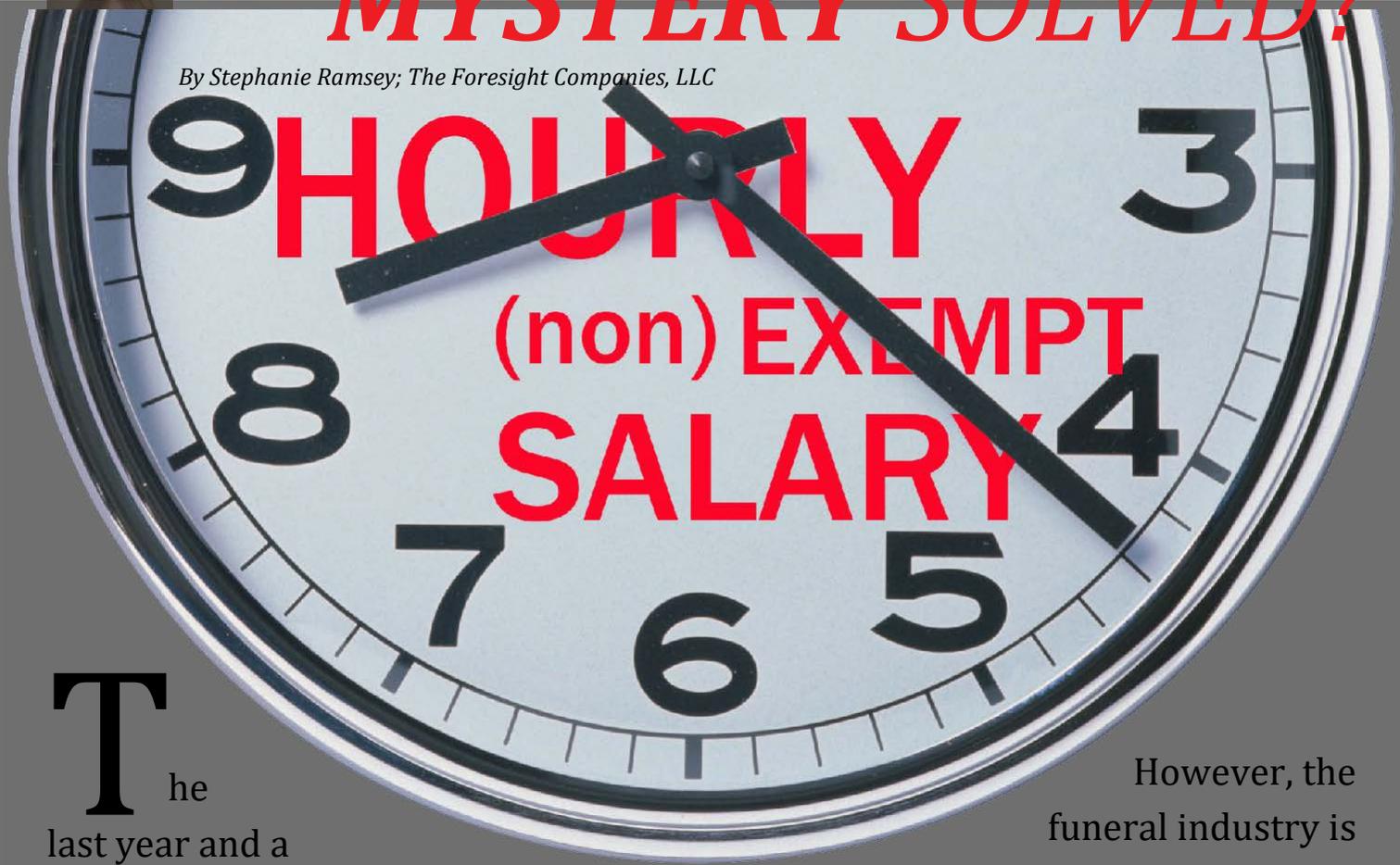


JOB CLASSIFICATION: MYSTERY SOLVED?

By Stephanie Ramsey; The Foresight Companies, LLC



HOURLY
(non) EXEMPT
SALARY

The last year and a

half presented a series of ups and downs for funeral service owners and managers dealing with employee compensation costs. The on-again, off-again saga of the revised Department of Labor (DOL) overtime rules which were supposed to be implemented on December 1st, 2016 has confused and frustrated business owners in every industry.

