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Funeral Services: The Industry, Its Workforce, and Labor Standards

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William G. Whittaker
Specialist in Labor Economics
Domestic Social Policy Division

Funeral Services: The Industry, Its Workforce, and Labor Standards

Summary

Under Section 13(a)(1) of the Fair Labor Standards Act (FLSA), persons who are employed in a *bona fide* “executive, administrative, or professional” capacity may be exempt from minimum wage and overtime pay protection if they meet certain criteria set forth by the Department of Labor (DOL). Such criteria can be difficult to meet, which some argue is the nature of an exemption. During recent years, some confusion — and litigation — has developed about the application of this exemption to licensed funeral directors and embalmers. In order to eliminate any doubt about applicability, legislation has been proposed that would bypass Section 13(a)(1) and declare “any employee employed as a licensed funeral director or a licensed embalmer” to be exempt by definition — i.e., a simple categorical exemption.

During the past two decades, there have been major changes in the funeral industry. It has moved from a group of “mom-and-pop” enterprises to domination by a series of mega-firms, a process known in the industry as *consolidation*. With corporate consolidation have come economies of scale: bulk buying, centralized use of facilities and staff by clusters of establishments under a single ownership, new marketing arrangements, etc. Other changes have affected the industry as well: e.g., a shift from in-ground burial to cremation and the advent of vendors offering discount caskets and related merchandise. These changes have given rise to a corporate culture — and to increased visibility of the industry in the world of policy.

Similarly, there have been shifts in the labor force. Where funeral directing and embalming had been largely a domain of white males, it has become increasingly open to women and minorities. Consolidation appears to have led to a less personal pattern of labor-management relations than in the past. Societal change has suggested the need for a better-educated funeral industry workforce — for reasons of image and considerations of skill — and, in turn, this has led to efforts to enhance general licensing standards and to make them consistent throughout the nation. (Currently, licensing requirements are left to the determination of the individual states and the District of Columbia.) But, if funeral directors and embalmers are highly skilled, are they *professional* as DOL defines the concept for Section 13(a)(1) purposes? Should they be covered by FLSA wage and hour protections? Or, if not, why should they be excluded from such protection?

Legislation concerning the status of funeral directors (and, subsequently, embalmers) has been introduced in several Congresses — beginning with the 105th — but none of them has been enacted. On March 2003, the Department of Labor proposed a new regulation [Section 13(a)(1)] dealing with executives, administrators and professionals. The new regulation *could* have the effect, desired by the industry, of affecting the status of funeral directors and embalmers and of removing them from overtime pay status. This report will be updated as events require.

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Funeral Services: The Industry, Its Workforce, and Labor Standards

Most Recent Developments

Should workers employed in the funeral industry (licensed funeral directors and embalmers) be covered by the minimum wage and overtime pay protections of the Fair Labor Standards Act (FLSA)? If not, what might justify exempting these workers from such protections? Should such an exemption be specific (categorical), dealing narrowly with funeral directors and embalmers, or should it flow from more general criteria set forth by Congress or by the Department of Labor (DOL)? How have such wage/hour concerns been impacted by social and cultural change during recent years and by structural and economic shifts within the deathcare industry?

Although there may be some difference of opinion, public policy embodied through the FLSA has been to protect such workers in their overtime rights. In general, funeral directors would seem to have more in common with retail sales. Embalmers, conversely, would seem to have a more *professional* status; but, even so, they have not, traditionally, satisfied requirements set down by the Department.

That policy has been of concern to the industry (which would like to see the definition altered) and has resulted in recent litigation. It also became the focus of legislative proposals in 105th Congress and beyond. Aside from the regulatory context, *per se*, this paper reviews the structure of the deathcare industry, the character of its workforce, and the potential impact of the changes in wage/hour requirements.

Context of the Issue for the 107th Congress

Death does not occur on a fixed schedule. Thus, by the nature of their work, funeral service employees are often called upon to work irregular hours and to be available upon demand. But the funeral industry is not entirely unique in that respect. Utilities workers, public safety personnel, medical staff, some construction crews, journalists, etc., work under similar considerations of time. Their work requires a measure of flexibility.

When enacting the FLSA (the primary federal statute dealing with minimum wages, overtime pay, and related issues), Congress sought to limit the number of hours worked to a reasonable number: i.e., not more than 40 per week. However, cognizant of work patterns within particular industries, it made the act flexible. For example, although the act requires that 1½ times a worker's regular rate of pay (time-and-a-half) be paid for hours worked in excess of 40 per week, there is no daily restriction. Thus, a worker can be assigned to work any combination of hours —

days, nights, a split shift, compressed or flexible scheduling — so long as the total hours worked *per week* do not exceed 40. Even then, overtime rates need to be paid only for those hours worked in excess of 40 per week.¹ At the same time, Congress confined FLSA wage standards to a minimal requirement: a wage floor.

Existing FLSA workhours and wage requirements have long been a concern of employers — including those in the funeral industry.² Generalized concerns evolved into litigation when, in 1998, the U.S. District Court for the Western District of Michigan (*Rutlin v. Prime Succession, Inc.*) examined the wage/hour treatment of a Michigan man engaged as a funeral director and embalmer. The case was subsequently appealed to the U.S. Court of Appeals for the Sixth Circuit, and a decision was rendered in July 2000 (*Rutlin v. Prime Succession Inc.*, 6th Cir., No. 99-1042, July 20, 2000). Under Section 13(a)(1) of the act, certain *bona fide* “executive, administrative, or professional” employees (including licensed funeral directors and embalmers) may be exempt from FLSA wage and hour requirements if they meet DOL standards.

Exemption, however, is not automatic, nor is it universal: the qualifying criteria are technical. In general, DOL has regarded funeral directors and embalmers as technical or as retail/service employees, not as *professionals*. In the *Rutlin* case, the Court of Appeals found that the plaintiff was a professional even though, in this instance, he performed additional duties that did not require professional training. It held that those duties “that were of principal importance to Prime Succession were those related to directing funerals and embalming bodies.” The case also involved the mode of payment (salaried or hourly) and payment for periods of time when Rutlin was off duty but *on call*. Here the Court of Appeals ruled that given the particular circumstances in this case, the plaintiff should have been compensated for off duty but *on call* hours (while paid on an hourly basis).³ Whether other cases, given factual variations, would result in a similar interpretation may be problematic.⁴

In 1998, in order to bring clarity to the issue, a legislative solution was proposed. The legislation, had it been adopted, would have exempted “any employee employed as a licensed funeral director” from minimum wage and overtime pay protection under the FLSA.⁵ Senator Lauch Faircloth, when presenting the proposal, pointed to “the economic hardship” and “financial strain” such requirements place

¹ There are a variety of options open to employers. See 29 C.F.R. Part 778. The stated motivations of Congress in this respect have been mixed: in part, economic, but social as well.

² *The American Funeral Director*, Dec. 1994, p. 62. See also testimony of Howard Raether, representing the National Funeral Directors Association, in U.S. Congress, Senate Subcommittee on Labor, Committee on Labor and Public Welfare, *Fair Labor Standards Amendments of 1971*, hearings, 92nd Cong., 1st sess., Sept. 24, 27, and 30, 1971 (Washington: GPO, 1971), pp. 1672-1676.

³ See *Rutlin v. Prime Succession Inc.*, 220 F.3d 737 (6th Cir.2000), reversing 38 F. Supp. 2d 194 (W.D. Mich. 1998).

⁴ Judge Karen Nelson Moore of the Sixth Circuit Court dissented in the *Rutlin* case, finding for Rutlin rather than Prime Succession.

⁵ See S. 2405 (Faircloth) and H.R. 4540 (Graham), both of the 105th Congress.

on small business owners who have “to allocate revenues for that purpose” — i.e., to pay their employees at least the minimum wage and overtime pay for hours worked in excess of 40 per week.⁶ No action was taken on this legislation during the 105th Congress.

Early in the 106th Congress (following the decision in the *Rutlin* case), new legislation was introduced: H.R. 793 (Graham). Somewhat expanded, it proposed elimination of minimum wage and overtime pay protection both for licensed funeral directors and licensed embalmers.⁷ No action was immediately taken on H.R. 793, but its language was incorporated within H.R. 3081 (Lazio) — tax legislation that would also raise the federal minimum wage and make certain other changes in the FLSA. On January 28, 2000, the Committee on Education and the Workforce was discharged from further responsibility for the measure. No hearing had been held on the Graham (now, Lazio) funeral industry provision. On March 9, 2000, H.R. 3081 was passed by the House and, subsequently, dispatched to the Senate. But when the 106th Congress came to an end, neither bill had been approved.

Early in the 107th Congress, new legislation (H.R. 546, Quinn; and H.R. 648, Graham) was introduced that would have exempted employers of licensed funeral directors and embalmers from the minimum wage and overtime pay requirements of the FLSA. The bills were referred to the Committee on Education and the Workforce — and the tax provisions of H.R. 546 to the Committee on Ways and Means. Neither bill was enacted. In the 108th Congress, two new bills of similar intent were introduced — H.R. 2065 (Tiberi) and S. 292 (Graham of South Carolina) — but, like their predecessors, neither was approved by the Congress.

The purpose of the proposed funeral industry exemption is fairly direct. It would allow funeral industry employers to avoid having to pay their employees (those employed as licensed funeral directors and/or licensed embalmers) the FLSA minimum wage and *time-and-a-half* for overtime hours worked. That result could be achieved through at least two routes. **First.** Under the FLSA’s Section 13(a)(1), *bona fide* executive, administrative or professional employees may be exempt from wage and hour protection if they meet certain tests (discussed below) established by DOL. Congress could modify Section 13(a)(1) so that licensed funeral directors and embalmers would qualify as exempt — presumably as *professionals* (but possibly, as administrative or executive employees) — were it demonstrated that they actually were *professional* for Section 13(a)(1) purposes: that is, highly educated and highly paid.⁸ However, it appears that many could not meet that standard — often being low-wage entry-level employees. (See discussion below.) **Second.** Congress could write into the statute a categorical exemption by declaring that licensed funeral directors and embalmers are, by definition, exempt from minimum wage and

⁶ *Congressional Record*, July 31, 1998, p. S9562.

⁷ H.R. 793, introduced by Representative Lindsey Graham (R-SC) on Feb. 23, 1999, was referred to the House Committee on Education and the Workforce and, later, to the Subcommittee on Workforce Protections.

⁸ For an example of this approach, see CRS Report RL30537, *Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act*, by William G. Whittaker.

overtime pay protection.⁹ The latter course (categorical exemption) was the approach that has been proposed in the past several Congresses. This report will examine both the professional and categorical approaches and their policy implications.

The Regulatory Context

Under the FLSA, **Section 6** specifies the federal minimum wage that must be paid to covered employees. **Section 7** requires that covered workers must be paid 1½ times their “regular rate” of pay for hours worked in excess of 40 per week. Then, in **Section 13**, Congress wrote into the act a series of exemptions from Section 6 or Section 7 or from both. For example, Section 13(a)(1) provides:

- (a) The provisions of section 206 ... and section 207 of this title shall not apply with respect to —
- (1) any employee employed in a bona fide executive, administrative, or professional capacity

The definition of “bona fide” and of “executive, administrative, or professional” has been left by Congress to the Secretary of Labor to be established through the rulemaking process.¹⁰ In the case of licensed funeral directors and licensed embalmers, the issue has focused upon the concept of *professional* — though such workers might also be exempt as executive or administrative staff.

Speaking generally, to be exempt under Section 13(a)(1), two criteria must be met. *First*, the worker must be paid a salary above a threshold established by the Secretary: **the salary test**. *Second*, the worker must be engaged in duties that would meet a standard of a professional (**the duties test**) as specified by the Secretary.

