

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

In the matter of the amendment of ARM	)	NOTICE OF AMENDMENT AND
24.147.302 definitions, 24.147.401 fee	)	ADOPTION
schedule, 24.147.407 name change,	)	
closure, transfer, or change of	)	
ownership – mortuary, branch	)	
establishment, crematory, or cemetery,	)	
24.147.507 mortician licenses,	)	
24.147.1105 crematory records,	)	
24.147.1107 cremation authorizations,	)	
24.147.1110 integrity of identification of	)	
human remains, 24.147.1111 cremation	)	
procedures, 24.147.1112 crematory	)	
prohibitions, 24.147.1503 requirements	)	
for sale of at-need, preneed, and	)	
prepaid funeral arrangements,	)	
24.147.2101 continuing education	)	
requirements – morticians, 24.147.2301	)	
unprofessional conduct, and the	)	
adoption of New Rule I preneed	)	
agreements – notification of closure or	)	
change of ownership – mortuary,	)	
branch establishment, or crematory	)	

TO: All Concerned Persons

1. On October 18, 2019, the Board of Funeral Service (board) published MAR Notice No. 24-147-40 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 1769 of the 2019 Montana Administrative Register, Issue No. 20.

2. On November 13, 2019, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the November 15, 2019 deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board responses are as follows:

COMMENT 1: One commenter stated the board is moving rule language around but not clarifying the rules for the public.

RESPONSE 1: The board disagrees and believes the rule changes accomplish the board's intent to clarify the rules.

COMMENT 2: One commenter stated that all current requirements specific to mortician scope of practice should be left in the crematory rules because removing the language will confuse the public as to what is allowable under crematory, crematory operator, and crematory technician scopes of practice.

RESPONSE 2: Rules pertaining to the practice of mortuary science by morticians and mortician interns at mortuaries and branch establishments apply to these specific types of licenses, and not the scopes of practice for crematory technicians, crematory operators, or crematories. Changes to rules pertaining to mortuary science are outside the scope of this rulemaking. However, the board is open to future discussions with stakeholders regarding potential rulemaking on practice requirements and procedures for morticians, mortician interns, mortuaries, and branch establishments.

### **ARM 24.147.302**

COMMENT 3: A commenter asked why the definition in (1) for an "Authorization for Removal, Transportation, and Final Disposition of a Dead Body form" stops at what is described in (a) and (b) since the form provides for many other things including who authorized the cremation and the method of disposition.

RESPONSE 3: This form is developed by the Montana Department of Public Health and Human Services (DPHHS) and the board has no control over its content. Sections (1)(a) and (b) refer to the statutes that DPHHS implements that are relevant to the crematory and cremation process without detailing every facet of the form. As for the form of disposition, the crematory would only be accepting the body when the form of final disposition was cremation and it was authorized by the correct signatures. The board determined that further specification is not required.

COMMENT 4: Multiple commenters did not understand the use of the word "prior" in the definition of cremation authorization forms at (3) as being agreements between authorizing agents and crematories prior to receipt of human remains. The commenters further stated that because preneed cremation authorizations occur prior to receipt and are the authorizations to cremate, they are in fact cremation authorization forms.

RESPONSE 4: The board agrees with the commenters and is amending ARM 24.147.302(3) to replace "prior" with "pertaining." Additionally, the commenters are correct that the board inadvertently inserted a mutually exclusive statement into (3)(c) and is amending the rule to strike (c) in its entirety.

COMMENT 5: Multiple commenters stated the definition for cremation authorization form in (3) changes current meaning and practices, is confusing, and believed the definition may work for a standalone cemetery but not for a full-service mortuary/crematory. The commenters asked the board to strike the definition or further amend it.

RESPONSE 5: The board is assuming, based on context, that the comments reference a standalone crematory and not a cemetery. The board agrees the definition of cremation authorization form is confusing. See RESPONSE 4. However, the board does not have statutory authority to issue a dual license for a "full service mortuary/crematory." If the practice of mortuary science and cremation is conducted in the same physical location, the facility and owner(s) must have two separate licenses, one for a crematory and one for a mortuary or branch establishment. From a licensure standpoint there is no difference in legal requirements for a crematory located in the same space as a mortuary or a crematory located in a separate location that may or may not be owned by an individual who owns and licenses a mortuary.

