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Below are a dozen Wage/Hour mistakes that managers make. If your organization can avoid these mistakes, you'll be well on your way to a wage-and-hour compliant workforce.

Mistake #12: *Failure to Pay Employees All They are Owed when Terminated.* *Unlike most other states, Florida does not have a wage payment law. Pay is due the next regularly scheduled pay day. Visit your vacation policy now to see how paid vacation accrues. Florida does have a law that provides for attorneys' fees for the employee in any suit for unpaid wages.* So long as the employee is paid promptly all wages due, there is unlikely to be much repercussion.

Mistake #11: "On Call" Pay and working from home. Today, with so many off-duty workers carrying employer-issued pagers and cellular phones, employers must be cautious about the "on call" wage and hour rules for non-exempt employees. The general rule is that employees need not be paid for "on call" status if they can still effectively use the time as their own, for normal activities outside of work. For employees who have some form of "on call" status in their work, the law recognizes a distinction between "waiting to be paid" (non-work status) and being "paid to wait" (working or mandatory compensation status). Merely carrying a pager or cellular phone will usually not prevent an employee from carrying on normal activities outside of work, and not all employees who carry such devices must be paid for the hours where they *might* be called to work. On the other hand, requiring that an "on call" employee stay home, or be within a short distance from the workplace, might be enough of a restriction so that the employee must be paid. This is especially true if the employee is called in frequently. Of course, even in cases where no pay is required for carrying a pager or phone, the employee must be compensated if called and required to perform work. Work-related telephone calls are also compensable time.

Mistake #10: Not paying overtime on **incentive** pay. Many employers do not realize that they must pay overtime on any commissions or bonuses the employee has earned. **All commissions must be included in the employee's regular rate of pay for purposes of calculating overtime.** And **only discretionary bonuses** can be excluded from calculations pertaining to the employee's regular rate of pay. To be exempt from the overtime calculation, both the fact that the bonus is to be made and the amount of the payment must be discretionary. So any bonus paid pursuant to a plan, policy, announcement or even a usual practice must be included in the employee's regular pay rate and, therefore, is subject to overtime.

Mistake #9: Misclassifying a person as an Independent Contractor. Some employers mistakenly believe that they can control costs and head count restrictions by treating certain workers as independent contractors. This is a risky maneuver. The Florida Department of Revenue and the DOL have a **Memorandum of Understanding** to combat employee misclassification. Misclassification of workers as "contractors" can expose employers to liability

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for tax obligations and employee benefits, along with minimum wage and overtime violations. Calling someone an “independent contractor” does not make them one. Instead, courts often apply an economic realities test that evaluates the degree of control the employer exercises and the degree to which the workers are economically dependent on the business. Several factors are relevant to this analysis, including the extent to which the services provided are an integral part of the business and the permanency of the relationship.

Mistake #8: Not paying for overtime unless the overtime was approved in advance. Many companies have a policy requiring employees to seek approval in advance before working overtime. The problem arises when an employer refuses to pay an employee for non-approved overtime. The FLSA, unfortunately, does not distinguish between approved and non-approved overtime—if the employee works the overtime, you are required to pay time and one-half the regular rate for that overtime. But the company is not without recourse: An employee who violates a company policy by working non-approved overtime can be disciplined or terminated for that violation of policy.

Mistake #7: Focusing only on the FLSA. When evaluating their wage and hour compliance, some companies look only to federal wage and hour law, the FLSA. This is another mistake. Employers must comply with state law as well as federal law—whichever one offers more protection to employees. Some states have laws that require daily overtime or require breaks after a certain number of hours worked. Florida has a higher minimum wage and has different rules regarding hours that minors can work. Miami has a wage/hour ordinance. Employers should carefully check state and local wage and hour law for all the locations where their employees work.

Mistake #6: Providing compensatory time-off in lieu of overtime. Private employers may not provide compensatory time off to non-exempt employees in lieu of overtime. But private employers can provide non-exempt employees with time off on a 1:1 basis in the same work week without incurring liability for overtime (unless they are in a state where daily overtime is required).

Mistake #5: Not tracking hours actually worked. Do your non-exempt employees’ timesheets consistently reflect time worked as “9 am – 5 pm”? If so, this should be a red flag. Time records must reflect actual hours worked, not just the employee’s work schedule. A surprising number of employers have informal or non-existent means to record hours worked by non-exempt employees. Some of these employers rely on an honor system or a presumption that employees work a set schedule, and believe that requiring employees to sign in or punch a time card would be a negative factor in the culture of the workplace. This is frequently true in office settings and other white-collar workplaces. Other workplaces keep records – but not accurately. Week after week, regardless of hours actually worked, the employer maintains records showing the same hours worked, typically based on scheduled hours rather than actual hours worked. Some employers even pay “overtime” by adding extra pay each week to an employee’s paycheck, regardless of the hours the employee is working. Still other employers allow employees to work before “starting” time, or to work through meal times or breaks, or after “quitting” time, without recording the actual time worked.

Mistake #4: Paying incorrectly for travel time. The FLSA has numerous, specific rules about when a non-exempt employee’s travel time is compensable. For example, regular commuting from home to work is not compensable. However, travel that is all in a day’s work is

compensable. Travel out of town, however, is handled differently and whether it is compensable depends in part on whether the employee was traveling during his or her work hours, and whether the employee was driving, riding, or flying.

Mistake #3: Deducting from exempt employees' pay. The FLSA also has very specific rules on when deductions can be made to exempt employees' pay. When an employer has a practice of making improper salary deductions, the employer may lose the right to classify the employee as "exempt" from the FLSA. Thus, making improper deductions is high on the list of potentially costly FLSA mistakes.

Mistake #2: Automatic deductions for meal breaks. Many employers automatically dock their hourly employees for a 30 or 60-minute meal break each day. Although this is not illegal, it is a frequent subject of litigation and liability. If you are sued by an employee or audited by the Department of Labor, it is your burden to prove the hours actually worked by your hourly employees. If employees later claim that they worked through lunch most days, it will be extremely difficult for you to prove that each of your employees actually took a full lunch break each and every day for which an automatic meal break deduction is made. These automatic deduction cases usually become collective actions and can become very expensive for employers who have such a policy.

Fortunately, there is an easy solution: require your hourly employees to clock out and in for their meal breaks. It is imperative that during this meal break the employee is completely relieved from duty and is not performing any work whatsoever, but it is not necessary that employees be allowed to leave the company premises during the meal break.

Mistake #1: Misclassifying employees as exempt. This is arguably the biggest, most common, and potentially expensive FLSA mistake. Classifying employees as "exempt" may be attractive where the employer believes the employee is highly skilled, possesses a college degree, or otherwise fills an important, professional role with the employer. But none of those facts, standing alone, provides a basis to classify the employee as "exempt" and avoid paying overtime. Each exemption has specific tests, and each employee to whom you pay a salary must be evaluated to see whether the exemption applies. Don't forget that job titles and job descriptions aren't the determining factor any more than paying a salary is—just because you call someone a manager or an assistant manager and pay them a salary does not mean they qualify for the exemption. The courts and Department of Labor construe all of the exemptions narrowly, and the burden of proof always remains with the employer.

For a Wage/Hour Self- Audit, send an e-mail request to Tom@EmploymentLawFlorida.com