Through the years, employers have often sought to expand this exemption (Section 13(a)(1)) in order to avoid payment of overtime rates: workers, conversely, have tended to resist expansion of the exemption. The several tests are imposed so that a title alone cannot establish the exemption. For example, a “professional” must actually be a professional in order to be exempt: the designation and exemption being rooted, therefore, both in a duties test (that he does the work of a professional) and in a salary test (that he is paid a professional’s wage). The tests, however, have been impacted by changes in educational and training practices and by fluctuations in the economy.¹¹

⁹ There is ample precedent for excluding specific categories of workers from FLSA protections. Such exemptions may be justified either as economic policy or as legislative accommodation and compromise — or both.

¹⁰ In the U.S. code, the Sections are 206, 207, and 213 respectively. Wage and hour policy is also a concern of the states and the latter may have more rigid standards than the federal government. Where there is overlapping coverage, the higher standard normally prevails.

¹¹ The Section 13(a)(1) designation (the EAP exemption) needs to be approached with some caution. See, for example James A. Prozzi, “Overtime Pay and the Managerial Employee: Still a ‘Twilight Zone of Uncertainty,’” in *Labor Law Journal*, Mar. 1990, pp. 178-182; and (continued...)

In attempting to distinguish a professional person from a worker who is technically trained and highly skilled, the Department established certain criteria of assessment. For example, the work of a professional must require:

... knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes

DOL has emphasized the “original and creative character” of such work and the “exercise of discretion and judgment” in its performance. It must be predominantly what the worker actually does: i.e., the major portion of his or her work.¹²

In the *Rutlin* case the Circuit Court, in the absence of a categorical exemption, conducted its review under the old Section 13(a)(1).¹³ It held that Rutlin, as a licensed funeral director and embalmer in Michigan, was a *professional* and that, although he had spent much of his time on non-professional duties, he met the duties time test because of the relatively greater importance of the work he performed within his professional field. Each case, of course, is different. And, even here, Judge Moore of the Circuit Court filed a lengthy and detailed dissenting opinion. It is not clear how other courts might view the several tests.

The Funeral Industry

During recent years, the funeral industry has undergone stark change, both in its structure and economic orientation. DOL regulations and the ambiguities of the *Rutlin* case aside, there are forces within the industry that could encourage efforts to secure exemption from FLSA minimum wage and overtime pay requirements. The following section discusses the nature and implications of these changes.

Funeral services in America are, today, profitable and socially important. Estimates vary, depending upon what is counted and how a tally is made, but *The Economist* points to a “\$15 billion a year funeral industry.”¹⁴ The *deathcare* industry

¹¹ (...continued)

U.S. General Accounting Office, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, report to the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, GAO/HEHS-99-164, Sept. 1999 (Washington: GPO, 1999).

¹² See 29 C.F.R. § 541.3(a) forward. The rule has changed somewhat in the new Section 13(a)(1) standard discussed below; but the impact of that change may need to await further developments.

¹³ Although the court also took into account Michigan law, the focus here is upon the federal statute and its supporting regulations.

¹⁴ “Barbarians at the Pearly Gates,” *The Economist*, Sept. 28, 1996, p. 79. Precise estimates are difficult, involving complex disaggregation of data — and of holdings. See also Gary (continued...)

is usually divided into three components: “(1) ceremony and tribute, usually in the form of a funeral or memorial service, (2) disposition of remains, either through burial or cremation, and (3) memorialization, through monuments, markers or inscriptions.”¹⁵ Funeral arrangements are made in a variety of ways but, often, they are prepaid in order to be certain the wishes of the deceased are complied with and to ease the burden on survivors: a concept known as “preneed.” In 1994, about 760,000 individuals prearranged their funerals — “spending over \$3.4 billion in the process.”¹⁶

For a little over a decade, a primary theme within the funeral industry has been *consolidation*. Where most deathcare establishments had been relatively small and locally owned (or, at most, small chains), the 1990s saw a rapid growth of mega-corporations with nationwide and international holdings. There are estimated to be about 23,000 funeral homes and 9,500 cemeteries in the United States. In the late 1990s, the *consolidators* (the industry term for the mega-corporations) were said to control “about 25 percent” of industry revenue dollars.¹⁷ At mid-decade, about 85% of industry facilities were thought to be “family-owned.”¹⁸ Percentages, however, may be difficult to assess since the consolidators “operate seemingly independent funeral businesses under one parent company.”¹⁹ In any case, the percentage may be of little importance. “While the independents still account for the majority of firms in number of operating units,” states Tom Fisher, columnist for *Mortuary Magazine* and a close observer of the industry, “their power — always fragmented, always fractured by suspicion — is gone.”²⁰

¹⁴ (...continued)

McWilliams, and William G. Symonds, “Dustup in ‘Death Services’,” *Business Week*, Oct. 7, 1996, p. 40. (Hereafter cited as McWilliams and Symonds, *Dustup in ‘Death Services’*.)

¹⁵ *The U.S. Funeral Services Industry: A Marketing, Competitive and Operational Analysis* (Tampa: Marketdata Enterprises, Inc., 1997), p. 8. (Hereafter cited as Marketdata, *The U.S. Funeral Services Industry*). See also Arthur Phaneuf, “Public Players in a Private Industry,” *The American Funeral Director*, Mar. 1995, p. 46.

¹⁶ Arthur Phaneuf, “How Big a Market?,” *The American Funeral Director*, Sept. 1995, p. 30. (Hereafter cited as Phaneuf, *How Big a Market?*).

¹⁷ Susan Little, “Taking Stock in Death Care Industry: Present and Future,” *The American Funeral Director*, Jan. 1999, p. 23. (Hereafter cited as Little, *Taking Stock in Death Care Industry*).

¹⁸ Hank Cox, “While the Grim Reaper Toils, Corporations Reap Big Profits,” *Insight on the News*, Dec. 30, 1996, pp. 42-43. (Hereafter cited as Cox, *While the Grim Reaper Toils*). For clarity of meaning, such estimates require further definition which is not immediately available.

¹⁹ Phaneuf, *How Big a Market?*, p. 27.

²⁰ Tom Fisher, “The Culture of Contemporary Funeral Service Corporations,” *Mortuary Management*, Apr. 1996, p. 14. (Hereafter cited as Fisher, *The Culture of Contemporary Funeral Service Corporations*).

The Culture of an Industry

The traditional mode of doing business in the funeral industry has also changed.²¹ “Whatever the ‘American way of death’ was in 1960,” writes analyst Richard Gill, “it is obviously becoming something radically different as we head into the twenty-first century.”²² The industry, some argue, was in trouble as the 1990s dawned. Business had not accommodated to “societal changes.”²³ Inefficiencies had crept in; profit margins had shrunk. In some cases, inheritors of funeral homes were unenthusiastic about the mortuary craft; in other cases, family members had been added to the staff — perhaps somewhat gratuitously.²⁴

The process of consolidation may have been set in motion by Robert Waltrip of Houston. Having inherited the family business, he began to expand through acquisition of other establishments until, by the mid-1990s, organized as Service Corporation International (SCI), he reportedly operated 2,882 funeral service locations, 345 cemeteries and 150 crematoria. Gradually, other consolidators followed suit.²⁵ (See **Table 1**).

Increasing consolidation brought with it cultural change within the industry and, perhaps, some sense of loss. In contrast to the small community-oriented family operations, some argue, the large publicly owned companies are focused upon return on investment.²⁶

The president of the Associated Independent Family Funeral Homes of Maine stated: “The corporate philosophy is to make the most for their stockholders placing their values on Wall Street.” This is very different, in his opinion, from the old, independent firms, whose “values are on the mainstreet of the communities in which they live.”²⁷ “Too often,” opined Ron Hast of *Mortuary Management*, “a demanding, intense focus on Wall Street numbers makes it clear that the most important factor driving the leaders (and followers) of the consolidators’ program is MONEY.”²⁸ But,

²¹ The industry has changed, markedly, since the late 1990s and early into the present century. The overview, presented here, addresses the realities of a period — about 1999 to 2000. There may have been changes within the industry: among the players, certainly, and in terms of major stakeholders.

²² Richard T. Gill, “Whatever Happened to the American Way of Death?,” *Public Interest*, spring 1996, p. 108.

²³ Fisher, *The Culture of Contemporary Funeral Service Corporations*, p. 15.

²⁴ Christopher Palmeri, “Funeral Prospects,” *Forbes*, Sept. 11, 1995, p. 46. (Hereafter cited as Palmeri, *Funeral Prospects*).

²⁵ See Robert Bryce, “Merchant of Death,” *Texas Monthly*, June 1996, pp. 58-62. (Hereafter cited as Bryce, *Merchant of Death*); and Marketdata, *The U.S. Funeral Services Industry*, p. 40.

²⁶ Fisher, *The Culture of Contemporary Funeral Service Corporations*, p. 14.

²⁷ Fernald is quoted in *The Bangor Daily News*, Apr. 21, 2000, no page number provided.

²⁸ Ron Hast, Waltrip, Loewen, Stewart, “Achievement, Perspective, Vision,” *Mortuary* (continued...)

realistically, the world of business is moved by competition and profitability. “Profits,” observed Bob Adkins of the Southeastern Funeral Directors Service, “are the very foundation of our nation.”²⁹

**Table 1. The United States Deathcare Industry:
Major Firms, ca. 1995-1996**

Firm	Number of funeral homes	Number of crematoria	Number of cemeteries	Total employees
Service Corporation International (Texas)	2,882	150	345	29,061
The Loewen Group, Inc. (British Columbia)*	950	—	289	13,000
Stewart Enterprises, Inc. (Louisiana)	308	—	121	—

Source: Compiled from data contained in *The U.S. Funeral Services Industry* (Tampa: Marketdata Enterprises, Inc., 1997). Movement within the industry — consolidations, divestitures — has been so rapid in recent years that reliable data are difficult to secure, especially so since 1996.

* Although The Loewen Group, Inc., is based in British Columbia, the bulk of its business is conducted within the United States. Each of these firms (the three largest in 1996) operate in an international context — especially so, SCI.

The altered structure of the industry may not be immediately apparent to the public. “Outwardly,” reported Robin Fields for *The Los Angeles Times*, “acquired homes remained unchanged, the names on their signs comfotingly constant. Inside, however, old-fashioned family-run shops became corporate units.”³⁰ The change — and the challenge — has been multifaceted.

Structure and Strategy

As with other industries, funeral services establishments are of varied character, in some measure reflecting the tone of the communities in which they are located.

²⁸ (...continued)

Management, Mar. 1998, pp. 6-8. Emphasis in original.

²⁹ Adkins is quoted in “Profitability Is Focus of Palmetto Conclave,” *The American Funeral Director*, Aug. 1992, p. 24.

³⁰ Robin Fields, “Grim Time for Funeral Firms,” *The Los Angeles Times*, Oct. 24, 1999, Part C, p. 1. Intra-corporate relationship may vary from one acquisition to another. (Hereafter cited as Fields, *Grim Time for Funeral Firms*).

However, the “new economic realities” flowing from “acquisition and consolidation” have “forced some independents to change the way they did business.”³¹

Entry of Large Business. In the deathcare industry, consolidation may be the dominant trend of the 1990s. As the “major players” grew through acquisition, many “small family-owned funeral homes” found themselves compelled to confront “marketing plans, multiple facilities, and cost saving shared resources” utilized by the consolidators.³² Competitive pressures increased, notably from “the big three” of the industry: the Houston-based Service Corporation International (SCI), the New Orleans-based Stewart Enterprises, and the Loewen Group based in Vancouver but operating primarily in the States.³³ Others would join the race.

