

COMPLIANCE ADVISORY 19-02 Overtime Rules Changes

In May 2016, President Obama attempted to raise the mandatory overtime threshold to \$47,000/year with an automatic cost of living adjustment (COLA). There was also a plan to redefine the exemption test that was used to qualify employees for exempt status. Overall, this proposed law would have significant impact on funeral homes and was intended to go into effect December 1, 2016. It never happened. Twenty-one states filed suit against the administration blocking implementation of the new law. Their argument was that the Department of Labor (DOL) had overextended their authority with the sweeping changes in the proposed new rules. A Texas Federal judge agreed and in 2017 the Obama era overtime rules were scrapped. When President Trump took office, he tossed the issue to the new Secretary of Labor. The position of Secretary of Labor became a rotating door and the outcome of new overtime laws became unclear. Finally, on September 24, 2019 the news broke that the overtime laws were changing based on the work completed under Secretary of Labor, Alexander Acosta. What does this mean for funeral home owners?

Under the Fair Standards Labor Act (FSLA) employees are only exempt from overtime if they meet specific duties tests and are paid a salary. Previously, the salary threshold was \$455 per week (\$23,660 per year), now the threshold is \$684 per week or \$35,568 per year. The new rule does allow funeral home employers to use bonuses and incentive payments (including commissions) to be included as part of the calculation of total salary. The bonus and incentive payments cannot exceed 10% of an employee's total salary, must be paid at least annually and must be non-discretionary. To clarify, the bonus cannot be a randomly occurring bonus that is simply offered to the employee as a gesture of goodwill. A non-discretionary bonus is a budgeted, planned commitment on the part of the company to the employee.

Determining where an employee falls in terms of exempt or non-exempt status is crucial for funeral business owners and managers. There are various duties tests but the ones most likely to be applied in the funeral industry are the Executive, Administrative or Professional duties test. All these exempt status tests start with the premise that the employee is being paid a salary and that they are meeting the minimum salary threshold which beginning January 1, 2020 will be \$35,568 a year. From that point, the duties tests differ but there are some key elements that stand out for each test:

1. The Executive test requires that the employee manages (with the ability to make substantive employment decisions such as hiring, firing, giving raises) at least two other full-time employees.
2. The Administrative test addresses specific administrative duties that would be typical of an office manager or executive secretary.
3. The Professional test refers to employees who work jobs that require "learned" skills and experience.

If a licensed employee is actively managing two or more employees, then they would meet the Executive duties test. The Administrative duties test is not likely to be an appropriate fit for a licensed funeral director/embalmer. The DOL has already defined funeral directors/embalmers as employees who arrange the details and handle the logistics of funerals as Professional employees. However, the Professional duties test has a specific guideline for funeral directors/embalmers to meet the exempt from overtime standard. It is:

- Funeral Director or Embalmer must be licensed by **and** working in a state that requires successful completion of four (4) academic years of study beyond high school, including graduation from college of mortuary science accredited by the American Board of Funeral Service Education.

There have been federal court cases on funeral directors meeting this standard. Such cases have occurred in Michigan and New York where the courts found that the funeral directors would qualify as professionals based on an educational requirement that includes at least three (3) years of education beyond high school and a one-year internship to qualify to receive a state license. Only states that have this level of educational requirement may meet the federal exempt standard. In the past only fourteen (14) states have met this standard, but states can and do change their licensing requirements periodically, so the list of states is ever changing. It is important that you seek legal counsel within your state to determine if your state licensing requirements for a funeral director meet the federal definition for a professional employee.

Clearly, with the guidelines for establishing licensed staff at such a high bar for funeral employers in most of the United States, the new salary threshold becomes critical for funeral business owners to understand. Based on this threshold, employees who make less than \$35,568 per year would be qualified to earn overtime when they worked more than 40 hours per week. Overtime must be paid at 1 ½ times the employee's normal hourly rate of pay. By changing the salary threshold, funeral home owners may find that they will have to change the compensation of their employees or be prepared to pay them overtime if they are not qualified as exempt from overtime.

There are some other facts about the new overtime rules that funeral home owners/managers should be aware. The new rule also increased the threshold for highly compensated employees from \$100,000 to \$107,432. Highly compensated employees can be considered exempt from overtime if they meet a reduced duties test that consist of the following:

1. The employee's primary duty must be office or non-manual work.
2. The employee "customarily and regularly" performs at least one of the bona fide exempt duties of an executive, administrative or professional employee.

The new rule also does not have an automatic COLA although there have been statements made that the DOL intends to review the salary threshold more frequently than in the past. Additionally, funeral homes should consider how the new salary threshold and any adjustments that must be made by the business to comply with the new rules may impact other employee programs. For example, retirement or health insurance programs may have language addressing participants that are exempt or non-exempt employees. It is possible that funeral employers will have employees whose classification as exempt or non-exempt will change to address the new overtime rules.

For several years funeral service has anticipated there might be a change in the overtime rule. Now the rules are a reality and funeral homes will need to adjust to comply. If we can be of assistance, please contact HR Specialist Stephanie Ramsey or Director of Compliance, Curtis Rostad at 1-602-274-6464.

This advisory is for informational purposes only. Nothing herein shall be construed to be legal advice. You should consult legal counsel before implementing any changes in procedures or practices.