



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



ACC 2011 Meeting Enemies at the Gate

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Keep Them Out: Background Checks

- Detailed past employment verification
 - Explain Gaps
- Criminal and civil background checks
- Credit history checks
- Drug screening





Keep Them Out: Reference Checks

- Thorough
- Actually check the references
- Get secondary references



Keep Them Out: Legal Risks

- Fair Credit Reporting Act (FCRA)
- Bankruptcy Act
- State Laws and City Ordinances
 - State Law Notice Requirements
 - “Ban the Box”



Keep An Eye Out: Tone at the Top

- Management climate sets the tone
 - Honesty and integrity
- Clearly state message, repeat it often (and reinforce by example)
- Survey employees
- Fair goals and assessments
- Make honesty, integrity, and compliance (and thereby fraud prevention) part of management's compensation goals



Keep An Eye Out: Code of Conduct

- Deliver clear message about policies and tolerated behavior
- Should establish and explain reporting mechanism
- Reporting hotline
 - Should be anonymous
- Third party vendor code of conduct





Keep An Eye Out: Education

- Zero tolerance policy

- Provide training on fraud and illegal/impermissible conduct
 - Do employees understand what is not permitted?
 - Do employees understand consequences?

- Explain steps company has taken



Keep An Eye Out: Auditing

- Frequent audits
 - Divisions and individuals
 - Surprise/random
 - Internal and external best
- Data theft
- On-line data policies
 - Monitoring
 - Permitted activities
- Self-reporting of criminal conviction
- Annual records checks
 - Need appropriate authorizations



Keep An Eye Out: Enforcement

- Follow through and investigate reported activities
- Take prompt action following investigation
- Decide whether and how to communicate corrective action





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Don't Let The Intel Out: Minimize Those Who Know

- Can I tell you something that has to stay in this office?
- Did you hear that they brought in an outside lawyer and the accountants?
- Experience Hint: If you must have a meeting, make certain it is discreet.
- Word leaks out
 - No wrong to find
 - No evidence remains
 - Computer files gone



Don't Let The Intel Out: Backup

- Once You Have a Suspicion
 - Secure computers and servers
 - Mirror hard drives
 - Minimize those who know
 - Involve general counsel





Reach Out: Goals

- What records are relevant?
- What do those records show?
- What do witnesses and suspects say?



Reach Out: Your Questions

- Who?
- What?
- How?
- When?
- How much?
- Must we report this? To whom?



Reach Out: Outside Help

➤ Outside counsel

- Experience in investigations
- Experience in criminal matters
- Report to general counsel
- Preserve privilege



➤ Accountants

- Can they teach the police, a prosecutor, a juror?
- Do they have experience testifying?

➤ Investigators

- Real interviewing skill
- Tell you which witnesses are deceptive
- Know ethical and legal tactics for admissible evidence



Where Does It Come Out? Discharge The Employee

- Quick, easy
- Less expensive
- More discreet
- No meaningful message to employees about consequences
- Experience Hint: Don't stop too soon.



Where Does It Come Out: Civil Action

- Expensive
- Less productive – they usually spend the money
- Perhaps mandatory if data theft
- Could impact any criminal case





Where Does It Come Out? Criminal Investigation

- Initial expense
- Higher likelihood of publicity
- Message to employees
- Restitution more likely
- Slow
- Experience Hint: The accused finds restitution prior to sentencing.



Where Does It Come Out? Civil Action

➤ Criminal Timeline

- Discover theft
- Investigate
- Report facts to law enforcement
- Cooperate with police
- Let police make charging decisions
- Cooperate with trial
- Accept restitution
- Consider civil action



Avoid The Fallout: Don't Stop Too Soon

- Discover minor problem
- Discharge employee, accept restitution
- Discover much greater problem
- Police won't help
- Experience Rule: They will always admit what you know and don't recall anything else.