Growth had been rapid. For example, with the aid of venture capital, Tom Johnson, once associated with Pierce Brothers (funeral homes) in California, struck out on his own in the early 1990s and, in “slightly over four years,” he had “acquired over 160 operating units” with a market value, by some estimates, in the \$295 million range. In another case, Stewart, a family firm started in 1910, went public in 1991. Between 1991 and 1995, it “acquired 116 funeral homes and 79 cemeteries;” in fiscal 1996, it bought another “134 funeral homes and 15 cemeteries in 22 international and domestic markets.” Other firms progressed similarly. The Loewen Group went public in 1987: a firm with 47 funeral homes and one cemetery. Within a decade, it could boast “950 funeral homes and 289 cemeteries throughout Canada, the United States and Puerto Rico.” Service Corporation International, “the world’s largest operator of funeral homes, cemeteries, and crematoria,” started with a single mortuary in 1951. It went public in 1969. In 1993, SCI expanded its operation into Australia and, during the same period, acquired properties in the United Kingdom where it quickly became the largest funeral services provider. In 1995, it “purchased the funeral operations of” the French conglomerate, Lyonnaise des Eaux.³⁴

Still, the industry has sought to retain its prior image. John Fitch, Washington representative for the National Funeral Directors Association, depicts “funeral directors as human beings and neighbors, and funeral homes as one of the last of the true family owned, small businesses left in America,” and stresses “the need to recognize all these things when policy is being made or considered.”³⁵

³¹ Patrick D. Patullo, “1998: The Year In Review,” *The American Funeral Director*, Jan. 1999, p. 20.

³² Marketdata, *The U.S. Funeral Services Industry*, p. 10.

³³ *The Chicago Tribune*, Sept. 6, 1998, p. C2.

³⁴ See Tom Fisher, “The Saga of Tom Johnson and His Prime Succession Company,” *Mortuary Management*, July/Aug. 1996, p. 10; Marketdata, *The U.S. Funeral Services Industry*, pp. 36, 40 and 43; Bryce, *Merchant of Death*, pp. 58, 60, and 61; and *The Wall Street Journal*, Sept. 18, 1996, p. A6. In 1996, SCI sought to acquire Loewen — an offer that was rejected. SCI was said to have interests in Italy, Singapore and the Czech Republic. See Palmeri, *Funeral Prospects*, pp. 45-46.

³⁵ Fitch is quoted in “1998 in Review,” *The Director*, Dec. 1998, pp. 26 and 28.

Maintaining a Local Image. Although “[s]weeping consolidation is taking place in this historically family-held profession,” states William Barrett of SCI, “... you really can’t see it.” It’s a calculated strategy, he suggests. “... when we buy a funeral home, we don’t make any changes that are visible to the public.”³⁶ Goodwill (“an ongoing, satisfied clientele”) “translates into substantial intangible capital” and is a “component of any funeral home’s overall asset value.”³⁷ Industry analyst Dale Rollings advises that “[p]eople like to deal with those with whom they are familiar” and, therefore, in a consolidation, “maintaining a visibility and participation by prior ownership and management” is important.³⁸

Retaining a former owner to deal with the public may help preserve the good will “that family-owned independents have earned in their communities over many years.” However, it may also project an erroneous impression that the firm is a *mom-and-pop* operation and should be treated as a *small business* in terms of public policy.³⁹ The practice tends to focus consumer attention upon the traditional and the familiar.⁴⁰

Economic Change

It has been said that consolidation “has revolutionized” the deathcare business and “forced an unusually fragmented industry toward massive rationalization.” Concern with profit maximization has led, as well, to “blistering growth” and concerns with wage/hour requirements.⁴¹

Economies of Scale. The consolidators may bring efficiency to the deathcare industry. Buying in quantity — caskets, embalming fluid, etc. — allows a company to increase its profits. So does joint or collective management: the sharing of facilities and staff. It may also lead to new and creative personnel practices as a device for profit enhancement — appropriate, perhaps, but often a break from past practice in the industry.⁴²

Purchasing in bulk can be cost effective — and profitable. Until recently, there have been two major casket manufacturers: Batesville Casket Company (Indiana) and York Group, Inc., of Houston. In the mid-1990s, Batesville had an estimated

³⁶ Tom Ehrenfeld, “The Demise of Mom and Pop?,” *Inc.*, Jan. 1995, p. 47. (Hereafter cited as Ehrenfeld, *The Demise of Mom and Pop?*).

³⁷ Fred S. McChesney, “Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule,” *Journal of Law and Politics*, fall 1990, pp. 14-15.

³⁸ Dale L. Rollings, “Three Ways to Devalue Your Goodwill,” *Mortuary Management*, Oct. 1995, pp. 20-21.

³⁹ Cox, *While the Grim Reaper Toils*.

⁴⁰ Will Astor, “Discount Mortuary Ready to Make Death Less Painful to Pocketbook,” *Business Journal*, Jan. 15, 1999, p. 1.

⁴¹ McWilliams, and Symonds, *Dustup in ‘Death Services’*, p. 40.

⁴² Bryce, *Merchant of Death*, p. 61.

45% of the market; York, about 15%.⁴³ Some argue that consolidation has brought price pressures on these supply firms with the bulk purchasers able to force discounts.⁴⁴ To the extent that there are such pressures, they may have a disparate impact upon smaller firms (independents) for whom bulk buying may not be feasible and to whom discounts may not be an option. Thus, they could be placed under even greater pressure to economize in other areas such as labor costs.⁴⁵

In urban centers where a firm has more than one mortuary, it is reported that “conglomerates can jockey expensive equipment and underused personnel between funeral homes.”⁴⁶ Rather than retain an embalmer for each home, bodies may be shipped to a centralized “prep center” for processing. Similarly, funeral directors (normally staff employees) can be shifted from one place to another wherever their services may be required. One switchboard operator may handle reservations for all of the associated establishments. A single fleet of hearses and limos can serve a number of mortuaries: providing more efficient utilization of equipment and personnel with reduced cost.⁴⁷ But, such *clustering* need not be confined to strictly urban environments nor to high volume establishments. “Now the big companies are at the point where they are acquiring mid- and small-sized firms,” notes Fred Bates of National Selected Morticians, “where they can network in a geographic area with employees and equipment.”⁴⁸

Economic pressures have encouraged *clustering* throughout firms. To that end, Tom Fisher observed, “managers in the operating units must reduce salary schedules by sharing more staff among cluster facilities.” Increased use of “part-time labor” has also been forecast.⁴⁹ But, as with bulk purchasing, economies of scale in the area of personnel may not be an option for smaller, independent firms. But, both for consolidators and independents, economic pressure may lead to demands for reduction of manpower costs: for lower wages and elimination of overtime pay.

The Trend Toward Cremation. There is, some believe, a close relationship between consolidation and the growing trend to cremation. Smaller, often rural funeral homes, have a relatively low volume of business. If 20-50% of their client base opts for cremation, the economic impact can be substantial. For survival, such firms may need to reduce overhead — in part, through cutting labor costs. But, since competitive challenges in the industry are multiple and varied, the cremation trend

⁴³ *The Wall Street Journal*, Feb. 19, 1997, pp. B1, B10.

⁴⁴ Cox, *While the Grim Reaper Toils*, p. 43.

⁴⁵ Ron Hast, “Loewen, SCI, Stuart [sic] Marry Batesville,” *Mortuary Management*, Apr. 1998, p. 4.

⁴⁶ Shari Sweeney, “Graveyard Shifts,” *Inside Business*, Mar. 1999, pp. 34-37.

⁴⁷ Ehrenfeld, *The Demise of Mom and Pop?*, p. 47.

⁴⁸ Conglomerates Target a Broader Range, *Mortuary Management*, Feb. 1966, p. 25.

⁴⁹ Tom Fisher, “Contemporary Funeral Service: The Culture of Corporations,” *Mortuary Management*, May 1996, pp. 12-16. Early in 2000, SCI announced the layoff of 1,141 employees in its worldwide workforce. See Bureau of National Affairs, *Daily Labor Report*, Jan. 18, 2000, p. A11.

simply provides one more burden — and one additional rationale for smaller firms to sell to the consolidators.⁵⁰

Although irregularly so, some believe “[c]remation is gradually becoming the preferred American way of death.” Statistics (and projections) vary. In 1996, it was reported that about 22% of bodies, nationally, were cremated — with a projection of up to 40% by 2010.⁵¹ Nationally, there are wide variations in the trend, reflective of an urban/rural disparity, cultural and religious traditions, and migration patterns.⁵²

For the deathcare industry, the shift to cremation can be of significant economic importance. **First**, there is the way the funeral home handles the service — if there is a service. Will the body be embalmed? Will there be a viewing? What about flowers? **Second**, there is the question of a casket. In 1994, it was reported that just over 12% of American cremations were performed in caskets.⁵³ George Lemke of the Casket and Funeral Supply Association projects “a potential casket-sale loss of \$27.6 billion” between 1994 and 2010.⁵⁴ **Third**, there are collateral issues: a lessened need for cemetery space, for grave diggers and maintenance staff, for markers and monuments. The challenge for the industry, then, may be how to maintain profits (sales) in the face of a reduced demand for services. “On the one hand, the increased number of direct cremations is alarming,” states David Nixon of Funeral Management Service, Inc., of Springfield Illinois. “On the other hand, there is definitely room for growth in the sale of additional services and merchandise. Cremation-seeking families,” he adds, “constitute a market force you must deal with profitably.”⁵⁵

⁵⁰ “Independent Firms, Corporate Executives, Suppliers, and Cemeterians Talk About the Issues for 1999,” *The American Funeral Director*, Jan. 1995, p. 19.

⁵¹ Alexandra Alger, “The New (and More Convenient) American Way of Death,” *Forbes*, Oct. 21, 1996, p. 324. Robert T. Gill, “Whatever Happened to the American Way of Death?” *Public Interest*, spring 1996, p. 108. Gill sees an increase to “above 30 percent by 2010.”

⁵² “Cremation Statistics to the Year 2010,” *The American Funeral Director*, Nov. 1997, p. 20. Here, it is reported that the Pacific Coast “has been traditionally the percentage leader in the cremation rate,” though there are rate fluctuations. According to Jack Springer of the Cremation Association of North America (CANA), “in states like Hawaii and Nevada, they have been flirting around the 55-60 percent of cremations to deaths for a number of years. The state of Washington,” he stated, “was over 50 percent, and has dropped down this year to 49 percent.” In pockets, the rate may be higher — or far lower. See also “Now a Custom: Industry Seeks to Serve Cremation Families with Traditional Services,” *The American Funeral Director*, Nov. 1994, p. 18.

⁵³ “87.5% of ‘94 Cremations Were Casketless,” *The American Funeral Director*, Apr. 1995, p. 12.

⁵⁴ “Cremation Could Cost \$27 Billion in Casket Sales: Suppliers to Offer More Cremation Products and Programs,” *The American Funeral Director*, Nov. 1994, p. 22.

⁵⁵ David W. Nixon, “Are You Listening to Your Cremation Sales?,” *The American Funeral Director*, July 1995, p. 29.

Casket Competition. In a September 1999 study, the General Accounting Office reports that “cemeteries and casket retailers are now competing with traditional funeral providers, such as funeral homes, in the sales of caskets and other funeral goods and services.”⁵⁶ The extent of such competition may not be clear; but, in certain areas, it has provoked controversy.

