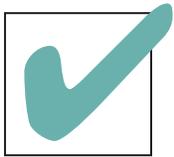


Human Resources

By Stephanie Ramsey

HR Reality Check



Yep, the Stories are True!

Scenario: Jackson-Smith Funeral Service, owned by Bill Smith Jr., is a three-location funeral business in the Midwest. Between the three locations, the business serves more than 350 families per year. Currently the business has five licensed funeral directors, three licensed embalmers and several funeral assistants, some of which are part-timers. All full-time employees are paid by salary and part-time employees are paid hourly.

Rather than using a third-party service to perform removal services and embalming after normal work hours, JSFS has created a schedule for its own staff to cover this need. A schedule is posted each month for the employees to follow. Employees are paid each time they perform a removal or embalming after hours regardless of their full-time or part-time status. This is \$25 per event (it is anticipated that a removal and an embalming take approximately two hours each).

Recently, one of Bill's new full-time funeral directors, Jim, inquired whether or not they were due to be paid overtime during a week in which they had performed several removals after normal business hours. Although Bill's initial reaction was to indicate that no overtime was due as they were paid a flat rate, he told the employee that he needed to do a little bit of research and reached out to an HR professional.

What are the rules? The Fair Standards Labor Act establishes minimum wage, overtime pay and defines exempt/nonexempt standards affecting employees in the private sector and in federal, state, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than \$7.25 per hour effective July 24, 2009. (Note: States can establish minimum wage rates above this minimum level. So, make sure you know your state minimum wage rate.)

Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek. Exempt employees do not qualify to receive overtime pay. Nonexempt employees do qualify to receive overtime pay. There are very clearly defined rules to determine if an employee is considered exempt or nonexempt. Being paid a salary or hourly is how an employee is paid, it does not establish whether they are exempt from overtime.

There is actually a definition for funeral directors to be considered exempt as established by the U.S. Department of Labor: *Funeral Director or Embalmer: Licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education. (See Regulations, Part 541.301(e)(9).)*

Unfortunately, JSFS resides in a state that does not meet this education requirement. Therefore, the only other way that the full-time employees could possibly be considered exempt from overtime would be by meeting the various exemption test. These include the executive, professional, administrative, computer and outside sales exemption tests. For the purposes of this case study, the most likely exemption to apply would be the executive exemption. The criteria to

meet this exemption are the following:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week.
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

While Bill's most senior funeral director might meet this standard, his

other funeral directors and funeral assistants do not. Therefore, they are likely not exempt from overtime. However, this does not mean that Bill cannot pay piecework for removals and embalming that occur after normal business hours if it meets the requirements of the overtime rules.

Did employer make any mistakes? Possibly. Fortunately, Bill has always required that employees log their time even though full-time employees are paid a salary. The question is, have employees been paid the appropriate amount if they have, in fact, worked overtime to make removals or performed an embalming outside of the normal business hours? This would have to be evaluated on a per employee basis. To make this determination, Bill needs to understand each employee's salary as an hourly rate. See the table below:

Jim's Overtime Calculation	
Converting Salary to Hourly	
Jim's Annual Salary	\$30,000
Per 26 pay periods	\$1,153.85
Hourly rate (based on 80 hours)	\$14.42
Overtime rate (1.5 X hourly)	\$21.63
Piece Work Rate versus Overtime	
# of Removals	4
Pay per removal	\$25
Total Pay	\$100
Hours per removal	2
Total Hours	8
Removal pay per hour	\$12.50
Overtime calculation	\$173.08
Owed to Jim	\$73.08

If Jim worked 40 hours during normal business hours and then worked additional time after hours to perform removals, it appears based on this calculation and Jim's overtime rate that he is owed \$73.08 as he is not exempt from overtime.

Resolution of the issue: There are several solutions here. Bill can develop a piecework rate that would adequately cover the overtime rate of those employees that would be scheduled to perform after-hours removals and embalming. This could be costly as the rate would have to be set such that it would cover the hourly rate of the higher paid employees.

Bill can also convert salaried employees to hourly employees and pay overtime as earned based on each employee's hourly rate.

