

## Recovering Losses From EXEMPT Employees

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Our recent Quick Quiz [Answer](#) on recovering losses from non-exempt employees has caused some to ask whether the same analysis applies to employees who are treated as exempt under the federal Fair Labor Standards Act's executive, administrative, or professional exemption (including the "computer employee" and "highly compensated employee" versions). To answer this question, let's repeat the facts with a few changes:

Store Manager Alex is paid on a salary basis at the rate of \$800 per week. He meets all of the duties requirements for the FLSA's "executive" exemption. On Monday, he approves accepting a \$150 check in payment for merchandise. He was so busy that he forgot to ensure that the cashier had the necessary customer information, and now the check has been returned because the account is closed. Alex's employer is unable to contact the customer.

A written company policy that is given to all Managers when they are hired requires Alex to pay for the loss that workweek through payroll deduction, in cash, or by personal check. As the policy requires, the District Manager has Alex sign a memo saying that he agrees to make the payment. Alex adds a notation that he prefers to pay in cash. He works exactly 45 hours that workweek. Under the FLSA, how much can the employer recover from Alex that workweek?

### The "Salary Basis" Principle

To qualify for the FLSA's executive, administrative, or professional exemption, most employees must be paid on a "salary basis". This means that the employee must regularly receive each pay period a predetermined amount (of not less than \$455 per week) constituting all or part of his or her compensation. With limited exceptions, this fixed amount cannot be subject to reduction because of variations in the quantity or quality of the work performed. Officials at the U.S. Wage and Hour Division have said that deducting a cash loss from an exempt employee's salary destroys the "salary basis" of pay required for exempt status. *See, e.g., Opinion Letter of Deputy Wage-Hour Administrator Dated April 1, 1999* (cash missing from a locked bank bag)([link below](#)). The rationale is that such a deduction is based upon the "quality" of the employee's work. *Cf. Opinion Letter of Wage-Hour Acting Administrator FLSA2006-7* (March 10, 2006)("salary basis" impaired by policy of deducting from salary for cost of lost or damaged tools or equipment).

### So The Answer Is . . .

The employer may not directly or indirectly recover *any* of the loss from Alex's salary in that workweek or in any future workweek, at least not if the employer wants to preserve Alex's exempt status under the FLSA. As with non-exempt employees, this is true even though the employer published a policy in advance, and even though Alex signed something saying that he would make the

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payment. Furthermore, it makes no difference whether Alex pays in cash, or by check, through payroll deduction, or in some other manner. It might be possible to recover the loss from commissions or bonuses Alex is due separately from his salary, provided that this (1) is done in a way that carefully avoids impairing the salary, (2) is permitted under all other applicable laws, and (3) is consistent with the terms of the commission or bonus plan.

[Opinion of Deputy Administrator 04 01 99.pdf \(22.46 kb\)](#)