Following years of intermittent complaints about deceptive business practices in the industry (and Jessica Mitford’s deathcare study),⁵⁷ the Federal Trade Commission issued a rule that became fully effective in April 1984. *Inter alia*, it required funeral homes: (a) to provide a general price list (GPL) to customers, (b) to allow customers to select only those services they wish rather than providing a predetermined package of goods and services, and (3) to secure express approval before embalming can be performed.⁵⁸ The rule targeted funeral homes, but left questions about coverage in other segments of the deathcare industry. Chris Raymond, editor of *The Director*, queried: “Is ‘Caskets-R-U’s’ in the strip-mall ... required to provide a GPL to their customers?”⁵⁹ These issues have continued in dispute.⁶⁰

Increasingly, cut-rate and discount casket merchants have emerged.⁶¹ This, in turn, has sparked competition between the old-line dealers and the newer low-cost firms. In some areas, there have been disputes over licensing requirements and business practices. How much public regulation should be imposed upon firms dealing in hardware (caskets, urns, shrouds, etc.), as opposed to actual embalming and burial activities, remains in contention. Where strictly hardware is concerned, observed *The Forth Worth Star-Telegram*, “there’s no practical reason” why such a business “has to be licensed. The state already has consumer protection laws in place that would apply to such products.” Yet such items are an integral part of the business of the narrower funeral industry.⁶²

⁵⁶ U.S. General Accounting Office, *Funeral-Related Industries: Complaints and State Laws Vary, and FTC Could Better Manage the Funeral Rule*, report to Congressional Requesters, GAO/GGD-99-156, Sept. 1999 (Washington: GPO, 1999), p. 7. (Hereafter cited as GAO, *Funeral-Related Industries*.)

⁵⁷ Jessica Mitford’s controversial account of the deathcare industry, *The American Way of Death* (New York: Simon and Schuster) was published in 1963. Subsequent editions appeared in 1978 and 1998. See also Tom Fisher, “Jessica Mitford: A Retrospect,” *Mortuary Management*, Sept. 1996, pp. 12-14.

⁵⁸ GAO, *Funeral-Related Industries*, p. 6. The rule was updated in 1994 and was again under review in 1999.

⁵⁹ Chris Raymond, “Knowledge, Power & You,” *The Director*, June 1999, p. 7.

⁶⁰ On the current status of the FTC rule, see Fitch, John H., Jr. “NFDA and the Funeral Rule,” *The Director*, June 1999, p. 18 and 20.

⁶¹ Gordon Fairclough, “Casket Stores Offer Bargains to Die For,” *The Wall Street Journal*, Feb 19, 1997, p. B1; and “Mexican Caskets Migrate Northward,” *Mortuary Management*, June 1997, p. 37.

⁶² “Of Grave Import,” *The Forth Worth Star-Telegram*, Jan. 8, 2000, p. 12. See also Bill Brewer, “Lawsuit to Challenge State Law on Casket Sales,” *Knoxville News-Sentinel*, Sept. (continued...)

The economic impact of these shifts could be substantial. On the one hand, the older casket manufacturers are confronted with competition from insurgent retailers — at the same time that they are under pressure from the consolidators for bulk-purchase discounts. Conversely, funeral homes may find increasing numbers of clients demanding fewer services — and providing their own cut-rate coffins. “In this era of bargain-basement cremation societies and store-front casket vendors,” observed Patrick Bellomi in *Mortuary Management*, “it appears that the traditional funeral director is ... to go the way of the horse-drawn hearse.”⁶³

A “Shaking Out” of the Industry

“People who don’t buy our stock just don’t like money,” Robert Waltrip of SCI is quoted as saying. During three decades, Waltrip built a firm with \$1.7 billion in annual sales: a 1995 profit margin of 11%. In 1996, SCI would conduct “one out of ten funeral services in U.S., about 230,000 in total.” During the mid-1990s, SCI had “nearly quadrupled its holdings,” emerging as the largest provider of funeral services in the United Kingdom and France — and it continued to expand.⁶⁴ The other major consolidators, Loewen and Stewart, were following in largely the same path.

Then, things seemed to change. Robin Fields of *The Los Angeles Times* quipped that the funeral business had “caught a glimpse of its own mortality.”⁶⁵ In *The Wall Street Journal*, Bruce Ingersoll pointed to “unprecedented industry turmoil.”⁶⁶ What happened is subject to interpretation. Change within the industry had been rapid. Some suggested that the death rate had been lower than expected.⁶⁷ There may have been internal management problems in some sectors.⁶⁸ The Loewen Group became involved in costly business-related litigation with a Mississippi firm (in the mid-

⁶² (...continued)

16, 1999, p. C1; Beth Brady, “Casket Trust Gouges Grieving Families,” *Chattanooga Times*, Oct. 14, 1999, p. B7; Mike Koller, “Casket Retailers Form Association to Protect Interests,” *Dallas Business Journal*, Oct. 1, 1999, p. 22; Miranda Perry, “Urning an Honest Living,” *Intellectual Ammunition*, Nov./Dec. 1999, p. 8; and Siobhan Byrne, “Cut-Price Coffin Makers Dig in for Funeral Trade Wars,” *Scotland on Sunday*, Oct. 17, 1999, p. 20. Comparison shopping seems not to be a common practice among those seeking an undertaker.

⁶³ Patrick Bellomi, “Removals: Front Line to the Bottom Line,” *Mortuary Management*, Sept. 1997, p. 17.

⁶⁴ Bryce, *Merchant of Death*, pp. 58 and 60.

⁶⁵ Fields, *Grim Time for Funeral Firms*, p. C1.

⁶⁶ Bruce Ingersoll, “Senate Probe of Funeral Home Abuses May Spur Stricter Federal Regulation,” *The Wall Street Journal*, Oct. 22, 1999, p. B11.

⁶⁷ Little, *Taking Stock in Death Care Industry*, p. 23; and Gary Meyers, “Death Care Industry Has Fallen on Hard Times,” *The State Journal-Register* (Springfield, Ill.), Aug. 29, 1999, p. 50.

⁶⁸ “Interview: Jon Thomas,” *Today in Deathcare*, June 1999, p. 14.

1990s).⁶⁹ Then, in 1996, SCI proposed a takeover of Loewen (which Loewen resisted): the Canadian firm continued to expand.⁷⁰ But, by the summer of 1999, for diverse causes, the Loewen Group filed for Chapter 11 bankruptcy protection.⁷¹

Through the fall of 1999 and beyond, the industry appears to have undergone something of a reassessment. In early 2000, SCI announced employee layoffs and reportedly halted acquisitions. Nevertheless, many analysts felt the industry picture remained generally positive. “Death care is one of the most stable competitive industries, with one of the fewest failure rates of any industry in the country.”⁷² The more positive aspects of consolidation (from an industry perspective — economies of scale, more efficient employee utilization, reconsideration of the types of service to be rendered) remain in place together, some might argue, with a heightened consumer awareness.

A Presence in Washington

The deathcare industry is diverse and represented by a variety of trade associations. For licensed funeral directors and embalmers, a primary agency appears to be the National Funeral Directors Association (NFDA), founded in 1882. Based in Wisconsin, it is said to have 15,000 members with 50 state units, a staff of 44 and a budget in excess of \$9 million.⁷³

At least since the close of World War II, the NFDA had been represented before the Congress and various federal agencies. But, with changes in the industry in the early 1990s, Washington representation became more systematized, developing a new structure and taking on new staff. It began a general assessment of “the costs to funeral homes of complying with regulations on all levels of government” in order to be able to provide data “to lawmakers and bureaucrats to thwart costly regulation.”⁷⁴ A Washington office for the NFDA was authorized and, in March

⁶⁹ Xavier A. Cronin, “A Bitter Battle Is Settled,” *The American Funeral Director*, Mar. 1996, pp. 18-19.

⁷⁰ Steve Lipin, and Tamsin Carlisle, “Service Corp. Seeks Loewen in \$2.8 Billion Stock Deal,” *The Wall Street Journal*, Sept. 18, 1996, pp. A3, A6; Fields, *Grim Time for Funeral Firms*, p. C1; and McWilliams and Symonds, *Dustup in ‘Death Services’*, p. 40.

⁷¹ See *National Post* (Canada), June 2, 1999, p. CO1; June 18, 1999, p. DO1; and Sept. 1, 1999, p. CO1; and “The Loewen Group Files Chapter 11 in U.S. and Canada,” *The American Funeral Director*, July 1999, pp. 6, 92-93.

⁷² Little, *Taking Stock in Death Care Industry*, p. 23. See also Jeff Harrington, “A Phoenix in the Ashes,” *St. Petersburg Times*, Jan. 31, 2000, p. 8E; Bureau of National Affairs, *Daily Labor Report*, Jan. 18, 2000, p. A11; Greg Hassell, “Service Corp. Battles Tombstone Blues: Firm Seeks Revival with New Strategy,” *The Houston Chronicle*, Feb. 11, 2000, p. 1; and “The Death Business: Staying Alive,” *The Economist*, Aug. 5, 2000, pp. 61-62.

⁷³ Tara E. Sheets, ed., *Encyclopedia of Associations*, 35th Edition (Farmington Hills, Mich.: The Gale Group, 1999), v. 1, pp. 277-278. (Hereafter cited as Sheets, *Encyclopedia of Associations*.)

⁷⁴ “NFDA Revamps Government Relations Program,” *The American Funeral Director*, Aug. (continued...)

1997, John H. Fitch was brought aboard as Director of Government Relations. An associate, Paul Miller, joined him early in 1998.⁷⁵

Fitch was instructed by the NFDA to “[e]stablish a presence” for the Association in Washington. The lobbying agenda reportedly was extensive: to alter the asset treatment of *preneed* policies for Medicaid eligibility purposes, to reform the bankruptcy laws, to encourage the FTC to impose “funeral rule” requirements on cemeteries and funeral-related retailers, to modify licensing requirements for recorded music, to deal with OSHA and EPA issues, to amend the FLSA with respect to *comp time*, and to effect exemption of “licensed funeral directors and embalmers from the federal wage & hour laws.”⁷⁶

The Workforce

How many licensed funeral directors and licensed embalmers are there in the United States? Who are they and what do they do? What are their working hours and how much do they earn? Are such persons highly-paid professionals or just rank-and-file employees?

General Characteristics

In a brief sketch, it is difficult to determine who funeral directors and embalmers actually are. One practical problem is disaggregation. In the literature, it is not always clear when the two types of work are joined in one person and when they are distinct. Further, for statistical purposes, there is a tendency to consider funeral industry employees without differentiation.

What Do the Numbers Suggest? Paul Miller of the NFDA indicates that there are about 50,000 funeral directors and embalmers nationwide: about 15,000 funeral directors (who may also be embalmers) are members of the Association.⁷⁷ But, funeral directors need not be embalmers — nor is it required that embalmers be funeral directors: some states license these workers jointly; others, separately. Since the NFDA is identified as a federation “of state funeral directors’ associations with individual membership of funeral directors” (15,000 members), it may not be immediately clear how many of the members are individuals and how many are

⁷⁴ (...continued)
1994, p. 8.

⁷⁵ John H. Fitch, “1998 in Review,” *The Director*, Dec. 1998, p. 26. (Hereafter cited as Fitch, *1998 in Review*). See also “Stronger PR Programs,” *Mortuary Management*, June 1998, p. 21; *The Chicago Tribune*, Sept. 6, 1998, p. C2; and “NFDA Hires Government Relations Director,” *Mortuary Management*, Apr. 1997, p. 24.

⁷⁶ *The Director*, May 1999, p. 62. See also *The Director*, Dec. 1998, pp. 26, 28, 30, 60, 68, and 70.

