

# When can you dock your employees' wages for mistakes, damages or theft? Not knowing the answer to this question can cost you.

Article

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- Your employee negligently damages company property, resulting in the company being charged a significant deductible by the insurance company when you submit a claim for the costs of the repair.
- Your cashier's drawer is short at the end of the day because he mistakenly gave a customer too much change.
- Your employee fails to return a company phone that was assigned to her when she leaves the company.

Can you legally deduct these losses from the employee's paycheck?

Wisconsin employers should tread carefully before unilaterally deciding to deduct from employees' paychecks for mistakes, damages caused by employee negligence, cash register shortages, or even theft. While the federal Fair Labor Standards Act allows employers to deduct from an employee's wages as long as the deductions don't cause the employee to fall below minimum wage, the same is not true under Wisconsin law. In 1931, the Wisconsin Legislature created Wisconsin Statute Section 103.455, which prohibits employers from making any deductions from "earned wages" for "defective or faulty workmanship, lost or stolen property, or damage to property" unless one of three exceptions applies.

## **First Exception: No "Blanket Pre-Authorizations"**

The first exception allows employers to make deductions if the employee "authorizes the employer in writing to make the deduction, after the loss has occurred and before the deduction is made." Employers may be tempted to require a "pre-authorization" for such deductions at the time of hire or at some other time before any losses have occurred, or otherwise condition hire or compensation on a written "pre-authorization." However, in *Erdman v. Jovoco, Inc.*, the Wisconsin Supreme Court held that "blanket authorizations at the time of hiring are not contemplated by the statute" and thus do not satisfy the exception. Rather, consent for the deduction must be given in writing *after* the loss has

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occurred and *before* the deduction is made. It also bears mention that the *Erdman* court found that the word “wages” in the statute “encompasses a variety of forms of employee remuneration” and includes commissions, not just hourly wages or salaries. Hence, regardless of the form of the compensation, no “blanket pre-authorization” will permit a unilateral deduction from the employee’s pay.

### **Second Exception: If Employer and Employee Agree as to Cause Of Loss— After It Occurs**

The second exception applies if “the employer and the employee’s representative determine that defective or faulty work, loss or theft, or damage is the result of the employee’s negligence, carelessness, or willful and intentional conduct.” By definition, therefore, the authorization can only occur by agreement between the employer and employee *after* the loss has occurred, as this exception provides the employee with an opportunity to dispute the deduction. If the employer and employee disagree about the cause of the loss or whether the employer can make the deduction, the employer still may not unilaterally make the deduction. Instead, the employer’s only recourse is to submit the dispute to the Wisconsin Department of Workforce Development for a ruling on the matter, which can then be appealed to circuit court.

### **Third Exception: A Court Ruling**

Similarly, the third exception requires a finding by “a court of competent jurisdiction” that the employee is “guilty or held liable” for the loss “by reason of the employee’s negligence, carelessness, or willful and intentional misconduct.” Needless to say, most employers will not seek such a court finding in the absence of a sizeable loss. Moreover, obtaining such a finding before wages are due to the employee is unlikely.

### **Penalties for Improper Deductions**

If an employer makes a deduction or takes a credit in violation of the statute, the employee can go straight to court (bypassing the agency) to bring an action against the employer, and the employer can be held liable for *twice* the amount of the deduction or credit. Employers may also not terminate or otherwise discriminate against an employee for refusing to authorize such a deduction or for making a complaint alleging an improper wage deduction. An employee terminated in violation of the statute can bring a claim for wrongful discharge and the employer can be held liable for the terminated employee’s lost wages.

### **Statute Doesn’t Apply for Mistaken Overpayment of Wages or Expenses**

Importantly, the statute does not apply when an employer overpays wages or expenses to an employee by mistake, nor does it apply when an employee overextends his or her draw but refuses to repay the employer or allow the employer to offset such payment against future payments. Under those

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circumstances, even when there still exists a dispute between employer and employee, the employer can lawfully discipline or even terminate the employee.

### **Employers Can Still Discipline Employees for Negligence, Theft, and Damage**

Before making any deduction, employers may also confront an employee suspected of a loss or damage (that may occur) and request an authorization. If the employee refuses to give an authorization, the employer's only options are to continue to negotiate with the employee or his or her representative or seek a court ruling. However, when there is such a dispute, under no circumstances should the employer terminate or otherwise discipline the employee *for refusing to allow the deduction*.

Of course, nothing in the statute prevents an employer from disciplining an employee for faulty work, negligence, dishonesty, theft, and the like. Employers should be sure to train employees on the requirements of their jobs and instruct them that faulty performance and improper conduct will result in discipline. When a loss occurs, rather than making unilateral wage deductions, employers can and should document incidents of poor performance, negligence, or other conduct that result in a loss and discipline accordingly.

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