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OASAS and OMH follow suit by proposing to update executive compensation regulations

By Peter Egan, Jena Grady and Jennifer Greco

We [recently reported](#) that New York's Office for People with Developmental Disabilities (OPWDD) amended its executive compensation regulations to conform to the matter of *LeadingAge N.Y., Inc. v. Shah*,¹ an October 18, 2018, decision issued by New York's highest court. The court of appeals' decision addressed the State Department of Health's (DOH) executive compensation regulations, which were an outgrowth of Governor Cuomo's Executive Order 38 (EO38), issued in January 2012. On September 4, 2019, DOH published proposed conforming amendments to its executive compensation regulations. Like DOH, the Office of Addiction Services and Supports (OASAS) and Office of Mental Health (OMH) effectuated essentially identical executive compensation regulations in July 2013.

According to the court in *LeadingAge N.Y.*, the "hard cap" for executive compensation included in EO 38 remains valid, but the "soft cap" was deemed invalid. As background, EO 38 and the executive compensation regulations place limits on the amount and type of funds that can be utilized to pay executive compensation. The hard cap pertains to the amount of state funds a covered provider can use to pay executive compensation and limits state funds to a maximum of \$199,000 unless a waiver is requested from the funding agency. The soft cap includes private funds and imposes certain requirements on a covered provider's use of private funds to pay compensation in excess of \$199,000. While the court of appeals determined that the hard cap was within the regulatory agency's rule-making power, it found that the soft cap exceeded the agency's authority because it ventured beyond legislative directives relating to the efficient use of state funds and into the realm of broader public policy concerns.²

As a result of the *LeadingAge N.Y.* decision and subsequent action of the other state administrative agencies, OASAS and OMH recently proposed to amend each agencies' executive compensation regulations to remove the soft cap. OASAS issued its notice of proposed rulemaking on October 30,

¹ *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249 (2018).

² *Id.* at 268.

2019, to remove the soft cap found at 14 NYCRR § 812.5(b).³ Soon after on November 20, 2019, OMH issued its proposal to eliminate the soft cap in 14 NYCRR § 513.5(b).⁴ Both agencies will receive public comments for 60 days from the notice. Based on the court's decision, it is likely that these amendments will be implemented as proposed.

If implemented as proposed, the amended regulations will allow covered OMH and OASAS providers to pay executive compensation in excess of \$199,000 if (i) a provider uses private funds to pay the amount over \$199,000, or (ii) a provider requests a waiver from the regulatory agency to use state funds to pay any amount over \$199,000.

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³ <https://www.dos.ny.gov/info/register/2019/oct30.pdf>.

⁴ <https://www.dos.ny.gov/info/register/2019/nov20.pdf>.