⁷⁷ Telephone discussion with Mr. Miller, Oct. 19, 1999.

institutional units.⁷⁸ The 1998-1999 *Occupational Outlook Handbook* notes: “Funeral directors held about 33,000 jobs in 1996.”⁷⁹ In its occupational employment series, however, the Bureau of Labor Statistics offers a slightly different distribution (in this case, for 1997): funeral directors and morticians, 24,880; funeral attendants, 22,410; and embalmers, 5,890.⁸⁰ But, with “almost 27,000 funeral service providers” nationwide, one might wonder at the small number of embalmers. Then, there may be definitional problems with respect to the various categories of workers.⁸¹

A Common Body of Duties? Though the duties of an embalmer may be relatively clear, the distinct responsibilities of “funeral directors,” “morticians,” and “funeral attendants” may raise some questions. Where the funeral director is not simultaneously an embalmer, his duties would appear to be largely organizational: i.e., arranging the logistics of the funeral, consoling the family, and conducting the business aspects of the proceeding. He may also be involved, depending upon the make-up of the unit, in placing obituaries and polishing hearses. The distinction, in terms of duties, between a *licensed* funeral director and a staffer who may not yet be licensed may be ambiguous and dependent upon the size of the funeral home, the volume of business conducted, tradition, etc. Clearly, the duties of a funeral director might vary substantially, depending upon whether the funeral home it is a *free-standing* owner-operated facility or part of a *cluster* operated by a consolidator.

An Employee, Not Necessarily an Owner/Manager. What may be more clear is that the funeral director is often not (or, at least, need not be) the owner of a funeral home. The Bureau of Labor Statistics notes that three-fourths of such workers are *employees* and not self-employed.⁸² Nor are they necessarily top-level supervisors. For example, one analyst speaking of career trajectories suggests that, in large funeral homes, one may advance “to chapel manager, where you help supervise the efforts of several funeral directors who report to you.”⁸³ A funeral

⁷⁸ Sheets, *Encyclopedia of Associations*, v. 1, p. 277.

⁷⁹ *Occupational Outlook Handbook, 1998-1999*, U.S. Department of Labor, Bureau of Labor Statistics. Available at [<http://stats.bls.gov/oco/ocos011.htm>], Oct. 20, 1999. (Hereafter cited as DOL, *Occupational Outlook Handbook, 1998-1999*).

⁸⁰ U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics, 1997 National Occupation Employment and Wage Estimates*. Current data available at [<http://stats.bls.gov/oes/current/oes119061.htm>], and [<http://stats.bls.gov/oes/current/oes394011.htm>].

⁸¹ U.S. General Accounting Office, *Funeral-Related Industries: Complaints and State Laws Vary, and FTC Could Better Manage the Funeral Rule*, report to Congressional Requesters, GAO/GGD-99-156, Sept. 1999 (Washington: GPO, 1999). Information on p. 3 states that there are “almost 27,000 funeral service providers, such as funeral homes and crematories,” nationwide. Complicating matters further is the definition of “funeral service provider” — and, whether one is speaking of an independently owned mortuary or one that is part of a “cluster” of units attached to one of the large chains.

⁸² DOL, *Occupational Outlook Handbook, 1998-1999*.

⁸³ Terence J. Sacks, *Opportunities in Funeral Services Careers* (Lincolnwood, Illinois: VGM Career Horizons, 1997), p. 40. (Hereafter cited as Sacks, *Opportunities in Funeral* (continued...))

director may be an entry-level employee — or he (or she) may be a senior staff person or even an owner, though the latter, it seems, ought not to be implied by the job title — funeral director. Similarly, an embalmer may more likely be an employee than an independent owner/mortician.

Wages and Hours. Earnings estimates vary substantially. Terence Sacks, in his analysis of career opportunities in the funeral industry, suggests that the average earnings (salary and bonus) *for owner/managers* in 1994 was about \$67,000 — but, he also suggests that income would vary with the size of the homes and the number of services performed. He then moves on down through the hierarchy to the third level: i.e., *the funeral directors and embalmers*. For such workers, he states, salary might range from \$34,172 in large establishments to \$26,410 in smaller homes. But Sacks emphasizes that “these are national figures” and subject to wide fluctuation on a local or regional basis.⁸⁴ BLS, using 1996 data, suggests a slightly different range, weekly and monthly: the middle 50% earned between \$447 (\$23,244) and \$849 (\$44,148) — with the lowest 10% earning *less than* \$356 (\$18,512).⁸⁵ Some, however, report a less encouraging picture.⁸⁶

In addition to widely varying wage rates, sometimes relatively low, the hours worked by funeral directors have often been “long” and “irregular.” “Shift work is sometimes necessary because funeral home hours include evenings and weekends.”⁸⁷ There has been in the industry, Ron Hast of *Mortuary Management* observes, a belief “that day, night and weekend commitment was necessary if one were to earn a living in funeral service.”⁸⁸ But with restructuring, that approach may be changing. “Funeral homes will have to be more creative in their approach to compensating and motivating top-quality employees,” observes Ralph Klicker in *The American Funeral Director*. “Salaries will have to go up and the number of hours worked and the scheduling of nights, weekends, and on-call will have to decline.” He adds, with an eye to the future: “The still-present belief that when you are slow, employees can spend the entire day around the funeral home doing other tasks, and then if you get a call at 5 p.m., they should expect to stay without extra compensation, is on the way out.”⁸⁹

⁸³ (...continued)
Services Careers.)

⁸⁴ *Ibid.*, pp. 44-46.

⁸⁵ DOL, *Occupational Outlook Handbook, 1998-1999*.

⁸⁶ Ralph L. Klicker, “Funeral Service Faces A World of Change,” *The American Funeral Director*, May 1992, p. 38. (Hereafter cited as Klicker, *Funeral Service Faces a World of Change*.) See also Gordon Bigelow, “Funeral Service Education: Background and Status,” *The American Funeral Director*, Oct. 1992, pp. 80 and 82. (Hereafter cited as Bigelow, *Funeral Service Education*.)

⁸⁷ DOL, *Occupational Outlook Handbook, 1998-1999*.

⁸⁸ Ron Hast, “Waltrip, Loewen, Stewart: Achievement, Perspective, Vision,” *Mortuary Management*, Mar. 1998, p. 6.

⁸⁹ Klicker, *Funeral Service Faces A World of Change*, p. 42. With the flexibility built into
(continued...)

Basically Non-Union? Trade unionization among funeral directors seems to be minimal, though some measure of organization appears to have developed in Chicago and in New York City. Tom Fisher of *Mortuary Management*, for example, notes that the industry in New York City “... maintains a highly structured labor union climate. There are four separate mortuary-related bargaining unions [*sic*]. Each represents a distinct mortuary discipline, ranging from a bargaining unit for embalmers to another for porters.”⁹⁰ Both the NFDA and the AFL-CIO have expressed awareness of organizational efforts in Chicago, generally associated with the International Brotherhood of Teamsters — also, apparently, organizing in New York City. Whether the workers being organized are funeral directors or, possibly, drivers employed by large urban mortuaries is not clear.⁹¹ Although the sample was small, the pattern is reflected in data presented by the Bureau of National Affairs (BNA). In the general category of *funeral service and crematories* (with no further differentiation), BNA places the percentage of trade unionization in the industry at 1.9% (1998) and 1.2% (1999).⁹²

Changing Demographics. Change in funeral industry employment appears to be occurring in at least three respects: *gender, race, and age*. “... there can be no argument that historically white males have dominated the funeral industry,” observes Jacquelyn Taylor of San Francisco College of Mortuary Science. She points to a significant change through the past several decades with more women (especially African-American women) entering the field. She also notes a larger number of students who commence their training at an older age.⁹³

As women have increased in number among students preparing for a career in the funeral industry, they appear to have become an increasingly valued component of the labor force.⁹⁴ In addition to their ability to meet normal service requirements, women have come to be regarded, it seems, as “more compassionate and sensitive and [to] work better with families.”⁹⁵ Conversely, states Eugene Ogradnik of the

⁸⁹ (...continued)

the FLSA, flexible scheduling and shift work are permitted — and may offer one solution to the irregular hours problem. See also Jacquelyn Taylor, “Where’s All the Good Help: A Look at Changes in the Labor Pool,” *The American Funeral Director*, Apr. 1999, p. 28. (Hereafter cited as Taylor, *Where’s all the Good Help*.)

⁹⁰ Tom Fisher, “On The Expansion Track with Stephen Mack,” *Mortuary Management*, Nov. 1995, p. 14.

⁹¹ Telephone discussion with Paul Miller, NFDA, Oct. 19, 1999; and with staff of the organizational departments of the Teamsters and AFL-CIO, Oct. 21, 1999.

⁹² Barry T. Hirsch, and David A. Macpherson, *Union Membership and Earnings Data Book: Compilations from the Current Population Survey (1999 Edition)* (Washington: The Bureau of National Affairs, Inc., 1999), p. 52. See also the 2000 Edition, p. 54.

⁹³ Taylor, *Where’s All the Good Help*, p. 26.

⁹⁴ Edward J. DeFort, “You’ve Come a Long Way: It Seems that Today, a Woman’s Place Is in the (Funeral) Home,” *The American Funeral Director*, May 1997, p. 22.

⁹⁵ Darwin Gearhart of Miami/Dade Department of Funeral Service Education, quoted in Xavier A. Cronin “Acceptance Is Growing As More Women Enter the Field,” *The American* (continued...)

Pittsburgh Institute of Mortuary Science, “Men have a harder time being seen as sensitive ... And there’s a perception that even when men are sensitive there’s an ulterior motive that doesn’t come across with a woman.”⁹⁶ Further, some have suggested, women “are not necessarily motivated by salary as much as service.”⁹⁷ (See **Table 2**).

Table 2. U.S. Funeral Service Education Graduates 1976-1995
(by race and gender)

	African-American		Caucasian	
	Male	Female	Male	Female
1976	169	70	1,529	90
1981	175	103	1,057	144
1986	169	99	1,059	203
1991	137	137	979	251
1995	210	202	1,257	473

Source: American Board of Funeral Service Education, published in Edward J. Deport “You’ve Come A Long Way: It Seems that Today, a Woman’s Place Is in the (Funeral) Home,” *The American Funeral Director*, May 1997, p. 22.

Profession or Craft?

As noted above, exemption from the minimum wage and overtime pay requirements of the FLSA can be accomplished by at least two routes. **First**, Congress (with the President concurring) can simply declare a body of workers — in this instance, persons employed as a licensed funeral director or a licensed embalmer — to be exempt. This would remove the issue from the hands of the Secretary of Labor: no further administrative determinations would be necessary. **Second**, the targeted workers can be rendered exempt because they meet certain conditions or qualifications associated with an existing exemption: here, that they are *bona fide* professionals under Section 13(a)(1) of the act. (See discussion of the *Rutlin* case and of Section 13(a)(1) above.)

For Section 13(a)(1) purposes, *professional* has a specialized meaning beyond the colloquial. *Inter alia*, it includes work “of an advance[d] type in a field of science or learning customarily acquired by a *prolonged course* of specialized intellectual instruction and study, *as distinguished from a general academic*

⁹⁵ (...continued)

Funeral Director, May 1995, pp. 19-20. (Hereafter cited as Cronin, *Acceptance Is Growing*).

⁹⁶ Eugene Ogradnik, quoted in Cronin, *Acceptance Is Growing*, p. 62.

