



Prosecuting Employee Theft

**Any theft can be prosecuted.
Not all prosecutions are successful.
Not all guilty verdicts provide restitution.**

Prosecute, Restitution, Promissory Note, Paycheck or Sue? What Are Your Options?

The following is not intended to be construed as legal advice but is my opinion based to a reasonable degree of professional certainty. Always contact an attorney for legal advice.

Note: Theft, fraud, and embezzlement are crimes. Criminal investigations should only be conducted by professionals with experience in that arena, specifically law enforcement or civilians with extensive training. The mishandling of a criminal investigation can ultimately put you at the risk of civil litigation, damaging the prosecutability of a case, or suffering through a criminal complaint brought by the offender you pursue.

Employee theft statistics in retail will give you insight into the depth of the problem in all businesses.

PROSECUTION. Prosecuting any employee for theft, regardless of amount or position within a company, should be considered carefully.

The process for filing charges against an employee is, in general, no different than any other criminal process. There are no special laws that pertain specifically to employees however there are criminal offenses that are more appropriate for fraud and embezzlement based on the facts of the case. How a particular crime is classified is an issue for law enforcement and the courts.

Patience will pay big dividends. Prosecution is an option but it does not have to be initiated instantaneously. In fact, my recommendation, where possible, is to document everything first: complete your investigation by creating complete documentation of the events, take statements if need be, summarize your evidence, and THEN call the police. While having an employee taken out of the building in handcuffs is dramatic and may provide a sense of satisfaction, it is not necessarily in your best interests to do so. Here's why: The police officer who comes out is only there to perform a very cursory investigation and then be the conduit into the justice system. While you and the officer may agree you have a prosecutable case, successful prosecution is another thing. There is a judicial process involved beyond law enforcement that can cause the case to be dismissed before ever reaching a courtroom. This may create some civil liability exposure. How you approach that decision should be done carefully and with advice from legal counsel. Keep in mind however, once you start the prosecution process, you can't take it back by dropping charges without a great deal of civil exposure.

What do you get by prosecuting an employee? Possibly nothing. The manner in which the court punishes your employee thief (if found guilty or pleads guilty) is totally in their hands and the truth is



you may never hear about the case again. The courts may have your best interests at heart in broad terms but accepting a plea is the most likely arrangement to be made.

If they plead guilty or are found guilty via a trial there are two options available to the court.

- They receive jail time in the County jail or State Penitentiary. There is no guarantee that a restitution agreement is part of the sentencing.
- They receive probation. To best understand the types of probation possible in your jurisdiction, you should discuss with investigation authorities. However, probation usually mandates restitution over the term of the sentence. In short, the person is allowed to make restitution with regular payments over the life of the probation. Employers should be aware of the potential short comings of this program. If, for example, the probation is for 5 years for the theft of \$10,000, the former employer would receive \$167.00 a month for the 5 years (or some other amount determined by the court). Upon receiving probation, the County Probation Department becomes responsible for ensuring payment. It becomes the responsibility of the former employer to ensure the Probation Department manages the process. Over time, probationers tend to forget to make payments and the Probation Departments can fail to recognize the violation of the terms of the probation.

RESTITUTION. If prosecution is not viable then voluntary restitution may be the best alternative. The term "voluntary" is key. If the circumstances permit, the employee should return any goods or property they may still have in their possession or that they can reclaim from friends, relatives, pawn shops and alike. I view this as "**recovery**" of stolen goods/money and not restitution. If it is no longer in a usable/saleable condition you could add that property to the restitution you demand. I recommend that the employee write, in their own hand, a list of stolen items and the value of each and that they want to repay you for them. If you have the luxury of doing so, create a formal document that states the amount owed and divide that into equal payments over a year's time. The theft has now become a collection item and you could send them an invoice each month. The payments are voluntary and your chances of actually receiving all payments are slim. Once out the door, your former employee's memory will likely fade as to the original agreement. That is why the next two options may be more effective.

PAYCHECK. If an employee wishes to make restitution, they can use their final pay to pay towards that end. You cannot take their wages involuntarily but the employee can relinquish pending wages, vacation pay, holiday pay, bonus, profit sharing, stocks or any other negotiable tender to pay you for their deeds. To accomplish this, contact your HR Department or Labor Attorney and draw up a document for the employee to sign specifying how they wish to repay your company. Once it is authorized by the employee, arrangements should be made through the appropriate method to fulfill the agreement. A word of caution: Threatening to prosecute unless they make restitution is basically extortion. Never threaten to prosecute someone if they don't pay you back or if they stop paying you.

PROMISSORY NOTE. If their paychecks or other monies cannot fully cover the amount stolen then a Promissory Note may be appropriate. A Promissory Note is a contract. Contracts cannot be signed by juveniles so the parents must be the guarantor of the promissory note. Check with your HR Department, CPA, or attorney to create a proper document. The promissory note gives you the power to sue the person civilly if they fail to pay. Frankly, good luck. The person probably does not have assets

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that could be awarded to you as payment and besides, what would you do with an old couch anyway? It's reality.

CIVIL RESTITUTION. Many states have statutes that allow merchants to seek civil damages against shoplifters and employee thieves. These statutes are not limited to only retailers. These statutes provide little real relief as the monetary awards are generally very small. If this action is pursued however, and the employee does not meet their obligation, they can be sued in an attempt to have liens on real property. This too is of little relief unless the employee has attachable assets. The amount of time (money) invested in this process usually outweighs any benefit gained. As a side note, this avenue can be pursued even if they are prosecuted because this is a civil matter