COMMENT 6: One commenter stated that "agreement" in (3) was confusing since the current rules say anyone could sign a cremation authorization and provided the example of signing a napkin and saying, "I choose cremation." The commenter believed that would be a cremation authorization which is not necessarily an agreement because the person can change his or her mind.

RESPONSE 6: The definition for a cremation authorization form specifically refers to authorization between the authorizing agent and a licensed crematory. The commenter example is not accurate, and the example statement is not a cremation authorization.

COMMENT 7: Multiple commenters said the specific requirement in (3) that the cremation authorization form be signed prior to receiving the remains does not conform with current practices as many "homes" do not have the document signed until after the remains are received.

RESPONSE 7: See RESPONSE 4.

COMMENT 8: A commenter stated that the requirement in (5) for mortuaries and branch establishments to keep records of hazardous implant removal and disposal was interesting as the commenter was unaware the requirement was previously in rule.

RESPONSE 8: The board notes that this requirement previously existed in ARM 24.147.1112(2).

#### **ARM 24.147.401**

COMMENT 9: Multiple commenters opposed the fee increase due to its impact on small businesses and licensees, and the increased difficulty in attracting people to move to Montana and apply for licenses under the board. Commenters stated the state does not deserve any more funds until the board does what it is supposed to do and enforces the laws the licensees are paying to have enforced.

RESPONSE 9: The board conducted a small business impact analysis as part of the rulemaking process as required by 2-4-111, MCA, and acknowledged the potential small business impact in the proposal notice as required. However, having a small business impact does not negate the board's authority to conduct rulemaking to increase fees. As stated in the proposal notice, the board must raise fees to comply with the statutory provisions in 37-1-134, MCA, and continue board operations, which includes enforcing the laws under its jurisdiction. As to commenters' second point, the board incurs expenses to process, investigate, and where supported by the evidence and law, prosecute complaints against licensees for unprofessional conduct and against individuals for unlicensed practice. A significant portion of this work occurs outside of public view and may go unnoticed by licensees. Taking into consideration the public's comments, the board is amending the rule to reduce the fee increases to 45%.

COMMENT 10: Multiple commenters suggested that the proposed fee increases are not reasonable and might violate 2-4-111, MCA. The commenters also noted that if previous 2017 legislation had passed, it would have helped the board stay "in the black."

RESPONSE 10: See RESPONSE 9. Additionally, the board must operate under current statutes. Legislation that died in process during past legislative sessions is not law and is irrelevant and unrelated to the scope of this rulemaking.

COMMENT 11: Multiple commenters stated the funeral industry plays a public health role/benefit and licensees are compelled by state law to be responsible for the disposition of human remains and recordkeeping/reporting regarding vital statistics. As a result, the commenters asserted the state should bear the cost of regulation, not licensees.

RESPONSE 11: All professional licensing boards allocated to the department are mandated by 37-1-134, MCA, to set fees that provide the money usually needed for board operation for services that include licensing, reciprocity, renewals, applications, inspections, investigations, compliance, discipline, and audits. The department sets fees for administrative services such as license verification, duplicate licenses, late penalty renewals, licensee lists, and other administrative service fees applicable to all boards. The department collects fees on behalf of each board and deposits them in the state special revenue fund in the appropriate account for each board. Only the legislature can change this statute.

#### **ARM 24.147.507**

COMMENT 12: Multiple commenters appreciate the board making the rule changes necessary to implement House Bill 196 and remove the additional education requirements for morticians and mortician interns.

RESPONSE 12: The board appreciates all comments received during the rulemaking process.

**ARM 24.147.1105**

COMMENT 13: One commenter stated that removing "as applicable" from (2)(c) makes the rule impossible to follow because the commenter would not necessarily have disposition directions per (2)(c)(ii). The commenter further stated that (2)(c)(i) is just a restatement of the requirement for a cremation authorization form under (2)(b).