However, the funeral industry is particularly impacted by any

proposed change to the overtime rules or the re-classifications of the exempt categories due to the nature of services provided. Frequently, first-calls occur outside the normal business hours of 8 AM – 5 PM, as do visitation hours. Let's not forget the families who want to hold chapel or memorial services on weekends to accommodate more family participation.

The Trump administration proposed re-writing the over-time rules in court on June 30, 2017. The U.S. Department of Labor (DOL) published a request for information (RFI) on the various exempt categories on July 27, 2017. How do funeral service employers unravel this mystery? Funeral service employers need to understand overtime and exempt status based upon existing federal laws today and not wait for a resolution between the DOL and the Trump administration.

Some may question why they can't simply wait to see what the outcome is between these two juggernauts. The reality is that the DOL agents who are auditing businesses and issuing fines are not waiting for the final determination on the over-time rules. They continue to audit and issue fines as normal operating procedure. Failure to be in compliance with the current regulations, can lead to an expensive outcome for funeral service providers.

The DOL provides very specific guidelines for who is qualified as exempt from overtime. There are several categories of exemptions. The ones that are most likely relative to the funeral industry for a funeral director/embalmer are the professional, executive and administrative exemptions. All three of these categories require that the employee in question be paid on a salaried basis at a rate currently set at no less than \$455/week.

After the common salary component, the "exemption tests" are quite different for each of them. It is important that funeral service employers review whether or not their employees that they believe to be exempt actually meet the established requirements.

Let's look first at the professional category. It clearly states that the employee's primary duty must be the performance of work requiring advanced knowledge. That advanced

knowledge must be in a field of science or learning and must be acquired by specialized intellectual instruction. The DOL actually has a definition of funeral director that meets the professional exemption. The definition states that a funeral director or embalmer must be licensed by and working in a state that requires successful completion of four (4) academic years of pre-professional or professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education (Regulations, Part 541.301(e)(9)).

So now the question is, what does pre-professional mean? Pre-professional is a category of students who are preparing for advanced degrees (professional) after graduating with their bachelor's degree for professions such as dentistry, medicine, veterinary, etc. Basically this definition indicates that high school graduates must have 4 total years of academic study. This can be accomplished by studying at an advanced education institution (college, university, etc.) and graduating from mortuary school.



The challenge for funeral service employers utilizing this definition to determine that their funeral directors/embalmers are exempt, is that less than twenty states have educational requirements for licensing that meet the criteria for the professional exemption. Those that live in states that



The last category is the administrative exemption. This employee's duties must primarily be office or non-manual work related to the management or general business operations of the employer or their customers. Also, those primary duties must illustrate that the employee has to use their discretion and independent judgement on issues that are significant to the ongoing business operations.

another rabbit out of the top hat.

Upon failing the professional category exemption, most funeral owners/manager then look to the executive exemption.

This exemption requires that the employee's primary duty is managing the business or a department of the business whereby they regularly supervise the work of at least two other full-time employees or four part-time employees. This supervision must include the authority to hire or fire these employees. Barring a direct authority to hire and fire the staff they directly supervise, the executive's opinion must be given substantive weight in the hiring, firing, advancement, promotion or any other change of status of other employees.

While many funeral service employers expect certain individuals to manage the activities of other employees, they do not always give them the authority required to meet the executive exemption. They hope that the DOL will agree with their perception of the employee's authority. You know that old magician's mirror trick where the viewer sees one thing but it is really something else? Do be surprised if the DOL doesn't fall for it. They have seen this trick many times before. In particular, with small funeral businesses, the managing employee that has this level of authority may not manage enough staff to meet the requirement.

At first blush, this category may appear to be the most appropriate category to apply to funeral directors/embalmers in determining exempt status. However, funeral service employers should be cautious with this category. There is no guarantee that the DOL will view embalming/casketing/dressing as non-manual labor. If the funeral director/embalmer has to seek approval from a supervisor in dealing with daily operational issues, are they really using their discretion and independent judgement on significant business matters? It may be difficult for funeral service employers to provide sufficient evidence that their funeral directors/embalmers meet the administrative exemption test.

Another way an employee can be exempt is if they are paid a salary of \$100,000 or more which establishes them as exempt from overtime as a highly compensated employee. The bottom line is that unless a funeral service employer feels confident that their funeral director/embalmer meets the various guidelines for exempt status under one of these categories or is paid a \$100,000 salary or more they should not classify the employee as exempt from overtime.

