the parents of a juvenile. The monetary value of the theft is irrelevant. What is important to know is that Civil Restitution is a separate matter from prosecution. In essence an employer can seek prosecution, full restitution and then file for Civil Restitution. Check with your attorney on this and how to go about it. Regardless of the method chosen, there should be a written policy put in place to adequately cover this practice.

1. If you prosecute, you will receive restitution through the courts and it is up to the court as to the amount (if any) of payment and the length of time to repay.



2. If prosecution is not intended then restitution should be agreed to and a Promissory Note should be created. I recommend a term of one year with equal payments each month.
3. Check with your attorney or HR Department and discuss how an employee can voluntarily forfeit final pay, vacation pay, profit sharing or any other source within the company for restitution. A document should be created that allows the employee to use those funds for restitution. The form should be signed but does not need, necessarily, to be notarized. This method shows the greatest opportunity to recover from theft.

### **After-action**

This is the part that is frequently left out of an investigation: root cause analysis or what happened and why did we not catch it earlier? Prevention is the key and plugging gaps in your current way of doing business is an ongoing challenge. Prevention efforts will be successful about 80% of the time. A component of prevention is the fear of detection. It's the old question of would you steal a million dollars if no one knew you did it. Some people would never steal. Some would steal if given an opportunity regardless of the chance of detection. That middle group fears they would be found out. That process of detection must be in place through rigorous oversight of controls, policy and procedures. The apprehension of an employee is the result of a failure somewhere along the way. All of the procedures were written with a perfect world in mind and those procedures never occur 100% correctly 100% of the time. Employees prey on systemic weakness and human error. You can't have one without the other.

Review every piece of the chain of events regarding the theft. Remember...you asked the employee how this happened. Make suitable changes but try not to go overboard and put safeguards in place that begin to hamper business.