

Recent Decision Casts More Uncertainty Over New York Executive Order 38's Cap on Executive Compensation

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With so many questions surrounding the implementation of the New York State ("NYS" or "State") Governor's Executive Order 38 cap on executive compensation (and administrative expenses), most stakeholders expected clarification from NYS after the State budget was passed on March 31, 2014. Instead, there is now more uncertainty than ever before.

Subject to certain exceptions, Executive Order 38 caps annual executive compensation at \$199,000 for certain service providers in NYS, including hospitals, nursing homes, health care agencies, hospices, health maintenance organizations, and other providers of services to the general public that receive State funds exceeding certain thresholds. Although regulations implemented by various State agencies have been in effect since July 1, 2013, many providers are required to comply with the restrictions beginning in calendar year 2014 and must submit an annual disclosure form within 180 days after the end of the year.

Immediately after the budget was passed, the Governor's Council on Executive Order 38 began informally notifying stakeholders that it expects to issue additional guidance on the limits on executive compensation (and administrative expenses) by early June 2014. Through these conversations, the Council is also soliciting questions from stakeholders to determine areas of uncertainty or misunderstanding and has indicated that it expects to publish (1) a revised guidance document or FAQs (frequently asked questions), and (2) a reporting mechanism regarding submission by providers of the required disclosure forms. The NYS Division of the Budget also recently published a [Request for Information](#) to identify compensation surveys that can be used by service providers to determine allowable executive compensation pursuant to the Executive Order and associated State agency regulations. Executive Order 38 permits compensation in excess of \$199,000, so long as it does not exceed the 75th percentile of that compensation provided to comparable executives in other providers of the same size and within the same program service sector and the same or comparable geographic area as established by a compensation survey identified, provided, or

recognized by the NYS Department of Health (“DOH”)—or the applicable department that has promulgated similar regulations—and the Director of the Division of the Budget.

Despite the State’s efforts to clarify Executive Order 38 and the associated regulations, a recent court decision further complicates the matter. On April 8, 2014, the Nassau County Supreme Court, in *Agencies for Children’s Therapy Services, Inc. v. New York State Department of Health*, held that Executive Order 38 and the regulations promulgated by the DOH are invalid and cannot be enforced. The court found that both the Governor and DOH exceeded their respective authority, particularly in light of the fact that the NYS Legislature previously rejected the proposed budgetary legislation that included an identical proposal to cap executive compensation and administrative expenses through provisions virtually identical to the terms of the Executive Order. The NYS State Attorney General’s Office, through a [spokesperson](#), has stated that it believes the decision is wrong and intends to appeal.

It is unclear how the *Agencies for Children’s Therapy Services* decision will impact Executive Order 38 and the associated regulations, particularly since this recent decision departs from a July 10, 2013, decision by the Suffolk County Supreme Court in [Concerned Home Care Providers, Inc. v. New York State Department of Health](#), which sided with the Governor and DOH. To be prudent, providers are encouraged to continue to comply with the regulations until such time as this matter is fully resolved.

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