Like the sleight of hand card trick, funeral owners/managers believe their employees are exempt because they meet some of the duties test. This is untrue. The employees must meet

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the requirements of all the duties test for which every category of exemption is being considered. Those that discover that their employees do not meet all the criteria are then challenged to control employee compensation cost due to

the variable hours that may be required of funeral directors/ embalmers. However, there are alternatives to the structure of employee compensation that can assist funeral owners and managers in controlling these cost.

The most obvious option is to convert the employees that don't meet exempt standard to hourly employees by taking their current salary and dividing it by 40 hours to determine their hourly rate. This will result in an increase in overtime cost, should they work any, so funeral owners/managers need to closely monitor overtime hours. Another method is to divide the employee's current salary by an average of their total hours worked in a week.

For example, employing the first method, the employee's hourly rate based upon earning \$800/week would be \$20/hour

		IN	OUT	TOTAL DAILY HOURS	B
11	M	9a	5p		
12	T	9a	5p	8.0	
13	W	9a	5p	8.0	
14	T	9a	5p	8.0	
15	F	9a	5p	8.0	X
			5p	8.0	X
				40hrs	X

(\$800/40 hours) and if they accrued overtime they would be paid \$30/hour for each hour of overtime (\$20 x 1.5). For the second method, assuming an average 48-hour work week, the employee's hourly rate based upon \$800/week would be \$16.67/hour (\$800/48 hours) and their overtime rate would be \$25/hour. Either of these hourly methods take some extra effort. As demonstrated, the second method will assist with keeping the overtime cost down.

If funeral owners/managers want to avoid the math involved with conversion to an hourly rate they can simply change the employees from salaried exempt to salaried non-exempt or use a "Fluctuating work week" salary. What is the difference?

1 Under the salaried non-exempt method, you calculate the employee's weekly rate based on the salary

divided by the number of hours actually worked in that week, and then pay the employee 1.5 times that rate for all overtime hours accrued in the week. So, for a non-exempt employee who earns \$800/week, and works 48 hours in a week, the employee earns an additional \$8.33/hour for any time worked over 40 hours ($\$800/48 = \16.67 per hour base weekly rate x 1.5 = overtime rate of \$25. $\$25 - \$16.67 = \$8.33$). The employee would earn an additional \$200 for this pay week.

2 Using the fluctuating workweek method, you include the base-rate as part of the overtime premium in the employee's weekly salary, and only pay the 0.5

premium as overtime. Continuing with the same example as in number 1 above, the employee would still have an hourly rate of \$25/hour for overtime, but they would only earn an additional \$66.64 for the week, as under this method, \$16.67 of the \$25 overtime rate has already been paid as part of the base salary leaving only the difference of \$8.33 to be paid for the 8/hours of overtime.

Clearly the fluctuating work week will cost the funeral owner/ manager less in overtime. But it also requires more effort

on the part of the funeral owner/managers to establish the appropriate methodology for each employee's compensation. Additionally, the DOL has some specific guidelines that must be followed to use this method:

1 The employee must clearly understand that the straight-salary covers whatever hours he or she is required to work. It is advised to get this understanding in writing;

2 The straight-salary is paid irrespective of whether the employee works 40 hours or not;

3 The straight-salary must be at a pay-rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours worked is greatest; and

4 In addition to straight-salary, the employee is paid for all hours in excess of 40 hours at a rate not less than one-half the regular rate of pay.

The key to dealing with any of the various overtime methods for employees who are non-exempt is keeping clear time records. These records help the funeral owners/ managers create the facts on which they are compensating

their employees, even those that are salaried. They may not be happy that they have to track their time, but the reality is that the information is vital for proper accounting of their compensation.

There is no magic that eliminates an employer's responsibility to meet the DOL overtime guidelines as they exist today. We recommend you be pro-active and review your employee's job descriptions and actual duties to determine if they truly qualify as exempt employees. If you are struggling to make this determination feel free to reach out to the Foresight Companies. We are happy to help you solve the mystery.

Stephanie Ramsey is the HR Specialist for The Foresight Companies, LLC. She has a unique perspective on the challenges funeral and cemetery business owners and managers face when dealing with employee issues. She has written many Employee Handbooks and other job specific documents for clients nationwide. Stephanie writes a quarterly newsletter on HR matters that can be viewed at www.f4sight.com. She can be reached at Stephanie@f4sight.com.

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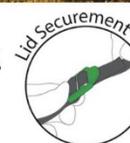
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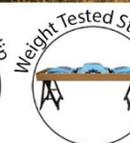
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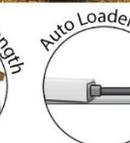
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