

HOME CARE CLIENT ALERT



Executive Order 38 Limits, Stricken in Part

By: [Amy Walters](#)

October 23, 2018

On October 18, 2018, the New York State Court of Appeals issued a decision striking down Department of Health (“DOH”) regulations under Executive Order 38 that limited compensation paid to executives of entities that receive Medicaid and non-Medicaid funds. The Court, however, affirmed that executives whose agencies receive solely State-funds, such as Medicaid, are subject to a \$199,000 annual compensation cap.

Overview of Executive Order 38

Executive Order 38 (“EO 38”) and its accompanying regulations limit executive compensation and administrative expenses for covered providers who receive State funds or State-authorized payments that exceed \$500,000, and account for 30% or more of the entity’s annual revenues.

With respect to executive compensation, the EO 38 regulations established a “hard cap” prohibiting covered providers from using State funds to provide annual compensation greater than \$199,000 to a covered executive. The regulations also imposed a “soft cap” prohibiting a covered executive from receiving more than \$199,000 annually – regardless of the source of the funds – unless certain exceptions apply. “Executive compensation” is broadly defined to include any form of compensation reportable on Form W-2 or 1099, including salary, bonuses, company vehicles, housing, entertainment, travel, etc. The definition also includes nontaxable retirement and welfare benefits to the extent they are not “substantially equal” to employee benefits provided to other employees.

Litigation Challenging EO 38

Two advocacy groups whose members include Medicaid-funded nursing homes, home care entities and health care plans, sued the DOH, alleging that EO 38 regulations were invalid because the DOH exceeded its authority in promulgating the regulations. A State trial court invalidated the “soft cap,” finding that the DOH had engaged in legislative activity beyond its regulatory powers, but upheld the “hard cap.” The Appellate Division affirmed.

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On appeal, the New York Court of Appeals concluded that DOH properly exercised its powers to ensure the appropriate use of State health care funds when it imposed the “hard cap” on executive compensation from public funding sources. In contrast, the Court struck down the “soft cap” as an inappropriate “value judgment” by DOH that executive compensation from all sources, including private funds, should be limited as a matter of public policy.

The Conclusion

The Court’s decision establishes that providers whose business is based solely on State funding, such as Medicaid, must adhere to the \$199,000 annual compensation cap. Providers whose business is made up of, at least in part, of private pay must consider strategies to segregate private pay revenues, which are not subject to the \$199,000 cap, all the while ensuring compliance with the cap for their State funds.

Please let us know if you have questions about compliance with EO 38. Any member of our [Home Care Group](#) team can help.



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