



# Human Resources

By Stephanie Ramsey

## What You Need to Know About the **New** Overtime Rules

Do you know what is important about Dec. 1, 2016? The recently released overtime rule changes to the Fair Labor Standards Acts released by the U.S. Department of Labor become effective. Cemetery and funeral business managers and owners will need to be in compliance with the new requirements by that date.

The last time revisions were made to the FLSA was 2004. On the surface, it may seem that there are really not that many changes to the FLSA after 12 years; however, the impact to funeral and cemetery business owners may be significant. To grasp the possible implications to business owners, it is necessary to clearly understand exactly what rules the DOL altered or expanded.

The FLSA previously established three tests that must be met for an employee to be exempt from overtime. Of particular concern for the DOL was how these three tests were applied in specific exempt-from-overtime employee categories. The new rules focus on the categories defined as executive, administrative and professional employees (frequently referred to as EAP). These particular categories are of interest to those in funeral service as several

states accept that funeral directors are exempt from overtime based on the criteria established for these categories.

The three tests consist of:

- 1) the salary basis test, which states that employees must be paid a predetermined, fixed salary regardless of the quality or quantity of the work performed by the employee;
- 2) the salary level test requiring that the base pay of an employee meet a minimum set amount, and;
- 3) the duties test whereby employees must be performing specific duties as part of their regular daily work (greater than 50 percent of their work time) as identified within the specific EAP categories.

Effective Dec. 1, the salary level test will change in several ways. Based on the new final rule issued by the DOL, the minimum salary level will increase to \$47,476, which is substantially

more than the current level of \$23,660. In fact, it is more than double the current minimum salary level.

In addition, DOL raised the salary of highly compensated employees from \$100,000 to \$134,004. What is an HCE? HCEs are deemed exempt from overtime if they:

- make the minimum stated compensation established by the DOL;
- their primary duty includes performing office or non-manual work; and
- they regularly perform at least one of the exempt duties from the EAP categories.

For example, an employee may qualify as an exempt HCE if they regularly direct the work of two or more other employees even though they may not perform any of the other tasks identified in the standard duties test and they are paid the minimum HCE salary.

The changes to the minimum salary are not the only alterations to the salary level test the DOL established. For the first time, employers will now be able to include nondiscretionary bonuses and other incentive payments, including commission, in calculating salary level as long as they do not exceed 10 percent of the employee's total salary. Nondiscretionary means that the employer has established specific criteria that the employee must achieve in order to receive the bonus or other incentive payments.

No changes were made to the salary basis test or the duties test at this time. Some were considered and abandoned based upon the more than 270,000 comments from the concerned public.

Finally, with this final rule, the DOL established a mechanism for updating these standards every three years.

So what is the impact of these changes for funeral and cemetery managers and business owners? A press release issued by the White House on May 17 makes a variety of comments about how beneficial these changes will be for American workers. The release also indicates that "employers retain considerable flexibility in how they comply with the new rule, such as increasing salaries to at least the new threshold to keep positions that fall within the EAP categories exempt from overtime pay." However, it does not make any comment about the financial burden these changes may have on businesses owners.

Many funeral homes pay their funeral directors/embalmers under the forthcoming minimum salary level of \$47,476. Now they will be challenged to find room in their budgets to accommodate this increase. Some may be forced to move some employees from full time to part time. Indeed, there is even a risk that layoffs will be required to meet their budgetary restrictions. There will be owners who will reduce their own take-home pay to keep their current employees on the payroll.

The HCE salary increase places the same obstacles in the path of funeral

business owners trying to maintain their employees in this specific exempt employee category. Remember, every three years both of these salary levels will be updated automatically, with no opportunity for further public comments before they become effective. As you can imagine, it is unlikely that these updates will result in a reduction to these salary levels.

While the ability to include nondiscretionary bonuses and other incentive payments, such as commission, may appear to be a beneficial form of relief to offset the upcoming additional cost, there are some complications. Primarily, the bonuses must be clearly identified as nondiscretionary, and owners must be ready to provide supporting evidence that they meet this definition. If these payments are deemed to be discretionary rather than nondiscretionary, then they cannot be included in the calculation of salary level. Unfortunately, this determination may occur after the owners have implemented the new compensation package and would lead to noncompliance. And let us not forget that these types of nondiscretionary payments cannot make up more than 10 percent of the total salary of the exempt employee.

Another risk occurs if the DOL decides that your exempt employees receiving the nondiscretionary bonuses do not, in fact, meet the three tests and therefore cannot be considered exempt. Then your employees are considered nonexempt and due overtime. Bad news! Nondiscretionary bonuses and incentive payments must be included in calculating an employee's base hourly rate for overtime. Should this situation occur, it could be very costly for the owner.

What can a funeral home owner do to prepare for the implementation of this new final rule? Before Dec. 1, owners should review the compensation offered to all employees that they currently treat as exempt from overtime. Make sure that under the revised rules these employees will continue to qualify for exempt status.

Unfortunately, the increase in the salary level established by the DOL is not adjusted for those who operate businesses in rural or suburban areas, which may have much lower wage rates than larger cities. During the review make sure to consider nondiscretionary bonuses and other incentive forms of compensation that may be included in this calculation.

Another employee group that owners and managers should review is any employee who is currently identified as an HCE and exempt from overtime. With the increase in the salary from \$115,000 to \$134,004 they may no longer meet the criteria for exempt. Adjusting for these salary-level increases may significantly impact business owner budgets in the current or forthcoming year. This review will need to be done every three years going forward, as the mechanism established to update these criteria will automatically increase the base level beginning in 2019.

There are steps that funeral home owners can take to control these potential increases in employee expenses. Consider whether or not it may make sense to change an employee to nonexempt status and then closely monitor his or her overtime. Evaluate the work that is being performed by employees to see if there is an opportunity to use nondiscretionary bonuses or other incentive payments to push employee salaries to the appropriate level. Remember that in order for an employee to get the nondiscretionary bonus or incentive pay, he or she must meet pre-established criteria. This provides some level of control, as long as the status of the payment remains nondiscretionary.

Most important, start to review your employees' compensation now – do not wait. This provides you with more time for strategizing a solution if it looks like there will need to be an adjustment to comply with the rule. Don't be reluctant to seek professional advice. The Foresight Companies stands ready to assist funeral and cemetery business owners and managers as they deal with these changes to the overtime rules. •