⁹⁷ John Kroshus, quoted in Cronin, *Acceptance Is Growing*, p. 62.

education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes” (Emphasis added.) Thus, for Section 13(a)(1) purposes, a worker must be something more than a skilled (even highly skilled) craftsman or technician.⁹⁸

How the Industry Views Itself. In December 1994, *The American Funeral Director* reviewed current policy issues of interest to the NFDA and, among other things, observed: “Funeral directors are still not defined as ‘professionals’ by the federal Department of Labor. NFDA says it is ‘investigating possible action to challenge current interpretation,’ but has not yet established a policy.”⁹⁹

It had “been evident for many years that there is a fundamental disagreement among practitioners as to whether funeral service is a vocation or a profession. If it is a vocation, a trade,” stated Dan Flory of the Cincinnati College of Mortuary Science, “then the federal government is correct in classifying funeral service among ‘personal services’” such as “massage, barbering, [and] drycleaning.”¹⁰⁰ After years of debate, the American Board of Funeral Service Education (ABFSE, the accrediting agency for the funeral service industry) began to lobby the NFDA membership for a higher sense of professionalism. In late 1990, it proposed an enhanced (professional) course of study and recommended “that an associate’s degree be the minimum academic requirement for licensure.”¹⁰¹

Within the NFDA, there were divergent views. The Board’s spokesman Gordon Bigelow reassured the Association’s members: “The technical area will remain at the core of the mortuary science curriculum because embalming is what is unique about funeral service.”¹⁰² He had allies. “If we want to be viewed as professionals,” observed Garth Nelson of Mt. Hood Community College in Gresham, Oregon, “we need to act like professionals and have a professional level of education.”¹⁰³ Louis Misantone of the New England Institute, Newton Center, Massachusetts, added: “Since our society has come to recognize professionals by their level of education, new funeral directors will have to meet client expectations of education expertise.”¹⁰⁴

Would an associate’s degree be sufficient? John Kroshus of the University of Minnesota questioned: “We are all aware that many occupations have tried to enhance their prestige with liberal use of labels such as profession and professional.”

⁹⁸ Again, this may be changing. See new rules issued under Section 13(a)(1) of the FLSA.

⁹⁹ “Government Affairs a Topic at Policy Board Meeting,” *The American Funeral Director*, Dec. 1994, p. 62.

¹⁰⁰ “College Executives Assess ABFSE Recommendations,” *The American Funeral Director*, Apr. 1992, p. 22. (Hereafter cited as AFD, *College Executives*), this is a symposium on the educational requirements of funeral industry personnel.

¹⁰¹ AFD, *College Executives*, p. 22. See also Phyllis A. Kusuplos, “More Responsibilities Require More Training,” *The American Funeral Director*, May 1991, pp. 20-21.

¹⁰² AFD, *College Executives*, p. 22.

¹⁰³ *Ibid.*, p. 25.

¹⁰⁴ *Ibid.*, p. 26.

But, what is behind such labels, he asked. Following closely the logic of the Department of Labor, Dr. Kroshus stated rhetorically: “Does the associate degree, diploma, or certificate of completion represent the fulfillment of intensive academic preparation aimed at imparting a specialized body of knowledge?” He suggested that the bachelor’s degree was the minimum required; but he added that an “occupation” does not “become a profession by simple proclamation.”¹⁰⁵

Reiterating his appeal for at least an associate’s degree requirement, Dr. Bigelow carefully explained that “[p]rofessional funeral service courses focus the mind on *specific technical tasks* required of the funeral director/embalmer, while liberal arts courses open the mind to learn how to deal with unanticipated situations.” Both, he felt, were important.¹⁰⁶ While some remained dubious or outright hostile to such enhanced (some might say, gratuitous) requirements, Ralph Klicker posed a double-edged query: “Are our profession’s entry level and continuing education requirements adequate to meet the demands of the future?” And: “Will the public expect the funeral directors they deal with to be as educated as they are?”¹⁰⁷

The debate would continue through the remainder of the century. In 1995, the newly elected president of the NFDA, Bruce Overton, argued that high school plus an associate degree was no longer sufficient. “We must change the picture where the educational requirements for the funeral director are far less than the occupations of client families sitting in his or her arrangement room.”¹⁰⁸

The Issue of Education. In the summer of 1999, David R. Pearson of the NFDA asserted: “Today’s state laws are a hodge-podge of entry-level requirements, and provide no consistency to the ... job that funeral directors do across the country.”¹⁰⁹ Gordon Bigelow, similarly, noted that the ABFSE had “worked hard ... to make funeral service education consistent” nationally so that a funeral services major in California would “have to take the same courses as if you were in New Jersey.”¹¹⁰ Given a somewhat ambiguous industry response, the campaign would be long and arduous.

¹⁰⁵ Ibid., pp. 22, 27-28. Neither Flory nor Kroshus seemed wholly convinced even of the adequacy of a bachelor’s degree. Flory observed: “Compare this to law, medicine, business, or teaching, where one encounters the master’s degree as an entry-level credential.” Kroshus concurred: “The general standard for both doctors and lawyers is that they have an earned bachelor’s degree before they even begin their professional academic training.”

¹⁰⁶ Bigelow, *Funeral Service Education*, p. 80.

¹⁰⁷ Klicker, *Funeral Service Faces a World of Change*, p. 38.

¹⁰⁸ “Overton Calls for Higher Educational Requirements, Cooperation,” *The American Funeral Director*, Dec. 1995, p. 27.

¹⁰⁹ David R. Pearson, “(NFDA president) Improving Funeral Service Through Education,” *The Director*, July 1999, p. 5. (Hereafter cited as Pearson, *Improving Funeral Service Through Education*.)

¹¹⁰ Edward J. DeFort, “After 15 Years with ABFSE, Bigelow Calls It a Career,” *The American Funeral Director*, Apr. 1999, pp. 90-91. (Hereafter cited as DeFort, *After 15 Years with ABFSE*.)

By September 1999, there were about 48 mortuary-instruction programs in the United States. Some of these were college and university programs; others, operated by community colleges or technical institutes of mortuary science and/or of embalming. The programs/schools are relatively small with about 3,000 students enrolled nationally.¹¹¹

As the NFDA's David Pearson indicates, the individual programs vary greatly: from programs that provide an associate degree with 12 to 16 months of training, to a certificate program completed in 6 months for those with previous college experience.¹¹² Evaluation of prior academic work for transfer purposes and/or program prerequisites, of course, can be a delicate task with substantial impact upon the time required for a diploma or associate's degree. Reportedly, the dropout rate for students is high ("Approximately 28-30% of students who enroll fail to complete the program."); but, the likelihood of success is said to be higher where students enter the program with some prior college training.¹¹³

In the early 1990s, the ABFSE had proposed the associate degree as the minimum standard for the profession and, in 1996, it approved "the Associate Degree or its credit hour equivalent to be accredited." Bigelow notes that it had taken "10 years to implement this level which had been discussed for 70 years."¹¹⁴ Almost immediately thereafter, a campaign was launched to set the requirement for funeral directors and embalmers at the B.A. level.

These initiatives met a mixed reception within the industry. The reasons varied. While some viewed increased education as an essential requirement for *professional* status and for dealing with the challenges of the field; others saw it as superfluous.¹¹⁵ There were structural impediments to change as well. "Generally speaking, educational institutions cannot grant a bachelor's degree without approval from some type of state higher education board. It is unlikely," observed John Kroshus of the University of Minnesota's Program of Mortuary Science, "that community colleges and private mortuary colleges would be able to secure any such approval." Some

¹¹¹ See AFD, *College Executives*, p. 24; David Lazarus, "Mortuary Field Wide Open," *The San Francisco Chronicle*, Sept. 25, 1999, p. A1. (Hereafter cited as Lazarus, *Mortuary Field Wide Open*); and Gordon Bigelow, "History of the ABFSE," *Journal of Funeral Service Education*, v. 4, 1997, p. 3. (Hereafter cited as Bigelow, *History of the ABFSE*) Liability considerations impose certain constraints with respect to hands-on experience on college campuses.

¹¹² Lazarus, *Mortuary Field Wide Open*, p. A1; and AFD, *College Executives*, p. 23.

¹¹³ Bigelow, *Funeral Service Education*, p. 80.

¹¹⁴ Bigelow, *History of the ABFSE*, v. 4, p. 4.

¹¹⁵ AFD, *College Executives*, pp. 24, 27. Tommy Metcalfe, "The \$64,000 Question: Can Funeral Service Afford the Baccalaureate Degree?" *Mortuary Management*, Apr. 1998, p. 6. (Hereafter cited as Metcalf, *The \$64,000 Question*). Tommy Metcalf of the Texas Funeral Directors Association and director of industrial relations for SCI, argued that additional education was not essential. Besides, he noted a "random survey of 100 licensees in Houston" disclosed that "less than 10% had a bachelor's degree." See also "For a Bachelor's Degree Requirement," *The American Funeral Director*, Feb. 1996, p. 6.

may have feared that the traditional schools would be swallowed up by the four-year colleges.¹¹⁶

Finally, there was the matter of costs: not the costs of education, but those flowing from heightened expectations on the part of better educated workers. Board director Bigelow observed: “A lot of funeral directors feel that if you upgrade the degree then the graduating students will demand higher salaries and that’s going to cost their businesses more.” He added: “The financial issue, and the fear of driving costs up is on their minds.”¹¹⁷ Kroshus of Minnesota affirmed: “The funeral business would have to demonstrate that rewards, in the form of salaries, fringe benefits, and personal satisfaction, are present in sufficient quantity to make the educational effort worthwhile.”¹¹⁸ But Eugene Ogrodnik of the Pittsburgh Institute of Mortuary Science was not optimistic. “Practically speaking ... [the] funeral service [industry] unfortunately is not ready to deliver the compensation package that goes with a bachelor’s degree ... truly a shame!”¹¹⁹

The Apprenticeship Requirement. Apprentice training, normally, is a part of the licensing program for funeral directors and embalmers and is, thus, one of the qualifying criteria for entry into the field. The process varies somewhat from state to state and is governed by state regulation. Ordinarily, the prospective apprentice secures employment and then enters a formal program of instruction leading to licensing in the craft. The length of apprenticeship differs from one state to another: it is usually from one to two years. Again, depending upon state practice, apprenticeship can be served “before, during, or after mortuary school.”¹²⁰

Speaking generally (because state requirements may vary), apprenticeship in the funeral services industry is organized and conducted by the employer — usually, it appears, under the general supervision of the state licensing agency.¹²¹ Generally, there is no union involved. The apprentice works with the employer. Training is “on-the-job” and, at least in some states, without directly related classroom instruction: the latter, it appears, may be conducted separately and independently from apprenticeship. Salary is arranged between the employer and the apprentice.

¹¹⁶ AFD, *College Executives*, p. 28. See also Louis Misantone, “Survival of the Fittest: Can an Independent Funeral Service Institute Survive a Merger with a College?,” *The American Funeral Director*, Oct. 1995. pp. 128-137.

¹¹⁷ DeFort, *After 15 Years with ABFSE*, p. 90.

¹¹⁸ AFD, *College Executives*, p. 28.

¹¹⁹ *Ibid.*, p. 26.

¹²⁰ DOL, *Occupational Outlook Handbook, 1998-1999*.

¹²¹ In the crafts, apprentice training is carefully structured. Under the Fitzgerald Act (the National Apprenticeship Act of 1937, Title 29, Section 50), apprenticeship has a precise meaning. Usually (though not always), it involves four entities: the apprentice, the employer, the trade union in the field, and public oversight and certification — either through the U.S. Department of Labor and/or through the various state apprenticeship councils. On a craft by craft basis, the duration of training, the scope of training and the rights and duties of the parties at interest are formalized and monitored under by the apprenticeship bureau at the Department of Labor.

