

## The Value of Employer Record-Keeping Obligations for Plaintiffs in Employment and Civil Rights Cases



**JUSTIN D. CUMMINS**, of Cummins & Cummins, LLP, prosecutes employment, civil rights, and consumer protection cases. Justin is an MSBA Board Certified Labor & Employment Law Specialist. He is also past Chair of the Minnesota State Bar Association's Labor & Employment Law Section and a past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards. In addition, Justin has taught employment and civil rights law at the University of Minnesota Law School and William Mitchell College of Law. Justin is consistently recognized as a Super Lawyer, and *Minnesota Lawyer* has identified him as one of the top attorneys in Minnesota.

### Introduction

Both Federal and Minnesota law require employers to create and maintain complete as well as accurate time and pay records regarding all employees. In the absence of such records, enforcement agencies and plaintiffs alike have difficulty effectively ensuring full compliance by employers with employment-related obligations.

For obvious reasons, employer time and pay records continue to provide vital evidence in wage-and-hour cases prosecuted under the Fair Labor Standards Act<sup>1</sup>, the Minnesota Fair Labor Standards Act<sup>2</sup>, the Minnesota Payment of Wages Act<sup>3</sup>, and similar statutes. For similar reasons, such records are also essential in employee benefits cases pursued under the Employee Retirement Income Security Act<sup>4</sup>. Employer time and pay records may be probative of disparate treatment or other adverse action, so those records can be highly useful as well in discrimination and retaliation cases litigated under Title VII<sup>5</sup>, the Age Discrimination in Employment Act<sup>6</sup>, the Americans with Disabilities Act<sup>7</sup>, the Family and Medical Leave Act<sup>8</sup>, the Minnesota Human Rights Act<sup>9</sup>, and similar statutes.

### I. Both Federal and Minnesota Law Impose an Explicit Legal Duty On Employers To Create And Maintain Time As Well As Pay Records That Are Complete And Accurate

Federal wage-and-hour law specifically requires the Employer to create and maintain records sufficient to show the nature and extent of work performed by all employees as well as the amounts paid to those employees for that work: “[e]very employer...*shall* make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and *shall* preserve such records for such periods of time...as necessary or appropriate for the enforcement...”<sup>10</sup> Federal employment benefits law imposes essentially the same obligations: “every employer *shall*...maintain records with respect to each of his

employees sufficient to determine the benefits due or which may become due to such employees.”<sup>11</sup>

Like Federal wage-and-hour and employee benefits law, Minnesota wage-and-hour law compels employers to create and maintain adequate time and pay records.<sup>12</sup> Reinforcing this clearly established legal regime, the Minnesota Supreme Court has ruled, “[f]or enforcement purposes, employers are required to ‘make and keep a record of’ the wages and hours worked by each employee subject to the [Minnesota Fair Labor Standards Act]...”<sup>13</sup>

These plain mandates flow from the understanding that it would be difficult to verify compliance effectively and address non-compliance fully without complete and accurate time and pay records. Although wage-and-hour and employee benefits cases offer the most obvious illustrations of the need for such records, an array of other employment and civil rights cases also directly benefit from complete and accurate record keeping by employers. In particular, how many hours employees work and how much they earn for that work can be key evidence in discrimination and retaliation cases.

### II. Employers’ Failure To Have Time and Pay Records Creates A Presumption That Plaintiffs’ Testimony About Work Time And Pay Is True And, Moreover, Exposes Employers To Financial Penalties And Criminal Sanctions

Consistent with settled Supreme Court precedent, the Eighth Circuit has expressly relied on the work time and pay evidence of plaintiffs rather than that of employers when employers disregard their record-keeping obligations: “[b]ecause [the employer] failed to maintain employment records required under [the Fair Labor Standards Act],... [the employer] will not be permitted to benefit from [the employer’s] failure to do so.”<sup>14</sup> Other Federal Courts of Appeals have similarly held that “an employer’s failure to maintain adequate records

shifts the burden to the employer to prove that the work performed was or was not covered.”<sup>15</sup>

Under Minnesota law, moreover, courts may assess a fine of up to \$1,000.00 per employee and per shift concerning employers that lack adequate time or pay records.<sup>16</sup> Needless to say, such financial penalties can add up quickly to an enormous sum for even smaller employers. Although payment of these fines goes to the State rather than to plaintiffs, the potential for enormous financial penalties in connection with a court judgment often provides employers significantly more incentive to resolve claims to plaintiffs’ advantage before trial.

Minnesota law also authorizes the award of punitive damages to plaintiffs when employers’ conduct reflects a deliberate disregard of plaintiffs’ rights.<sup>17</sup> Given the clarity of employers’ obligation to have complete and accurate time and

pay records, an employer’s failure to produce such records could support a successful motion for, and award of, punitive damages.

Notably, Minnesota law further imposes criminal liability on an employer consistently lacking the necessary time or pay records.<sup>18</sup> Specifically, it is a misdemeanor when an employer “repeatedly fails to make, keep, and preserve records as required by [the Minnesota Fair Labor Standards Act].”<sup>19</sup>

### Conclusion

Employer time and pay records can provide rich sources of data that plaintiffs can use to enforce a myriad of employment laws and civil rights. When employers flout their legal duty to have complete as well as accurate time and pay records, those employers will be subject to a number of adverse consequences – all of which work to the benefit of plaintiffs.  $\bar{\text{T}}$

<sup>12</sup>29 U.S.C. §§ 201, *et seq.*

<sup>13</sup>Minn. Stat. §§ 177.21, *et seq.*

<sup>14</sup>Minn. Stat. §§ 181.13, *et seq.*

<sup>15</sup>29 U.S.C. §§ 1001, *et seq.*

<sup>16</sup>42 U.S.C. §§ 2000e, *et seq.*

<sup>17</sup>29 U.S.C. §§ 621, *et seq.*

<sup>18</sup>42 U.S.C. §§ 12101, *et seq.*

<sup>19</sup>29 U.S.C. §§ 2601, *et seq.*

<sup>20</sup>Minn. Stat. §§ 363A.01, *et seq.*

<sup>21</sup>29 U.S.C. § 211(c) (emphasis added).

<sup>22</sup>29 U.S.C. § 1059(a)(1) (emphasis added).

<sup>23</sup>Minn. Stat. § 177.30(a)(5) (mandating that employers create and maintain time and pay records going back 3 years).

<sup>24</sup>*Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 611 (Minn. 2008) (citation omitted).

<sup>25</sup>*Reich v. Stewart*, 121 F.3d 400, 406 (8th Cir. 1997) (citations omitted).

<sup>26</sup>*Michigan Laborers’ Healthcare Fund v. Grimaldi Concrete, Inc.*, 30 F.3d 692, 696 (6th Cir. 1994) (citations omitted).

<sup>27</sup>Minn. Stat. § 177.30(b).

<sup>28</sup>Minn. Stat. § 549.20.

<sup>29</sup>Minn. Stat. § 177.32, Subd. 1(3).

<sup>30</sup>*Id.*

• 27 YEARS OF EXPERT WITNESS EXPERIENCE •  
OVER 1,000 LIFE CARE PLANS PREPARED  
TESTIFIED IN OVER 500 CASES

## CERTIFIED NURSE LIFE CARE PLANNER

Linda K. Graham, RN, BSN, MA, CLCP  
2263 Laurie Road West

Roseville, Minnesota 55113-5619

PHONE (651) 636-2327 • FAX (651) 493-7717

email: lifecareplanner@comcast.net

• Spinal Cord Injuries • Head Injuries • Birth Injuries • Other Personal Injuries •