

Executive Compensation

Bulletin

New York Postpones and Refines Its New Limits on Executive Pay at State-Funded Organizations

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The New York State Department of Health (DOH) and a number of other state departments have recently issued revised regulations that, among other changes, defer the effective date of new restrictions on executive compensation and administrative costs at state-funded not-for-profit and for-profit service providers. Affected organizations include service providers that receive more than \$500,000 in state support on average each year and receive at least 30% of their annual in-state revenues from state funds or state-authorized funds. (For more on the new pay limits, see [“A Closer Look at the Proposed New York Rules on Executive Pay in State-Funded Organizations,”](#) *Executive Compensation Bulletin*, December 7, 2012.)

The deferral of the rule’s effective date — from April 1, 2013, to July 1, 2013 — will give organizations more time to get ready to comply with the new restrictions, which bar covered service providers from using more than \$199,000 in state funds to pay executive compensation, with certain exceptions. Most of the other changes in the recent regulations are relatively modest. Here’s a closer look:

Effective Date

The most noteworthy change is the proposal to further delay the effective date of the new limits until July 1, 2013. As revised, the limits will apply to reporting periods commencing on or after that date. In other words, for organizations that report on a calendar-year basis, the rules become effective January 1, 2014.

“Reporting period” is a new term introduced in the revised regulations and is generally defined as the calendar year or, at an organization’s option, its fiscal year. However, an organization that is required to file an annual cost report with the state must use as its reporting period the same period applicable to the cost report.

The limits on executive compensation and on administrative expenses both apply as of “the *first day* [emphasis added] of each provider’s respective covered reporting period.” This seems to reflect the regulators’ intent to have the rules become effective at the start of the reporting period, rather than in midstream, which should help organizations make a cleaner transition to the new limits.

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Compensation Surveys and Other Changes

The rules allow covered providers to pay executives more than \$199,000 in total compensation from a combination of New York State and other funding sources if certain conditions are met. One of those conditions is that the provider must ensure that the executive's compensation does not exceed the 75th percentile of compensation provided to comparable executives in comparable organizations and geographic areas, based on a compensation survey identified, provided or recognized by the relevant state agency.

The revised regulations do not provide detailed guidance on the types of surveys that may be used for this purpose, but the DOH provides some insights about this in material that accompanies the revised rules. It notes that the regulations provide the flexibility to accept various compensation surveys, and it does not intend to limit acceptable surveys to one standard version or to surveys that have been preapproved. While the DOH expects to identify some "safe harbor" surveys or methodologies, the use of any safe harbor will not be mandatory.

Among the other changes in the latest revisions:

- Administrative expenses that cannot be paid for with more than 25% of a provider's state funding (gradually declining to 15%) do not include that portion of the salaries and benefits of staff performing policy development or research.
- To be covered by the limits, an executive must have compensation that exceeds \$199,000 (rather than compensation that equals or exceeds that threshold).
- Compensation that's subject to the limits excludes certain qualified retirement plan contributions, as long as the contributions are consistent with those provided to other employees. The revisions clarify that this exclusion applies not just to plans qualified under Internal Revenue Code Section 401, but also to those maintained under Sections 403, 457(b) and 457(f).
- State funds and state-authorized payments do not include payments for health insurance premiums, and the revisions clarify that this covers NYS Health Insurance Program premium payments or Supplemental Social Security Income (SSI) payments.
- Grandfathered contracts (to which the limits are not applicable) are now defined as those entered into prior to July 1, 2012 (rather than April 1). This relief is inapplicable without a state waiver if the contract extends beyond April 1, 2015 (formerly April 1, 2014).
- A disclosure form must be submitted for each reporting period no later than 180 days following the end of the period. A DOH explanation accompanying the proposed changes indicates that report would cover the preceding fiscal year.
- Waivers from the pay limits must be requested at the same time as the disclosure form is filed for a given reporting period for which the waiver is being sought (i.e., 180 days after the close of the period, rather than 90 days prior to the start of that period). This seems to permit a waiver to be requested after the fact. Despite this guidance, we expect organizations will want to apply for waivers in advance to avoid the possibility of a waiver being denied after the money has been paid.
- A waiver from the limits can be requested for a position rather than just for a person.

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Next Steps

In material that accompanied the revised rules, the DOH indicated that it is working with other state agencies to develop clear guidance, and provide information and assistance to covered providers as part of the implementation process. However, no specific time frame for this guidance was offered.

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