Post-Embezzlement Asset Recovery Procedure

By G. Michael Bellinger

Workplace embezzlement is an increasingly common occurrence: According to the most recent U.S. Department of Justice Statistics, embezzlement increased by 39% between 1990 and 2000. In the current economic environment, this trend will likely accelerate. But despite its frequency, embezzlement, when uncovered, still engenders feelings of rage, betrayal and embarrassment. Before the emotional reaction subsides, companies generally take immediate, reflexively punitive steps against the employee-suspect: on-the-spot termination, hasty escort from the premises, restricted access to the company's electronic network, and prompt notification of local law enforcement. While these steps may assuage the emotional wounds inflicted by the theft, a different approach may better serve a company's long-term financial interests. If a company's primary objective is asset recovery, that company should not rush to carry out the procedures enumerated above in response to a presumed embezzlement.

This admonition may seem counter-intuitive. Why not immediately call law enforcement when an employee has looted a corporate bank account? Doesn't one usually call the police if a home is burglarized or a car stolen? And why not immediately terminate a disloyal employee?

The two-pronged answer is simple. First, life rarely replicates "Law & Order." Burglary, car theft and other street crimes are most often committed by strangers whom the victim usually cannot identify and the police therefore cannot find and arrest. By contrast, an employer will almost always be able to identify an embezzler, if not immediately, then certainly after a thorough investigation. Second, and most importantly, law enforcement objectives and business interests frequently diverge. The criminal-justice system is linear: Police arrest, prosecutors take cases to trial, juries usually convict, and judges sentence. Although "restitution" is frequently a component of modern sentences, during the time between embezzlement and sentencing, the embezzler's ill-gotten gains have often been depleted by legal fees and/or "personal expenses."

Corporate interests under these circumstances are often quite different from those of law enforcement. Most companies want their capital returned, perhaps followed by a firing squad at dawn for the miscreant as an example to other employees. The decision to bring charges against an embezzler, however, is generally secondary to a company's financial interests. In fact, and not surprisingly, the chief executive of a corporation may not want an embezzlement made public at all, in the interest of avoiding disclosures to angry shareholders, second-guessing board members, and intrusive reporters with embarrassing questions. Given this maelstrom of competing interests, the following is a tried-and-true asset recovery methodology for companies to follow upon the discovery that the till has been looted.

**THE CRITICAL FIRST STEP: THE INVESTIGATION**

The mere suspicion of an embezzlement should trigger an immediate, thorough investigation. Since circumstances and established relationships often render it awkward for general counsel or others to interrogate high-level executives and are likely to raise real or imagined conflicts of interest, outside counsel should be retained expeditiously: Time is nearly always of the essence in these circumstances. Depending on the specific facts of each case, the company may also wish to retain through counsel a forensic accountant and a technology expert, the former to trace and illuminate the electronic trail. (In this technology age, almost everything that happens in an office leaves tracks in e-mail.)

Sometimes, the probable embezzler is identified before outside counsel is retained, but in any case the likely culprit should be interviewed as soon as possible. Outside counsel should conduct these interviews — preferably a lawyer experienced in white-collar criminal law and internal investigations, with specific training in the interrogation of individuals in tense, anxiety-ridden, adversarial circumstances. Criminal-law practitioners quickly develop a comprehensive understanding of the fraud and will often obtain a written or oral statement from the suspect containing an admission of culpability. Most people who engage in criminal conduct of this nature provide a statement rather quickly when proper, lawful interrogation techniques are employed. Indeed, the police secure a high percentage of confessions...
because, surprisingly, most suspects want to, and usually do, confess. Suspects are particularly likely to “talk” if they perceive a “way out” of their dilemma. In the handful of embezzlement interrogations I’ve participated in over the past five years, every transgressor confessed within an hour.

