

## Q&A on New White Collar Exemption Rule

By  
T. Scott Gilligan  
NFDA General Counsel

On May 18, 2016, the U.S. Department of Labor (DOL) issued its Final Rule that updated the salary level test for employees who qualify for the White Collar exemptions. Because the Final Rule will impact many funeral homes throughout the country, NFDA has prepared this Q&A piece explaining the new changes and options that are available to funeral homes.

### 1. *What are the White Collar Exemptions?*

The Wage and Hour laws exempt employees who meet the White Collar exemption criteria from overtime provisions. This allows employers to pay the employees a set salary no matter how many hours they work. The three most important White Collar exemptions are the Executive, Professional, and High Level Administrator exemptions.

In order for an employee to qualify under the White Collar exemption, the employee has to meet three criteria: the duties test, the salary basis test, and the salary level test. As far as the duties test, the DOL ruled in 2004 that funeral directors and embalmers who work in a state that requires at least four years of post-secondary education to be licensed are regarded as professionals under the duties test. Currently, only Minnesota and Ohio require four years of post-secondary education to be licensed as a funeral director or embalmer. Therefore, funeral directors and embalmers working in those two states meet the duties test as professionals.

However, based upon several federal court cases that have found funeral directors to qualify as professionals in Michigan and New York, various funeral homes in states that require at least three years of post-secondary education and a year of internship to be licensed, regard their licensees as professionals. The 14 states that require three years of post-secondary education, are Idaho, Iowa, Michigan, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, West Virginia, and Wisconsin. (NFDA strongly advises funeral homes in these 14 states to consult with their own attorney before regarding their licensed employees as professionals for wages and hour purposes).

The second criteria for the White Collar exemptions, the salary basis test, requires that an exempt employee be paid a set amount for the workweek, which amount may not be reduced because of variations in the quality or quantity of the work performed. If the employee performs any work in a workweek, he or she must be paid the full weekly salary. Therefore, regardless of whether the employee worked one hour or 60 hours in a given week, the employee would receive the same set salary for that workweek.

The third criteria for qualifying for the White Collar exemption is the salary level test. Since 2004, the salary level test has been set at \$23,660. In order to qualify for the White Collar exemption, an employee had to be paid at least \$23,660 a year or \$455 a week.

**2. What changes are being made to the White Collar exemption by the DOL?**

Of the three tests that apply to the White Collar exemptions, only the salary level test is being changed by the DOL's new rule. However, the change is significant. Starting on December 1, 2016, the salary level test increases from an annual salary of \$23,660 to \$47,476 (\$913 a week). Therefore, starting December 1, 2016, in order to be exempt from overtime, a licensed funeral director or embalmer who meets the professional classification must be paid at least \$913 a week.

**3. What does this mean for funeral homes that have exempt employees?**

If a funeral home wishes to continue to pay its licensed funeral directors and embalmers as professionals who are exempt from overtime compensation requirements, the annual salary for the employee must be at least \$47,476 a year. This works out to a weekly salary of \$913 a week.

**4. Our funeral home provides a rent-free apartment at the funeral home to our licensed funeral director. May we include the value of the apartment as part of his compensation when calculating the salary level test?**

No. Only actual pay received by the employee is counted when calculating if the employee is paid the \$913 minimum required salary under the salary level test. Perks such as free rent, use of a company car, a clothing allowance or other employee benefits are not part of the salary level test. However, as noted below, a portion of the salary can be paid in the form of non-discretionary bonuses and commissions.

**5. We pay our licensed embalmer a \$100 bonus for any late night removals and embalmings on top of his normal salary. Does the bonus count toward the salary level test?**

Yes, but only to the maximum of 10% of his salary. There are several important points to keep in mind on using bonuses and commissions to meet this salary level test. First, they must be non-discretionary. This means that the employer has a contractual obligation to pay them. In this case, where the employer has contracted to pay the employee a bonus for nighttime removals and embalmings, the bonus would qualify as non-discretionary. Bonuses such as those paid at Christmas are discretionary and do not count toward the salary level test.

Secondly, as noted above, the bonuses and commission payments will count towards the salary level test, but cannot be more than 10% of the salary. In addition, the bonuses must be paid on at least a quarterly basis. In other words, in order to count toward the salary level test, the bonus must be paid at least quarterly. The quarters do not have to be regular calendar quarters, but can be any three-month period selected by the employer.

**6. If in any particular quarter the funeral home does not pay enough bonus compensation to an employee to meet the salary level threshold, is there a way to pay extra bonus in the next quarter to make up for the shortfall in the previous quarter?**

Yes. The DOL does allow a catch-up payment. However, the catch-up bonus payment must be made in the first-pay period following the end of the quarter. For example, let's assume during the first quarter of the year ending March 31, 2017, an employee's bonus paid during that quarter leaves the employee \$200 short of that needed to meet the minimum weekly salary of \$913 a week throughout the quarter. If during the first pay period of the second quarter, the employee is paid that \$200 shortfall, he or she will still be regarded as an exempt employee. However, that \$200 payment would be counted as compensation paid in the first quarter, and could not be used to meet the salary level test in the second quarter.

