

Court of Appeals Seriously Weakens Executive Pay Cap

On October 18, 2018, the New York State Court of Appeals partially invalidated the Department of Health's Executive Order 38 regulations governing executive compensation. The result of the decision is that providers subject to Executive Order 38 regulations (including health care providers and health plans regulated by the Department of Health, as well as early intervention programs, and intermediate care facilities) may pay covered executives more than \$199,000 a year, so long as the amounts above \$199,000 are not derived from state funds. The decision should also extend to Executive Order 38-executive compensation regulations promulgated by the following state agencies:

- Agriculture & Markets
- Division of Criminal Justice Service
- Department of Corrections and Community Supervision
- Department of State
- Homes and Community Renewal
- Office for the Aging
- Office of Alcoholism and Substance Abuse Services
- Office of Children and Family Services
- Office of Mental Health
- Office for People with Developmental Disabilities
- Office of Temporary and Disability Assistance
- Office of Victim Services

The ruling invalidates a provision of the regulations promulgated by the Department of Health in 2013 (**10 NYCRR 1002**) that were implemented following Governor Andrew Cuomo's **Executive Order 38**. **Executive Order 38 regulations** prohibit organizations receiving state funds (including Medicaid) from paying executives more than \$199,000 per year with state funds, and caps administrative costs at 15 percent of total expenses. The Department of Health regulations apply to health care providers regulated by the Department of Health, as well as certain other programs (including early intervention programs and intermediate care facilities) receiving more than \$500,000 in state funds in a two-year period. In addition to these limits (referred to as the "hard caps"), the regulations penalized providers when total executive compensation for covered executives (including both state and other sources of funding) exceeded \$199,000 and the compensation was either greater than the 75th percentile for comparable positions or the compensation did not meet certain regulatory standards for board approval (the "soft cap").

The Court of Appeals declared that the "soft cap" provision (**10 NYCRR §1002.6(b)**) is unconstitutional. As a result of the decision, covered providers (including facilities regulated under Article 28, Article 36 and Article 40 of the Public Health Law, as well as early intervention programs and intermediate care facilities) may now pay covered executives more than \$199,000 per year using non-state funds. Although the "soft cap" has been eliminated, the "hard cap" limitations (15% of administrative expenses and the \$199,000 annual limit derived from state funds) were upheld by the Court of Appeals and remain in effect. Covered providers must continue to ensure that no more than \$199,000 of a covered executive's compensation is derived from state funds, unless the provider has obtained a waiver.

If you have questions about how your organization will be affected by this decision, or have other concerns regarding compliance with Executive Order 38 or **10 NYCRR Part 1002**, including obtaining waivers, please contact [Hermes Fernandez](#) any of the [attorneys](#) in our [Health Care Practice](#), or the attorney in the firm with whom you are regularly in contact.



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