The apprentice, at the discretion of the employer, may “do a little of nearly everything.” Terence Sacks, in his analysis of careers in funeral services, notes: “You might, for instance, assist in embalmings, in helping to cosmetize the dead, in placing the dead in caskets, and in assisting during funerals.” Aside from the learning experience, the apprentice appears often to function as a general utility worker.¹²²

“[O]n-the-job training,” suggests Louis Misantone (president, Funeral Institute of the North East), “happens in situations with little structure.” The content of the instruction and the manner of its presentation appear to rest with the individual employer (or a licensed practitioner in his employ). Misantone notes that “students consistently report resistance by their ‘on the job instructors’” — in part, perhaps, because of reluctance to impart skills to potential competitors who may be younger and command lower wages.¹²³ But the system “can be effective,” observes Marvin E. Grant of East Mississippi Community College, “provided that the embalmer/preceptors are trained in proper instruction techniques, and are willing to commit themselves to actually teaching, instead of looking for cheap labor.”¹²⁴

Licensure. All states, it appears, except Colorado, require funeral directors and embalmers to be licensed. But, licensing requirements vary from state to state. Some states have separate licensing requirements for directors and for embalmers; some issue a joint license. This may lead to separate (or joint) curricula in the various states — and, within the states, a variety of licenses may be allowed.¹²⁵

“Regulations are about as varied as the United States,” notes Nick Verrastro in *The American Funeral Director*, with 24 different types of licenses. Equally diverse are the requirements for securing a license. “For individual licenses, initial application fees range from nil to \$300, while renewal fees are from \$10 to \$300. Licenses have to be renewed annually in 29 states and every two years in 19,” he explained.¹²⁶ Further, Terry McEnany of Commonwealth Institute of Funeral Service (Houston) states that “[l]icensure requirements reflect the minimum education and training an individual is required to obtain to practice.”¹²⁷ And, since educational (and apprenticeship) requirements vary from state to state, evaluating the relative strength of a *license* may be somewhat problematic.

¹²² Sacks, *Opportunities in Funeral Services Careers*, pp. 38-39.

¹²³ Louis Misantone, “Teaching Our Most Important Skills: An Obligation of the Elders?,” *The American Funeral Director*, Apr. 1999, pp. 29-30.

¹²⁴ AFD, *College Executives*, p. 24.

¹²⁵ See *The Chicago Tribune*, Apr. 30, 2000, p. 1, Zone C; DOL, *Occupational Outlook Handbook, 1998-1999*; and Michael Landon, “The Online Classroom: Teaching Funeral Services Classes on the Internet,” *The American Funeral Director*, Apr. 1999, p. 24.

¹²⁶ Nick Verrastro, “Peer Groups Boards ‘On Mighty Thin Ice’,” *The American Funeral Director*, Jan. 1995. pp. 32, 34, and 42. Here, as in much of the literature, it is not entirely clear which precise license and sub-discipline is being discussed.

¹²⁷ AFD, *College Executives*, p. 23. See Bigelow, *Funeral Service Education*, pp. 78-84.

With wage/hour requirements dependent upon licensure (under the pending legislation during recent Congresses), some uniformity may be desirable: a lack of uniformity could raise other concerns. There are now “50 different licensing laws that effectively restrict a person’s ability to practice,” observes David Pearson of the NFDA.¹²⁸ The states, however, may have some reluctance to recognize each other’s requirements. In 1999, the NFDA proposed a reciprocity standard for submission to the states, recognizing beforehand that “each state will attempt to ‘tweak’ the plan.” The NFDA’s Bruce Overton opined that “the best way to achieve universal endorsement or reciprocity is to have universal educational standards.”¹²⁹ Meanwhile, however, state-by-state variation persists.

Some Policy Considerations

Through the past several Congresses, legislation has been proposed that would have excluded “any employee employed as a licensed funeral director or a licensed embalmer” from minimum wage and overtime pay protection under the Fair Labor Standards Act. Had the legislation been adopted, there would be no minimum wage required under federal law for the targeted workers and no requirement that overtime rates be paid after 40 hours of work per week. The motivation for such an exemption seems to be twofold: *first*, to reduce the cost to the employer of doing business; and, *second*, to enhance employer flexibility in manpower utilization.

In support of the proposed exemption, some have argued that the funeral industry operates under conditions that make FLSA obligations unusually onerous: e.g., that deathcare employers are *small businesses*, that the hours of work are often irregular, that the requirements of the FLSA are convoluted and difficult to understand. None of these basic contentions appears to be especially unique to the funeral industry, nor are the underlying assumptions upon which they rest necessarily beyond challenge. Others have suggested that licensed funeral directors and embalmers are *professionals* and should be exempt from minimum wage and overtime pay coverage on that basis.

It may be difficult to argue that deathcare, at large, constitutes a *small business*. During the past 10 to 15 years, there have been major changes in the funeral services industry. The primary change, it appears, has been its ongoing transformation from a collection of small family firms into substantial national and international corporate entities. (Small firms, however, remain more numerous than the consolidated firms, though some suggest that it is the latter that are now the driving force in the industry.) With consolidation, there has been a change in the industry’s economic structure: the manner in which it does business — i.e., bulk purchasing, economies of scale, *clustering* of facilities and cooperative utilization of staff and equipment. All of this has widened the gulf between the consolidators and the traditional “mom-and-pop” operations — though industry spokespersons still present “funeral directors as human

¹²⁸ Pearson, *Improving Funeral Service Through Education*, p. 5.

¹²⁹ Bruce Overton, “Positive Movement in Licensing Mobility,” *The American Funeral Director*, Jan. 1999. p. 22.

beings and neighbors” and “funeral homes as one of the last of the true family owned, small businesses left in America”¹³⁰ — the “quintessential small business.”¹³¹ The proposed exemption from minimum wage and overtime pay, however, would apply to small firms and to the consolidators alike. And, one might argue, the exemption might prove more useful to the larger firms in which labor-management relations may be more impersonal and in which employment patterns may be more concerned with immediate profit enhancement.¹³²

Similarly, there have been changes within the workforce serving the deathcare industry. What was, largely, a field dominated by white males is becoming increasingly open to women and minorities. There have also been changes in the amount of education required for licensed funeral directors and embalmers. The associate degree (2 years of college) with embalming school seems increasingly to be the norm — with some states requiring further education and others requiring less. The craft remains overwhelmingly non-union with individual bargaining between employees (regardless of education level) and management — and, with management becoming increasingly corporate and distant.

Although the work of embalmers (and, perhaps, of funeral directors where the fields are not joined) is clearly technical, requiring significant levels of skill, the Department of Labor has determined that it does not, in general, fit the concept of *professional* as set forth in regulations implementing FLSA Section 13(a)(1): work requiring “knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship. ...” In fact, the training/education of a funeral director or embalmer seems more nearly to resemble that of a skilled worker — for example, a journeyman electrician — acquired through on-the-job training and related instruction in an academic setting.¹³³

It might be argued that the DOL concept of *professional* (for Section 13(a)(1) purposes) is obsolete and in need of revision. Such revision, if warranted, could be effected through the rulemaking process or, directly, through legislative enactment. Recent legislative proposals would have acted directly, providing a categorical

¹³⁰ Fitch, *1998 in Review*, pp. 26, 28.

¹³¹ “NFDA Lends Support To Congressional Proposal,” *Mortuary Management*, Nov. 1997, p. 16.

¹³² See Nicole Blanchard, “Serving in the Deathcare Profession in an Independently Owned/Operated Establishment,” *Today In Deathcare*, June 1999, p. 16. In her article, the Richmond, VA funeral director explains with respect to the consolidators: “Performance and loyalty from an employee are often overshadowed by what is most profitable for the company. It’s a matter of culture,” she suggests. “Profitability is just as important in independent firms but the employee answers to one person and not to a board of directors and stockholders. In a smaller family owned setting,” she concludes, “professional performance and loyalty to the company are important qualities”

¹³³ Obviously, individual cases may differ and be viewed differently. The *Rutlin* case is one example. Further, the changes implied by the new Section 13(a)(1) standard will need to be taken into account.

exemption for employers of the targeted funeral directors and embalmers from FLSA minimum wage and overtime pay requirements. Thus, there have been no qualifying tests for exemption as is currently provided under Section 13(a)(1) of the act — neither with respect to the worker nor the employer. With respect to the targeted workers, the minimum wage and overtime pay protections of the FLSA would have disappeared.

Licensing for funeral directors and embalmers is left to the states, with standards differing in various ways from one jurisdiction to another. Requirements for securing a license are left up to the states: some are stringent; others, far less so. The states are also allowed to determine when a license is to be issued: that is, whether the license functions, in effect, as an entry permit or a certification. Elimination of minimum wage and overtime pay for licensed funeral directors and embalmers would seem to set, arguably, a premium upon licensing a prospective funeral director or embalmer *early* in the training process. For example, Tommy Metcalf of SCI and the State Licensing Board of Texas, when questioned about increased educational requirements for funeral directors, suggested that it could result in institution of “a tier license program” as in the nursing field: i.e., practical nurse, licensed vocational nurse, registered nurse, etc.¹³⁴ In effect, the legislation (which does not define “licensed” or set qualifications for being licensed) would transfer authority over definition of the FLSA exemption from the Department of Labor (where it now rests under Section 13(a)(1)) to the individual states. Thus, one impact *could be* for some states to reduce the stringency of the licensing requirement, *per se*, while, at the same time, mandating a period of post-licensing apprenticeship — thereby securing a cheaper and more flexible body of workers.¹³⁵ Much would depend upon the political dynamics of the state which, under the proposed legislation, would potentially become the arbiter of wage/hour standards for funeral directors and embalmers.

Apprenticeship requirements, like those for licensing, vary from one state to another. Depending upon the jurisdiction, apprenticeship can be served before, during or after mortuary school: usually through one to two years. A critical question might be whether apprenticeship *necessarily* precedes licensure. *Could* a license be awarded, under state regulation, following one’s academic training and requisite board examinations but prior to completion of a term of apprenticeship? For labor standards purposes, timing may be of some importance where the proposed changes of law are concerned. Would apprenticeship be a *pre-licensing* requirement, served at a time when the apprentice is protected under FLSA minimum wage and overtime pay standards; or, would it be mandated as a *post-licensing* continuing education requirement, served at a time when the apprentice would not be covered by FLSA wage and hour protections? Unaddressed in the legislation, the issue would be left to state regulatory boards.¹³⁶

¹³⁴ Metcalf, *The \$64,000 Question*, p. 6.

¹³⁵ Some have expressed concern about the phrasing “employed as” in the exemption, suggesting that anyone doing the work of a licensed funeral director or embalmer could be minimum wage and overtime pay exempt even though they might not *actually be* licensed.

¹³⁶ Even if exempted from federal wage/hour coverage under the FLSA, licensed funeral directors and licensed embalmers *could be* protected under state wage/hour law.

Restructuring and the advent of the new *corporate philosophy* of the consolidators, some argue, has altered the economic and business focus of the industry. The mega-firms, they contend, have a heightened need “to make the most for their stockholders”¹³⁷ and “to recoup acquisition costs.”¹³⁸ To this end, it is argued, they find it necessary to cut costs and enhance income by employing mass “production techniques” and instituting economies of scale.¹³⁹ These changes, in turn, have caused many smaller independent firms to operate in an atmosphere of increased fiscal and managerial pressure. One means of meeting these pressures (though it would impact both large and small firms) would be to cut labor costs. An exemption from the minimum wage and overtime pay requirements of the FLSA could be viewed as a step in that direction. What benefits it might have for individual workers may be less clear.

In the 108th Congress and Beyond

All at once, during the 108th Congress, the system seemed to change. Yet, on the other hand, it may not have changed at all. The implications are somewhat less than precise and may require deciphering.

Amendment of the FLSA

As during recent Congresses, proposals dealing with the minimum wage and overtime pay treatment of licensed funeral directors and licensed embalmers were introduced in the 108th Congress. Identical bills, **H.R. 2065** (Tiberi) and **S. 292** (Graham, S.C.), would have amended the FLSA by adding a new paragraph, Section 13(a)(4), which would directly exempt an employer of “any employee employed as a licensed funeral director or a licensed embalmer” from the overtime pay and minimum wage requirements of the act. There would be, under the proposal, no exemption tests — neither of earnings nor of duties.