RESPONSE 13: See RESPONSE 4. Further, the board agrees that (2)(c) could cause confusion and is amending the rule accordingly.

COMMENT 14: One commenter believed an issue exists in (4) where it references the authorizing agent giving the crematory authority to dispose of the cremated remains in a cremation authorization form. The commenter stated the authorizing agents should not be dealing with the crematory directly because they are not licensed to do so.

RESPONSE 14: There is nothing in current board statutes, rules, or these proposed rules that prohibits an authorizing agent from dealing directly with a crematory. The commenter is correct that crematories and licensed crematory operators and technicians are still responsible for ensuring that all required signatures and authorizations are received prior to accepting bodies and conducting the actual cremation.

COMMENT 15: Multiple commenters opposed the reference to crematories providing funeral goods in (5), stating that it is contrary to Federal Trade Commission (FTC) requirements regarding providing goods and services. The commenters believed that crematories cannot provide funeral goods and services and only morticians can provide funeral goods and services. The commenters believed Montana should ensure its laws and regulations are in compliance with FTC laws.

RESPONSE 15: The FTC Funeral Rule references "funeral providers" and does not prohibit crematories from providing funeral goods and services. In fact, the introduction to the guidelines produced by the FTC to complement the rule states: "You are a funeral provider if you sell or offer to sell funeral goods and both types of funeral services. You do not have to be a licensed funeral director and your business does not have to be a licensed funeral home to be covered by the Funeral Rule. Cemeteries, crematories, and other businesses can also be 'funeral providers' if they market both funeral goods and services."

**ARM 24.147.1107**

COMMENT 16: A commenter believed the current rules say that if a person preplans and signs a cremation authorization then that would "stand up" and a child/authorizing agent cannot change that. However, the commenter stated that the

"disposition instructions" in the proposed rule contradict the definition of an authorizing agent.

RESPONSE 16: While the board is unable to provide legal advice, the commenter should note that 37-19-903(2), MCA, states: "The funeral prearrangements that are prepaid and contracted for with a licensed mortuary or the disposition directions may not be canceled or substantially revised *unless the cancellation or substantial revision has been ordered by a person appointed by the decedent in the prepaid funeral contract or the disposition directions as the person authorized to cancel or revise the terms of the prepaid funeral contract or the disposition directions.*" (emphasis added).

COMMENT 17: One commenter believed an issue exists in the cremation authorization form definition as cited in this rule and defined in ARM 24.147.302.

RESPONSE 17: The board is unsure of the commenter's specific concern with the definition. However, see RESPONSE 4.

COMMENT 18: One commenter believed that (1)(p) referencing cremation authorizations is "the same, same rule" that is "being taken out of one and it's in one just a little bit later."

RESPONSE 18: The board is unclear of the meaning of this comment.

#### **ARM 24.147.1110**

COMMENT 19: One commenter stated that removing from the crematory rules the language regarding mortician scope of practice and what only a licensed mortician can do make the rules more confusing.

RESPONSE 19: See RESPONSE 2.

COMMENT 20: A commenter believed the crematory rules should include what happens prior to a body arriving at a crematory.

RESPONSE 20: What occurs prior to a body arriving at a crematory is outside the jurisdiction of the crematory, crematory operator, and crematory technician and outside the scope of this rulemaking. See RESPONSE 2.

#### **ARM 24.147.1111**

COMMENT 21: A commenter pointed out that (2)(c) includes "if applicable" which is proposed to be stricken from ARM 24.147.1105 and expressed the same concerns.

RESPONSE 21: See RESPONSES 4 and 14. The board is not amending this rule but is amending ARM 24.147.1105 in response to comments.

**ARM 24.147.1112**

COMMENT 22: Multiple commenters believe the references to morticians and what morticians can do should not be stricken from (1) as it can lead to misinterpretation.

RESPONSE 22: See RESPONSES 2 and 20.

**NEW RULE I**

COMMENT 23: Multiple commenters agreed that licensees who are the selling party(ies) should notify the buyer(s) of the existence of preneed funeral arrangement agreements along with the requirement to provide proper documentation of those agreements to the buyer. However, several commenters opposed requiring the seller to notify all preneed funeral arrangement purchasers of the change in ownership. The commenters stated that notification requirement should be the sole responsibility of the new owner(s) because requiring the seller to notify the purchasers is redundant and could potentially confuse the public to receive notification from the seller and then the new owner.