**7. Will the salary level of \$47,476 change in the future?**

Yes. The Final Rule provides that the salary level test will be adjusted every three years. The first such adjustment will take effect on January 1, 2020. The DOL will determine the salary level at the 40<sup>th</sup> percentile of all full-time salaried workers in the lowest-wage Census region (currently, the South) as of September 1, 2019. The DOL will then announce what the salary level will be and the adjusted salary level test will become effective on January 1, 2020.

**8. If the funeral home will not be able to pay a licensee \$47,476 a year, may the funeral home still pay the employee a salary?**

Yes, as long as it also pays overtime. If the licensee will not make at least \$47,476 a year, the licensee is entitled to overtime compensation. Therefore, although being paid a salary, the employee would still need to receive extra overtime compensation in any workweek where the employee worked in excess of 40 hours. For example, assume a licensed funeral director is paid \$800 a week salary or \$41,600 annually. In a particular workweek, the licensee works 45 hours. The funeral home would pay the licensee the set \$800 salary, plus 5 hours of overtime. Since the employee is being paid \$800 for a 40-hour workweek, the regular hourly rate paid to the employee would be \$20. Because overtime is compensated at time and one-half of the regular hourly rate (\$20 x 150%), the five hours of overtime at \$30 an hour would add an additional \$150 of extra compensation. So for the particular workweek, the employee would be entitled to a salary of \$950.

If an employee is non-exempt, it is important to track their work hours. This does not have to be done by punching a timeclock, but can be done with a simple notation of the hours worked each day during the workweek. When an employee is on-call, the time on-call is not considered hours worked as long as the employee enjoys personal freedom to be at home or within a certain mileage radius of the funeral home.

**9. If a funeral home now pay its licensees as exempt professionals, what are the available options for it on paying its licensed employees after December 1, 2016?**

Funeral homes that are now compensating their licensees as exempt professionals have several options, including the following:

- Establish the salary of a licensed employee at a minimum of \$47,476 a year to maintain the White Collar Exemption. An exempt employee does not have to be compensated for overtime.
- If the licensee will not make \$47,476 a year, pay the overtime compensation of time and one-half for any overtime hours worked in excess of the 40 hour workweek.
- Establish a schedule whereby licensees do not work in excess of 40 hours per week. This may be accomplished by hiring part-time work or by requiring exempt employees to work a greater number of hours so that non-exempt employees stay under the 40 hour per workweek level.
- Reduce the amount of compensation allocated to a licensee's base salary in order to have sufficient funds to account for overtime hours worked in excess of 40 hours a workweek. In this way, the funeral home maintains the current salary of the employee even though he or she will now be non-exempt. Caution: make sure that the base hourly wage equals or exceeds the higher of the current minimum wage in your state or \$7.25 an hour which is the current federal minimum wage.
- Adopt the fluctuating workweek arrangement method of compensation for licensees.

**10. What is the fluctuating workweek arrangement and what are the advantages and disadvantages of using it?**

The DOL allows an employer the option of using a pay method entitled the Fluctuating Workweek Arrangement (FWA), also known as the Variable Workweek Arrangement. In essence, it is a compensation method that allows an employer to pay half-time for overtime instead of time and one-half. However, in exchange, the employer must agree to pay the employee a guaranteed weekly salary even in those weeks where the employee works less than 40 hours.

There are four basic requirements for using the FWA compensation method. They are as follows:

- The number of hours that employee works must truly fluctuate from week-to-week. For example, if a funeral home puts an employee on a schedule where the employee works 42 hours one week and 46 hours the next, the funeral home could use an FWA compensation method because the employee has fluctuating workweeks.
- The FWA system must be explained to the employee. It is not required that the employee agree to the payment system, but only that the funeral home has explained to the employee how this system works. NFDA provides a sample Fluctuating Workweek Arrangement Information Memorandum in its online legal forms library which will help a funeral home explain the compensation method to a licensee and document that the licensee received the information. A copy of the Memorandum is also found at the end of the article.
- The funeral home must provide a guaranteed weekly salary to the employee that will not be reduced even in those workweeks where the employee works less than 40 hours. Moreover, the guaranteed weekly salary must be sufficient to provide compensation each week at a regular rate that is at least equal to the minimum wage. This is the tradeoff for the employee receiving half-time instead of time and one-half for overtime.
- The FWA compensation system should not be used if the employee is being paid bonuses and/or commissions, like the night-time removal and embalming bonus discussed in Question No. 5.

**11. Are FWA compensation methods legal in every state?**

No. California has declared that a FWA compensation system violates California's Wage and Hour laws. Moreover, private lawsuits brought in Pennsylvania have successfully challenged the use of the FWA compensation system by Pennsylvania employers. Therefore, funeral homes in those two states should not use the system.