The bills were referred, respectively, to the House Committee on Education and the Workforce and to the Senate Committee on Health, Education, Labor, and Pensions. Neither bill was acted upon. Each died at the close of the 108th Congress. But, if the past is any indication, one might expect to see additional bills proposed with time.

Altering Department of Labor Regulations

On April 23, 2004, the Department of Labor promulgated new regulations governing Section 13(a)(1) of the FLSA. The provision, as noted above, deals with exemptions from overtime pay (and, by extension, of minimum wage) for certain workers identified as *executive*, *administrative*, or *professional*. The exemption is now in place.

¹³⁷ James R. Fernald, “Funeral Service Industry,” *Bangor Daily News*, Apr. 21, 2000.

¹³⁸ Fields, *Grim Time for Funeral Firms*, part C, p. 1.

¹³⁹ Bryce, *Merchant of Death*, p. 61.

Under its terms, there is a two-fold test of exemption. *First*. It provides an income test. If a person earns less than \$23,660, he or she is automatically *non-exempt*. The worker may also have been exempt under the prior arrangement because of his or her duties. *Second*. If an employee is engaged in activity that is deemed by *the Department* to be of a character suggestive of *executive, administrative* or *professional* (and he or she earns in excess of \$23,660), then he or she may also be exempt.

While the earnings test may have little impact (a good many funeral directors and/or embalmers may earn more than \$23,660), the duties test could have a significant impact. Thus, are funeral directors and/or embalmers actually professional as defined by DOL for exemption under Section 13(a)(1) — or merely highly trained technicians?

John H. Fitch, representing the National Funeral Directors Association before a committee of the Congress, explained the disparity between the Department and the industry on the matter of overtime pay. “The NFDA’s position is based on the belief that licensed funeral directors and embalmers comply with the duties test of the current FLSA implementing regulations for professionals. The Department of Labor,” he stated, “has historically disagreed with NFDA on this issue.” He explained that “the final rule was changed slightly” but “it is the first time the Department of Labor has recognized licensed funeral directors and embalmers as professionals.”¹⁴⁰

The final rule provides: “Licensed funeral directors and embalmers who are 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, *generally meet* the duties requirements for the learned professional exemption.”¹⁴¹ (Italics added.) However, since many embalmers do not meet the requirements set down in the statute, it is not entirely clear how frequently the exemption will be used. Conversely, since licensed funeral directors are treated differently (just “licensed funeral directors...”), it may not be clear how often that option will be used.

¹⁴⁰ Testimony of John F. Fitch, National Funeral Directors Association, before a Subcommittee, House Committee on Small Business, May 20, 2004, p. 14.

¹⁴¹ *Federal Register*, Apr. 23, 2004, p. 22266.

Table 3. Funeral Service: Education and Related Requirements

Jurisdiction	Type of license	Educational requirements	Continuing education requirements	Apprenticeship
Alabama	Funeral Director and/or Embalmer	High school and mortuary college	No CE requirement	2 years before, after, or currently in school
Alaska	Embalmer	Graduation, accredited mortuary college	No CE requirement	1 year
	Funeral Director	30 semester hours, college or university	No CE requirement	1 year
Arizona	Embalmer	High school and mortuary college	12 hours per year	1 year after school
	Funeral Director	High school and mortuary college; 1 year embalmer licensure and experience	12 hours per year	1 year after school
Arkansas	Embalmer	High school and mortuary college	8 hours per year	1 year, before or after school
	Funeral Director	High school	8 hours per year	2 years (except with mortuary school, then 1 year before or after school)
California	Embalmer	High school and mortuary college	14 hours per 2 years	2 years before, during or after school
	Funeral Director	Only business entities are licenced	14 hours per 2 years	2 years before, during or after school
Colorado	None	Contact Colorado Board	None	Contact Colorado Board
Connecticut	Embalmer and Funeral Director	High school plus associate degree, mortuary science	No EC requirement	1 year

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Jurisdiction	Type of license	Educational requirements	Continuing education requirements	Apprenticeship
Delaware	Funeral Director	High school or equivalent; associate degree, mortuary science	10 hours per 2 years	1 year after school
District of Columbia	Funeral Service	High school and mortuary college	No CE requirement	1 year after school
Florida	Funeral Director and/or Embalmer	High school, 12-month mortuary college program. High school, associate degree, mortuary science	12 hours per 2 years; HIV/AIDS course	1 year after school
Georgia	Funeral Director and/or Embalmer	High school, mortuary college (18 months)	10 hours, every 2 years	18 months, before or after school
Hawaii	Embalmer	One of three choices: (a) 1 year practical experience, graduation, school of embalming; (b) 2 years practical experience, high school; (c) 5 years practical experience	No CE requirement	None indicated
Idaho	Mortician	2 years college, plus mortuary college	No CE requirement	1 year, before or after school
Illinois	Funeral Director and Embalmer	30 semester hours of college credit plus mortuary college or associate or bachelor's degree in mortuary science	12 hours, Funeral Director; 24 hours, Funeral Director/Embalmer per 2 years	1 year after school

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Jurisdiction	Type of license	Educational requirements	Continuing education requirements	Apprenticeship
Indiana	Funeral Director and Embalmer	1 year college, plus mortuary college	10 hours per 2 years	1 year after school
Iowa	Funeral Director	60 semester hours, college; plus course, mortuary science (curricula specified)	24 hours per 2 years	1 year after school
Kansas	Embalmer	Associate degree in mortuary science	6 hours per year	1 year after national board exam
	Funeral Director	60 semester hours, college (20 of which are defined by state board)	6 hours per year	1 year prior to taking board exam
Kentucky	Embalmer	Associate degree	4 hour per year	3 years total (associate degree counts for 2 years)
	Funeral Director	High school	4 hours per year	3 years total (30 semester hours can substitute for 1 year)
Louisiana	Embalmer	High school plus mortuary science program	4 hours per year	1 year, before or after school
	Funeral Director	High school plus 30 semester hours college	4 hours per year	1 year, before or after school
Maine	Funeral Director, Embalmer and Funeral Service Combination	1 year college, plus mortuary college or associate degree	12 per 2 years	1 year before or after school
Maryland	Funeral Director and Embalmer	Associate degree, mortuary science	12 hours per 2 years	1,000 hours
Massachusetts	Funeral Director and Embalmer	High school, plus mortuary college	5 CEUs per year	2 years, before or after school

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Jurisdiction	Type of license	Educational requirements	Continuing education requirements	Apprenticeship
Michigan	Mortuary Science License	2 years of college, curriculum specified, plus 1 year of mortuary college	No CE requirement	1 year after completion, mortuary college
Minnesota	Mortuary Science License	Bachelor of Science, major in mortuary science	12 hours per 2 years	1 year
Mississippi	Funeral Service License	High school plus mortuary college	No CE requirement	1 year, before or after school
	Funeral Director	High school	No CE requirement	1 year plus 1 year internship
Missouri	Embalmer	High school, plus mortuary college	No CE requirement	1 year
	Funeral Director	High School	No CE requirement	6 months; plus 6 months internship
Montana	Mortician's License	2 years college, plus mortuary college	6 hours per year, 12 hours per 2 years	1 year after school
Nebraska	Funeral Director and Embalmer	60 semesters of college credit, curriculum specified, plus mortuary college	16 hours per 2 years	6 months before and 6 months after, or 1 year of mortuary school
Nevada	Embalmer	2 years of college, plus mortuary college	No CE requirement	1 year before or after school
New Hampshire	Funeral Director and Embalmer	1 year of college, plus mortuary college	15 hours per 2 years	1 year before or after school
New Jersey	Funeral Director	2 years college, plus 1 year of mortuary college	10 hours per 2 years	2 years before, during or after school (1 year credit for school)
New Mexico	Funeral Service Practitioner License	2 years college, plus mortuary college	10 hours per NM fiscal year	1 year

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Jurisdiction	Type of license	Educational requirements	Continuing education requirements	Apprenticeship
New York	Funeral Director	60 semester credit hours, or 90 quarter credit hours from accredited funeral service institution	No CE requirement	1 year residency after school
North Carolina	Funeral Director and Embalmer, Funeral Service License	High school plus 32 semester hours from, or be a graduate of, a mortuary science college	5 hours per year	1 year before or after school
North Dakota	Embalmer	2 years of college	No CE requirement	1 year after school
Ohio	Embalmer	Bachelor's degree, plus 12-month mortuary school	12 hours every 2 years	1 year after mortuary school
	Funeral Director	Bachelor's degree	12 hours every 2 years	1 year after mortuary school
Oklahoma	Funeral Director and/or embalmer	60 college hours, including specific courses from regionally-accredited institution, plus graduate from mortuary college	No CE requirement	1 year during or after school
Oregon	Funeral Practitioner	Associate degree	No CE requirement	1 year
	Embalmer	High school plus mortuary college	No CE requirement	1 year
Pennsylvania	Funeral Director	2 years of college, curriculum specified; plus mortuary college	No CE requirement	1 year after school
Rhode Island	Funeral Director and Embalmer	High school, plus 60 semester hours from mortuary science school	No CE requirement	Not less than 1 year before or after school

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Jurisdiction	Type of license	Educational requirements	Continuing education requirements	Apprenticeship
South Carolina	Funeral Director and Embalmer	High school, plus mortuary college	3 hours per year	2 years before or after school
	Funeral Director	High school plus 1 year mortuary college, or 2 years of college, curriculum specified	3 hours per year	2 years before or after school
South Dakota	Funeral Service	2 years of college (specified curriculum), plus mortuary college	No CE requirement	1 year before or after school in South Dakota
Tennessee	Embalmer	High school plus mortuary college	10 hours per year	1 year
	Funeral Director	High school	10 hours per year	2 years
Texas	Funeral Director, Embalmer	High school, plus mortuary college	14 hours per 2 years	1 year after school
Utah	Funeral Director and Embalmer	Associate degree in mortuary science	10 hours per 2 years	1 year before or after school
Vermont	Embalmer	Graduation, 2-year school of funeral service; or completion of not less than one academic year with 30 additional credit hours in specified curriculum.	6 hours per 2 years	1 year before or after school
	Funeral Director	Assisted in direction 30 funerals under the supervision of a licensed funeral director or embalmer	6 hours per 2 years	1 year before or after school

Jurisdiction	Type of license	Educational requirements	Continuing education requirements	Apprenticeship
Virginia	Funeral Service	High school plus mortuary college	No CE requirement	18 months before or after school
Washington	Embalmer	60 semester hours of college including mortuary college	10 hours per 2 years	2 years training under a licensed embalmer in this state
	Funeral Director	Associate degree, mortuary science; or , completion of not less than 2 years of college	10 hours per 2 years	1 year training under licensed funeral director in this state
West Virginia	Funeral Director and Embalmer	Associate degree; or , about 2 years college in a declared field, prior to obtaining a diploma of graduation from a school of mortuary science	3 hours per 3 years	1 year before or after school
Wisconsin	Funeral Director	2 years of college (specified curriculum), plus mortuary college	15 hours per 2 years	1 year before or after mortuary school; must have sophomore standing for apprenticeship permit
Wyoming	Funeral Director	None	No CE requirement	None
	Embalming	1 year college, plus 1 year of mortuary college	No CE requirement	1 year before or after schooling served in Wyoming

Source: Material is adapted from the website of the National Funeral Directors Association, which may be found at [<http://www.nfda.org/careers/licensing/al.html>], from fall 1999. This is a general representation of basic requirements. Some concepts may require further definition. For additional information, contact the various state regulatory boards.