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Proposed federal rule could alter wage-and-hour litigation

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The federal rule specifying which American employees must receive overtime pay for working more than forty hours a week hasn't changed since 2004, but it might soon — and that change could affect wage-and-hour litigation, according to Missouri employment-law attorneys.

On March 7, the U.S. Department of Labor proposed an increase to the salary threshold below which workers are entitled to overtime pay. Currently, all workers earning less than \$23,660 per year may earn overtime. The proposed rule would raise that threshold to \$35,308, bringing 1.3 million more workers into eligibility for overtime, according to department estimates.

Brendan Donelon, a wage-and-hour plaintiffs' lawyer in Kansas City, points out that even workers who earn salaries above the new threshold still may be entitled to overtime if their duties lie outside the exempt categories of executive, administrative or professional work. In that sense, an employer who simply lifts her employees' salaries over the new threshold is not necessarily absolved of paying overtime.

"Some employers have false sense of security," said Donelon. "They think that as long as they pay their employees this new dollar amount, they don't have to worry about paying them overtime, but they still have to pass all these 'duties tests' — and the employer has the burden of proof on all that, too."

Yet according to Brian N. Woolley, a partner at Lathrop Gage, adoption of the proposed rule should shrink the need for litigation involving duties disagreements. Today, plaintiffs earning more than \$23,660 who believe they are owed unpaid overtime must argue that their duties don't fit into the exemptions. Raising the thresh-



Shawna Green, waitress at Granny Shaffer's, prepares utensils for customers at the restaurant in Joplin Dec. 18. Roger Nomer, of The Joplin Globe, The Associated Press.

old to \$35,308 will mean fewer plaintiffs need to make that argument. They will automatically be entitled to overtime.

On the other hand, Woolley said, new lawsuits could arise from confusion about the rule change. It would cause a massive reclassification of the workforce and require employers to do things they're not used to doing, such as tracking hours.

"There's so much wage-and-hour litigation that any time changes get publicity, that's going to generate questions and concerns, and that generates more litigation, so maybe it'll be a wash," he said.

In 2016, the Obama administration issued a final rule raising the threshold to \$47,476, but a U.S. District judge in Texas declared that rule invalid and the department went back to the drawing board.

The proposal has critics on both sides. The Economic Policy Institute, a think tank that advocates for low- and mid-

dle-income workers, lamented that "the new rule would leave behind millions of workers who would have gotten overtime protections under the 2016 guidelines."

On the employer side, Woolley said, there had been hope for more nuance. Some in the business community had wanted the rule to account for variations in company size, geographic regions and the economies of urban and rural areas. Instead, Woolley said, "it's really a one-size-fits-all proposal."

Under the process, the public has 60 days to comment on the proposal.

"The one thing that most people agree on is that the current salary level is too low," Woolley said. "The question is, what do you do about that? The last administration picked a high number and everybody got upset. This number seems to be in the middle, so in that sense, it's a compromise."