Experienced counsel will take the necessary precautions to ensure that any statement obtained from the employee will be admissible evidence in either a criminal or civil context should it prove necessary. Counsel will always have another lawyer present in the room to serve as a witness to any statement obtained and will always inform the employee-suspect that she or he is free to leave the conference room or interview area at any time, in order to weaken later claims of coercion. Again, it is advisable to record the statement of an employee after one is confident that the relevant facts have been established in an initial interview. The interrogation will include questions regarding the possibility of an internal or external confederate. Although the handful of embezzlers I’ve investigated all operated alone, the possibility of assistance should not be ignored. Accomplices or co-conspirators may have liquid assets and be potential sources of restitution. In sum, counsel will conduct a private investigation in full compliance with the law that may well result in the company’s recovery of lost assets.

**The End Game**

It must be determined how much has been embezzled, how much remains of what was taken, and the total amount of the suspected employee’s unencumbered assets. The company’s records will indicate whether the perpetrator can repay the embezzled funds from employee assets still held by the company, such as 401(k) funds and/or pensions, vacation pay and the like. Federal and state statutes control whether such assets are subject to court judgments, but the embezzler can often tap them voluntarily. Also potentially relevant are the assets of parents, relatives, spouses or significant others — anyone who may have an interest in avoiding the ignominy of seeing a relative exposed as a thief on page one of the local paper. The sources of potential restitution are vast, so counsel should leave no stone unturned.

Armed with a full confession and knowledge of a perpetrator’s ability to make his employee whole, a company is then in a position to negotiate with the perpetrator for the return of its stolen assets. One must proceed with caution since state statutes differ on how to proceed in this regard. In many jurisdictions, there is a very thin line between lawful attempts to obtain stolen property and extortion. Skillful counsel will be able to navigate these legal niceties.

**One Example**

This author once was retained by a client whose employee had embezzled over $750,000. The initial interview went as follows:

“Hi. We are lawyers, and we represent the company you work for. I know your mind is racing right now because you are wondering whether you have finally been caught. You have. The company knows what you have done, and we will determine what should happen now. This is your chance to demonstrate that you are a good person who did something out of character. This will be your only chance. Tell me what happened from beginning to end.”

The perpetrator made a voluntary oral confession and later signed a 19-page statement before a notary. The confession outlined the acquisition of a BMW, expensive jewelry, exotic vacations with her fiancé, expensive artwork (including a Picasso) for her condominium, a fur coat, and many mortgage payments. It provided a road map to the recovery of a treasure trove of physical assets. But $200,000 was still missing.

The police likely would have shrugged at the loss, because the case was “solved.” So we asked the perpetrator’s fiancé to come in for a chat. This youthful real-estate developer had trouble explaining how his fiancée working as a secretary was able to afford, among other things, the couple’s $1,000-a-night vacations in Los Cabos. Ultimately, he and his family contributed $200,000 on behalf of his future wife to make the client whole. Meanwhile, the BMW dealer who had accepted a credit card that did not bear the buyer’s name, and the banks that repeatedly had accepted an unauthorized signature on company checks, paid the company’s legal fees.

**Calling the Police and Collecting Insurance**

Only after the company has maximized its recovery should it debate whether to contact local authorities. It may have no choice, however, in those unfortunate cases where the investigatory process yielded little or naught, since police notification is a prerequisite to collecting a claim from the company’s insurance carrier. Even when there is a potential to recover assets, some annoyed CEOs will resist hiring outside counsel. “Let’s just collect insurance. That’s why we pay premiums.” But the insurance company will pay neither easily nor quickly and will use any perceived shortcomings in corporate procedures to determine future coverage and perhaps higher premiums. Finally, the company’s diligence in mitigating the loss may encourage the insurance company to downplay the shortfall and renew coverage on reasonable terms.

In sum, a company’s financial interests are best served by resisting the urge to fire the culprit and call the police immediately upon the discovery that an embezzler lurks in the ranks. Retaining experienced outside counsel and conducting a thorough internal investigation not only improves the chance of recovery, but also can minimize both internal scrutiny and unwanted publicity.