RESPONSE 23: The board disagrees based on comparisons of information obtained from financial institutions and licensees since licensees began reporting on preneed trust accounts in March 2018. The licensee(s) selling should be required to notify those individuals with whom it made preneed funeral arrangements. The licensee(s) selling a mortuary or branch establishment is still a licensee who is held to the requirements under board laws which include proper management of the public's money. Once the sale occurs that responsibility shifts to the new owner licensee which is why it is necessary for both the seller (prior to the change in ownership) and the new owner(s)/licensee (within 30 days of change) to notify the purchasers.

4. The board has amended ARM 24.147.407, 24.147.507, 24.147.1107, 24.147.1110, 24.147.1111, 24.147.1112, 24.147.1503, 24.147.2101, and 24.147.2301 exactly as proposed.

5. The board has adopted New Rule I (24.147.1506) exactly as proposed.

6. The board has amended ARM 24.147.302, 24.147.401, and 24.147.1105 with the following changes, stricken matter interlined, new matter underlined:

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

(1) and (2) remain as proposed.

(3) "Cremation authorization form" means an agreement executed between an authorizing agent and a crematory, mortuary, or branch establishment ~~prior~~ pertaining to receipt of the human remains. A cremation authorization form is not any of the following:

(a) remains as proposed.

- (b) a coroner's authorization to cremate under 46-4-122, MCA; or
- ~~(c) a preneed cremation authorization under 37-19-708, MCA; or~~
- (d) remains as proposed but is renumbered (c).
- (4) through (16) remain as proposed.

24.147.401 FEE SCHEDULE

(1) Facility application fees	
(a) Mortuary	\$600 <u>544</u>
(b) Mortuary branch facility	600 <u>544</u>
(c) Crematory	600 <u>544</u>
(d) Cemetery	2000 <u>1813</u>
(2) Facility inspection or reinspection fees	
(a) Mortuary	320 <u>290</u>
(b) Mortuary branch facility	320 <u>290</u>
(c) Crematory	320 <u>290</u>
(d) Cemetery	320 <u>290</u>
(3) Individual application fees	
(a) Mortician	600 <u>544</u>
(b) Crematory operator	480 <u>435</u>
(c) Crematory technician	480 <u>435</u>
(d) Mortician intern	528 <u>479</u>
(4) Activation of inactive license	
(a) Mortician	160 <u>145</u>
(b) Crematory operator	80 <u>73</u>
(c) Crematory technician	80 <u>73</u>
(5) Facility renewal fees (includes annual inspection)	
(a) Mortuary	720 <u>653</u>
(b) Mortuary branch facility	420 <u>109</u>
(c) Crematory	720 <u>653</u>
(d) Cemetery (five-year renewal)	2400 <u>2175</u>
(6) Individual renewal fees	
(a) Mortician - active	480 <u>435</u>
(b) Mortician - inactive	240 <u>218</u>
(c) Crematory operator - active	240 <u>218</u>
(d) Crematory operator - inactive	120 <u>109</u>
(e) Crematory technician - active	240 <u>218</u>
(f) Crematory technician - inactive	120 <u>109</u>
(7) through (9) remain as proposed.	

24.147.1105 CREMATORY RECORDS (1) through (2)(b) remain as proposed.

- ~~(c) one or both of the following:~~
- ~~(i) preneed cremation authorization executed in accordance with 37-19-708, MCA; and/or~~
- ~~(ii) (c) if applicable, disposition directions from a prepaid funeral contract as described in 37-19-903, MCA;~~
- (d) through (5) remain as proposed.

BOARD OF FUNERAL SERVICE  
JOHN TARR, PRESIDING OFFICER

/s/ DARCEE L. MOE  
Darcee L. Moe  
Rule Reviewer

/s/ BRENDA NORDLUND  
Brenda Nordlund, Acting Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State April 7, 2020.