Another solution would be for Bill to implement a fluctuating workweek salary.

What is the difference between these last two solutions?

1. Under the salaried nonexempt method, you calculate the employee's weekly rate based on the salary divided by the number of hours worked in that week, and then pay the employee 1.5 times that rate for all overtime hours accrued in the week. So, a nonexempt employee who earns \$800/week, and works 48 hours in a week, the employee would earn an additional \$8.34/hour worked

over 40 ($\$800/48 = \16.67 per hour base weekly rate $\times 1.5 =$ overtime rate of \$25). So, the employee would earn an additional \$200 for this pay week.

2. Using the fluctuating workweek method, you would 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. Using 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 eight hours of overtime.

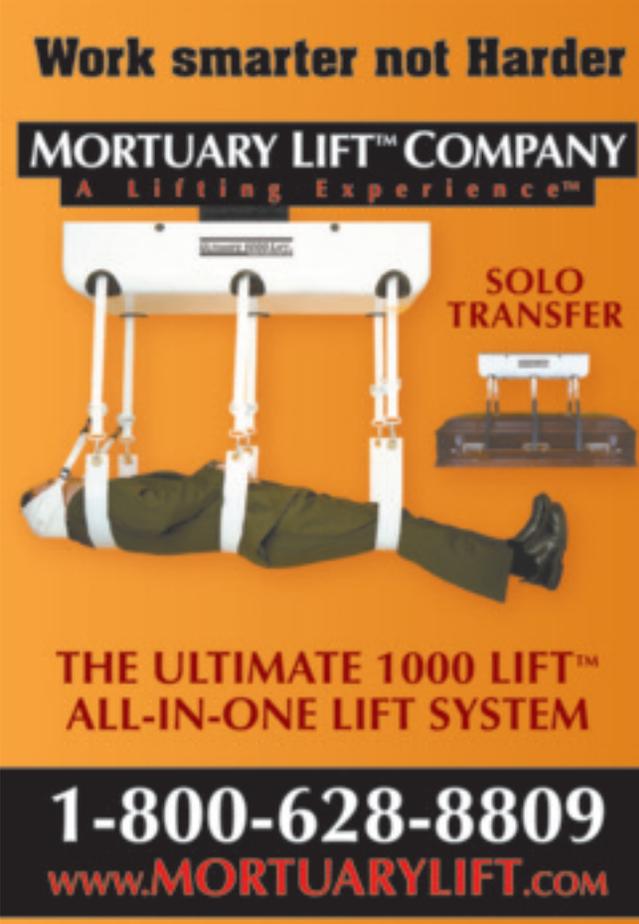
The fluctuating workweek would cost Bill less in overtime. But it also requires more effort for him to track each employee's compensation. Be aware that the DOL does have some guidelines that must be followed to use the fluctuating workweek method:

- The employee must clearly understand that the straight-salary covers whatever hours he or she is required to work, so be advised that it is wise to get this understanding in writing.
- The straight salary is paid irrespective of whether the employee works 40 hours or not, so if the employee only works 32 hours, they do get paid for 40 hours.
- 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
- 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.

Preventive measures: Bill needs to decide on how he is going to compensate the employees who handle after-hours removals and embalming that meet the federal overtime guidelines and then clearly communicate that to the employees involved in providing that service to families. While this may sound like a repeat mantra, it is critical; every funeral employer should have an employee handbook with policies that address issues such as:

1. Exempt versus nonexempt employee status.
2. The definition of overtime and when it occurs.
3. Payroll periods and pay schedules.
4. Time cards and/or time tracking of employees that may incur overtime.

Exempt/nonexempt status can be very confusing for a funeral business owner, and they can find themselves on the wrong side of the DOL facing costly fines. Additionally, employees may feel that they are being taken advantage of when they do not understand how they are being compensated. Communication can be key when aligning employee's expectations with corporate goals and objectives. *If you are not certain how your employees should be classified given their position and responsibilities, visit www.americanfuneraldirector.com/exempt to get more DOL information.* •



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