

BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed)	NOTICE OF PUBLIC
amendment of ARM 24.147.302,)	HEARING ON PROPOSED
funeral service definitions,)	AMENDMENT AND ADOPTION
ARM 24.147.401, fee schedule,)	
ARM 24.147.1101, crematory facility))	
regulation, ARM 24.147.1114,)	
licensure as a crematory operator,)	
ARM 24.147.1115, licensure as a)	
crematory technician,)	
ARM 24.147.1304, perpetual care)	
and maintenance fund reports, and)	
the proposed adoption of NEW RULE I))	
pertaining to audit expenses)	

TO: All Concerned Persons

1. On May 11, 2004, at 9:00 a.m., a public hearing will be held in room B-07, of the Park Avenue Building, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Funeral Service no later than 5:00 p.m., on May 4, 2004, to advise us of the nature of the accommodation that you need. Please contact Cheryl Smith, Board of Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2393; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdfnr@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

24.147.302 FUNERAL SERVICE DEFINITIONS As used in this chapter, the following definitions apply:

(1) and (2) remain the same.

(3) "Hazardous implant" means any foreign object that has been surgically or otherwise placed in the human body that may present a threat of injury to the operator or to the crematory retort during the cremation process, or the public.

(3) through (12) remain the same but are renumbered (4) through (13).

AUTH: 37-1-131, ~~37-19-101~~, 37-19-202, MCA

IMP: 37-19-705, 37-19-827, 37-19-828, 37-19-829, MCA

REASON: There is reasonable necessity to amend ARM 24.147.302 to include a definition of the term "hazardous implant." The Board was cited by the legislative auditors for not defining "hazardous implant" in rule as required by 37-19-705(3), MCA. An IMP cite is being added to reflect the implementation of 37-19-705, MCA. In addition, there is reasonable necessity to amend the AUTH cites to delete an erroneous statutory citation.

24.147.401 FEE SCHEDULE (1) through (18) remain the same.

~~(19) Administrative fee (change of name/address)~~ _____ 25

AUTH: 37-1-131, 37-1-134, 37-19-202, 37-19-703, MCA
IMP: 37-1-134, 37-19-301, 37-19-303, 37-19-304, 37-19-306, 37-19-401, 37-19-402, 37-19-403, 37-19-702, 37-19-703, 37-19-808, 37-19-814, 37-19-815, 37-19-816, MCA

REASON: The Board is required to set fees commensurate with costs, pursuant to 37-1-134, MCA. There is reasonable necessity to amend ARM 24.147.401 because a change of the licensee's name or address can now be done online by the licensee as part of the online license renewal process. This fee now exceeds the cost of this Board service and is therefore proposed to be deleted. The Board notes that during fiscal year 2003, the Board was not collecting the administrative fee for change of name or address, and thus there is no current data upon which to estimate the number of licensees who will be affected annually by this change. Accordingly, the Board cannot estimate the annual decrease in revenue, but it believes that the decrease in revenue is likely to make a minimal impact upon licensees as a whole. An erroneous AUTH cite is being deleted and both AUTH and IMP cites are being added to more accurately reflect the sources of the Board's rulemaking authority and all of the statutes implemented through this rule.

24.147.1101 CREMATORY FACILITY REGULATION (1) remains the same.

(2) The crematory facility shall comply with all applicable local, state and federal building codes ~~and regulations regarding environmental impact on the area in which it is located.~~

(3) through (10) remain the same.

AUTH: 37-1-131, 37-19-202, 37-19-703, MCA
IMP: 37-19-703, 37-19-705, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1101 to clarify its meaning. The Board recently learned that several licensees were confused and incorrectly interpreting the rule to mean they only had to comply with local, state and federal building code regulations when such

regulations were a duplication of state and federal environmental impact requirements. Since state and federal regulations already require compliance with the applicable building codes, the Board rules do not need to address this. An AUTH cite is being added to more accurately reflect the sources of the Board's rulemaking authority.

24.147.1114 LICENSURE AS A CREMATORY OPERATOR

(1) through (2)(b) remain the same.

(c) applicant is of good moral character, as shown by two letters of reference, ~~one of which must be from a licensed mortician.~~

AUTH: 37-1-131, 37-19-202, MCA
IMP: 37-19-702, 37-19-703, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1114 to address recently raised concerns that the requirement that an applicant needs a reference from a licensed mortician might be construed as requiring authorization from a business competitor as a condition of licensure. In order to avoid the potential for a conflict of interest, the Board proposes to modify the rule. An AUTH cite and an IMP cite are being added to more accurately reflect the sources of the Board's rulemaking authority and the statutes implemented through this rule.

24.147.1115 LICENSURE AS A CREMATORY TECHNICIAN

(1) through (2)(a) remain the same.

(b) name of supervising licensed crematory operator ~~or mortician; and~~

(c) remains the same.