**12. Our funeral home has always paid its licensed employees as subject to overtime provisions of the Wage and Hour laws because our state only require two years of post-secondary education to be licensed. May our funeral home switch over to the FWA compensation method?**

Yes. Subject to the restrictions and requirements we spell out in responses to Questions 10-14, any employer may use the FWA compensation method.

**13. How is an employee paid under the FWA compensation system?**

As stated above, the employee is provided a guaranteed weekly salary which must be paid even if the employee works less than 40 hours for the particular workweek. When the employee does work in excess of 40 hours in a workweek, he or she is entitled to half-time for each overtime hour rather than time and one-half. The employer must determine the employee's regular rate of pay by dividing the guaranteed weekly salary by the number of hours worked in that particular workweek. Using that regular hourly rate, the employee would then be paid one-half of the regular hourly rate for each hour of overtime.

The example that NFDA used in the Fluctuating Workweek Arrangement Information Memorandum shows how the compensation calculation is made. Assume a licensed funeral director has a guaranteed weekly salary of \$800. The example shows the compensation the employee would receive when he works 48 hours in the first workweek and 60 hours in the second workweek.

**First Week**

- Regular rate of pay. ( $\$800/48 \text{ hr} = \$16.67/\text{hr}$ )
- Overtime premium. ( $50\% \times 8 \text{ hr} \times \$16.67/\text{hr} = \$66.68$ )
- Total pay ( $\$800.00 + \$66.68 = \$866.68$ )

**Second Week**

- Regular rate of pay. ( $\$800/60 \text{ hr} = \$13.34/\text{hr}$ )
- Overtime premium. ( $50\% \times 20 \text{ hr} \times \$13.34/\text{hr} = \$133.40$ )
- Total pay ( $\$800 = \$133.40 = \$933.40$ )

**14. *Our funeral home is hiring a new funeral director and will pay her \$42,000 a year. She will work 42 hours one week and 48 hours the next. How do we set up a fluctuating workweek arrangement for her?***

Do the math. In this case, if the funeral director is given a guaranteed weekly salary of \$767, she will receive \$42,021 a year using the FWA compensation system and working a schedule of 42 hours one week and 48 hours the next. As long as the funeral home explains the FWA compensation system to the employee, it is free to use this method. Moreover, if there are weeks where the employee works in excess of 42 hours or 48 hours, the overtime to be paid to the employee would be one-half of the regular hourly rate versus 150% of the regular hourly rate.

NFDA members with questions regarding the new DOL Final Rule or the Fluctuating Workweek Arrangement may contact General Counsel Scott Gilligan at (513) 871-6332.

**SAMPLE FLUCTUATING WORKWEEK ARRANGEMENT  
INFORMATION MEMORANDUM**

**(This example is based on a guaranteed weekly base salary of \$800. Be sure to calculate the amounts below using the actual guaranteed weekly salary being paid to the employee)**

EMPLOYER: \_\_\_\_\_

EMPLOYEE: \_\_\_\_\_

POSITION: \_\_\_\_\_

GUARANTEED WEEKLY SALARY: \$800.00

1. **PURPOSE.** The purpose of this Fluctuating Workweek Arrangement Information Memorandum is to provide an explanation of the compensation that Employee shall receive. Employee will be paid in accordance with the regulations set forth in 29 CFR 778.114 governing fluctuating workweek arrangements.
2. **GUARANTEED WEEKLY SALARY.** In any week in which Employee works, Employee shall receive at least the Guaranteed Weekly Salary set forth above. The Guaranteed Weekly Salary will be paid even if Employee works less than forty (40) hours in a particular workweek.
3. **COMPENSATION CALCULATION.** For each workweek, the Employee's regular rate of pay is determined by dividing the number of total hours worked into the Guaranteed Weekly Salary. In any workweek in which the Employee works in excess of forty (40) hours, the overtime premium to be paid to the Employee is fifty (50%) percent of the regular rate of pay multiplied by the number of hours of overtime work. The examples below show the compensation an Employee would receive for working forty-eight (48) hours in the first week and sixty (60) hours in the second week.

***First Week***

- Regular rate of pay. ( $\$800 / 48 \text{ hr} = \$16.67/\text{hr}$ )
- Overtime premium. ( $50\% \times 8 \text{ hr} \times \$16.67/\text{hr} = \$66.68$ )
- Total pay ( $\$800.00 + \$66.68 = \$866.68$ )

***Second Week***

- Regular rate of pay. ( $\$800 / 60 \text{ hr} = \$13.34/\text{hr}$ )
- Overtime premium. ( $50\% \times 20 \text{ hr} \times \$13.34/\text{hr} = \$133.40$ )
- Total pay ( $\$800 + \$133.40 = \$933.40$ )

4. **ACKNOWLEDGEMENT BY EMPLOYEE.** Employee acknowledges that the Employee has reviewed this memorandum and understands the compensation Employee will receive under the Fluctuating Workweek Arrangement.

\_\_\_\_\_ Date: \_\_\_\_\_