Avoid The Fallout: Civil Before Criminal

- Don't bring a civil action too quickly
- Police will not investigate someone you have sued





Avoid The Fallout: Restitution

- Don't agree to restitution in exchange for silence
 - Discover problem
 - Suspend employee
 - Employee's attorney offers restitution if you agree to silence
 - Employee doesn't pay
 - Employee alleges extortion, unfair trade practice, compounding a felony



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Employee Theft Insurance: General Considerations

- Many different types of insurance
- Read the policy before any loss occurs
- Modifications to the standard policy language





Key Insuring Clauses

- Employee Dishonesty
 - Loss of money, securities or other property
 - Sometime requires “manifest intent” by employee to cause employer to sustain loss and obtain financial benefit for employee
- Forgery or Alteration
 - Loss from forgery of checks or other financial instruments
 - Separate coverage insuring against forgery by third parties
- Coverage generally applies to “employees”

Hint: Try to add endorsement which covers independent contractors if they pose fidelity risk



Key Insuring Clauses (cont)

➤ 3rd Party Conduct

- Premises Coverage
 - Loss of money and securities inside the premises by theft, robbery or destruction/disappearance
- In Transit Coverage
 - Loss of money, securities and other property outside the premises while in transit (may include home of employee if temporary)
- Computer Fraud
 - Loss of money, securities and other property from use of computer
 - Unlawful taking of money, securities of property resulting from a unauthorized deletion or entry of data or change to data elements or program logic
- Clients Property
 - Client loss sustained by employee theft or forgery not in collusion with such client



Specialty Coverages for Financial Institutions

- Financial Institution Bonds (fka Bankers Blanket Bonds)
 - Most common is Form 24
 - Covers losses “directly” caused
 - Two lines of cases – “proximate cause” and “direct means direct”
 - “Direct means direct” – no coverage for insured’s liability to third parties
 - Dishonest or fraudulent acts by employee with the “manifest intent”
 - Cause the insured to sustain a loss
 - To receive such benefit
 - “Manifest Intent” often left to the finder of fact
 - May differ depending upon jurisdiction





Coverage For Investigative Expense

- Very valuable for an organization
- Generally “add on” coverage that has “sublimits”
- Reasonable expenses of the Insured organization to establish the existence and amount of a covered loss
- Often subject to the Insurer’s prior written consent
- Excludes internal corporate costs (e.g., company salaries, etc.) and expenses of the insured’s clients

Hint: Try to add coverage to reproduce or duplicate damaged or destroyed data or programs



Loss Discovered or Loss Sustained Policy Trigger

- “Discovery” trigger or a “Loss Sustained” trigger
 - “Loss discovered”
 - Operates like a claims made and reported policy
 - “Loss Sustained”
 - Operates like an occurrence policy
 - Notice is often required prior to policy termination or a short time thereafter (e.g., within 60 days thereafter)
- Hint:** Beware that gaps in coverage may exist if a company moves from “discovery” to a “loss sustained” form



Key Exclusions

- Theft or Forgery by a partner/owner
- “Second chance” exclusion
- Loss of trade secrets/confidential processes
- Known losses prior to placement
- Loss sustained more than 60 days following termination of the employee





Preparing The Initial Claim Materials

- Gather the right team for the job
- Take the time to read the policy
- Carefully review the notice requirements and discovery definition
- Keep the insurer notified and “on side” with your approach





Handling and Negotiating a Fidelity Claim

- After notice, develop a comprehensive strategy
- Duty of cooperation
- Consider
 - Communication protocols
 - Regular meetings
 - Web-based data and document management systems
 - Document logs
 - Request for written coverage position
- Regular follow up with insurers
- Don't miss deadlines (Proof of Loss, Tolling Agreement)
- Value of internal company resources





Preparing and Submitting the Proof of Loss

- Proof of loss
 - Include narrative and supporting documents (e.g., policy report, summary of investigation and key investigation documents, copies of key statements taken)

- Time usually dictated by the policy

- Consider potential consequences of early submission



Insurance Against Employee Theft: Final Questions

- Does my Company have an insurance policy or fidelity bond that covers fraud or theft?
- Does it cover the major fidelity risks of the business?
- Does it exclude any major risks of the business?
- Does my Company have enough coverage for claims and investigative expenses?