AUTH: 37-1-131, 37-19-202, MCA
IMP: 37-19-702, 37-19-703, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1115 because pursuant to section 37-19-702(4), MCA, the person in charge of a crematory facility must be licensed as a crematory operator by the Board. The statute does not allow a mortician to be in charge. An AUTH cite is being added to more accurately reflect the sources of the Board's rulemaking authority.

24.147.1304 PERPETUAL CARE AND MAINTENANCE FUND REPORTS

(1) A cemetery shall be required to submit an annual report. The report must consist of an audit opinion or attestation opinion on a form provided by the board. The report shall consist of ~~the certificate~~ an opinion of the accountant or auditor preparing such ~~statement and report.~~ The report must be ~~shall be deemed to have been complied with when prepared by an independent certified public accountant or a licensed public accountant, provided that such statements report~~ fully and accurately ~~disclose~~ discloses the position of

the perpetual care and maintenance fund⁷, and that such certificate does not contain disclaimers or qualifications such as to preclude the rendering of an independent opinion. Failure to provide the annual report shall void the operating license of the cemetery.

(2) through (3)(c) remain the same.

(d) In the event that the board requires an audit, the board shall contract with a licensed or certified public accountant and the fee charged by the accountant for the actual cost of the audit must be paid by the cemetery authority.

AUTH: 37-1-131, 37-19-202, 37-19-807, MCA
IMP: 37-19-807, 37-19-822, 37-19-823, MCA

REASON: There is reasonable necessity to amend ARM 24.147.1304 because the Board was cited by the Legislative Auditor for not having in rule the fee the Board would charge the cemetery authority if the Board required an audit. The proposed amendment clarifies that the Board would charge the cemetery authority the full fee charged to the Board by the accountant. Because cemetery licenses are relatively new (the first of the five year renewals occurs in 2004), the Board has no basis upon which to estimate how many cemetery authorities will undertake an audit at the request of the Board. The Board likewise has no basis to estimate the total annual cost of the Board-requested audits.

The Board notes that it considered whether to establish a flat fee for audits. The Board rejected that approach for a number of reasons. First, the Board believes that it would be inequitable for a small cemetery authority, with relatively small amounts in its perpetual care and maintenance fund, to be charged the same as a cemetery with a much larger fund. Second, the establishment of a flat fee would require the Board to solicit proposals or bids from accountants who would be willing to perform the audits for a fixed fee. Such a contract would require the contractor to provide services throughout the state, and thus local accounting firms might tend to be discouraged from bidding. In addition, a flat fee for an audit would have to build in travel costs for the contracted accountant(s), and thus would likely be more expensive than if the audit was performed by a local accountant. Two AUTH cites are being added to more accurately reflect the sources of the Board's rulemaking authority.

4. The Board proposes to adopt NEW RULE I as follows:

NEW RULE I AUDIT FEES (1) In the event that the board requires an audit, the board shall contract with a licensed or certified public accountant and the fee charged by the accountant for the actual cost of the audit must be paid by the cemetery authority.

AUTH: 37-1-131, 37-19-202, 37-19-807, MCA
IMP: 37-19-807, 37-19-808, 37-19-822, 37-19-823, MCA

REASON: There is reasonable necessity to adopt NEW RULE I because the Board was cited by the Legislative Auditor for not having in rule the fee the Board would charge the cemetery authority if the Board required an audit. The proposed amendment clarifies that the Board would charge the cemetery authority the full fee charged to the Board by the accountant. Because cemetery licenses are relatively new (the first of the five year renewals occurs in 2004), the Board has no basis upon which to estimate how many cemetery authorities will undertake an audit at the request of the Board. The Board likewise has no basis to estimate the total annual cost of the Board-requested audits. The Board notes that pursuant to 37-19-808(2)(b), MCA, the costs of an audit must be borne by the cemetery company.

The Board notes that it considered whether to establish a flat fee for audits. The Board rejected that approach for a number of reasons. First, the Board believes that it would be inequitable for a small cemetery authority, with a relatively low volume of internments, to be charged the same as a cemetery with a much larger volume. Second, the establishment of a flat fee would require the Board to solicit proposals or bids from accountants who would be willing to perform the audits for a fixed fee. Such a contract would require the contractor to provide services throughout the state, and thus local accounting firms might tend to be discouraged from bidding. In addition, a flat fee for an audit would have to build in travel costs for the contracted accountant(s), and thus would likely be more expensive than if the audit was performed by a local accountant.

5. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdfnr@state.mt.us, and must be received no later than 5:00 p.m., May 18, 2004.

6. An electronic copy of this Notice of Public Hearing is available through the Department's and Board's site on the World Wide Web at <http://www.discoveringmontana.com/dli/fnr>. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may

be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The Board of Funeral Service maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Funeral Service administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdfnr@state.mt.us, or may be made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

9. Jack Atkins, attorney, has been designated to preside over and conduct this hearing.

BOARD OF FUNERAL SERVICE
JERED SCHERER, CHAIRMAN

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State March 29, 2004.