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### NEW YORK FEDERAL COURT CLARIFIES PLAINTIFF'S BURDEN IN OFF-THE-CLOCK CLAIMS

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Off-the-clock claims—those made for work done while an employee is “clocked out”—present a number of challenges for employers. Inherent in this type of claim is the plaintiff's argument that the employer's timekeeping records and time-tracking systems either failed or are inaccurate. Courts in the Second Circuit apply a burden-shifting framework to these types of claims that begins with the plaintiff giving evidence to show the amount and extent of work done for which he or she was not compensated. The standard of proof required of the plaintiff is critical in these cases. If the court sets it too low, in the face of bare allegations, the employer is left trying to prove in specific detail: that its records are indeed accurate and that the plaintiff did not work while clocked out.

In *Joza v. WW JFK LLC*, the Federal District Court for the Eastern District of New York determined that the plaintiff had not carried her initial burden and entered judgment for the defendants.” No. 07-CV-4153, 2010 U.S. Dist. LEXIS 94419 (E.D.N.Y. Sept. 10, 2010). Ms. Joza was employed by the Ramada Plaza Hotel as a reservation agent under a collective bargaining agreement that required her to work 35 hours per week, obtain approval in advance for any overtime worked, and fill out a form describing the amount and type of overtime work done. The agreement also established a grievance procedure to be used by covered employees. Ms. Joza alleged that she was not paid for all overtime worked because she underreported her time due to her belief that Ramada had created a culture hostile to legitimate overtime claims. She argued that Ramada had constructive knowledge of her off-the-clock work because her managers saw her working at times when they should have known she was off the clock.

In Ramada's defense, it presented a number of strong policies and practices designed to ensure pay for all hours worked. The company required overtime to be paid as long as the form describing the work was submitted. The hotel managers would reconcile forms submitted with weekly time clock reports and follow up with employees on any discrepancies.

Examining a number of circuit cases, the court began by stating, “[a]n

employer must have the opportunity to comply with the provisions of the FLSA,” and “where the acts of an employee prevent an employer from acquiring knowledge, here of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of the FLSA’s overtime requirements.” Throughout the opinion, the court focuses on the fact that “Joza was paid every penny of overtime she chose to report and process” and that her claim is that she was not paid for time she intentionally did not report. To explain her failure to report her hours properly, Joza alleged that there was hostility to employees filing overtime claims. Despite this broad claim, she produced no evidence that she was told not to submit overtime forms or punished or threatened with punishment for working overtime. The little evidence she did present was described by the court as “snippets of dialogue” that “are no more than customary management admonitions to supervisors to watch and maintain control of work assignments in order to avoid unnecessary overtime.” In contrast, the court sought evidence that she was prevented from reporting or being paid for all the time she worked.

The court made it clear that in off-the-clock claims where a “recognized system for reporting and obtaining compensation for overtime work” exists, the plaintiff must provide more than bare recollections of off-the-clock work or the burden does not shift to the employer.

For the protection afforded by cases like *Joza*, employers must develop strong off-the-clock and overtime policies and be proactive in policing compliance. In particular, employers should:

- State clearly the company’s policy to pay each employee for every hour worked.
- Remind employees and managers regularly of their obligation to ensure accurate timekeeping and the company’s policy to pay for all time worked.
- Implement a procedure that allows employees to raise concerns over the accuracy of their pay to someone other than their supervisor or manager.
- Train managers to be vigilant to ensure employees are always clocked in when performing work and to question the employee regarding any suspected off-the-clock work.
- Use a time system that records the actual start and stop time of both the employees’ shift and any lunch break instead of reporting total time worked only.

Defending off-the-clock litigation presents a number of challenges to employers. Ensuring systematic compliance with sound policies is the foundation for successfully defending claims.

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