

Coronavirus: Emerging Challenges

COVID-19 and CARES Act Section 3610 Cost Recovery and Compliance

Recouping Paid Leave to Maintain Workforces During the COVID-19 Pandemic

Agenda

- CARES Act Section 3610 in Brief
- The DoD Class Deviation: DFARS 231.205-79 / Frequently Asked Questions
- DoD Guidance
- Key Case Law
- Summary of Civilian Agency Guidance
- Best Practices
- Questions

CARES ACT Section 3610

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Section 3610, Federal Contractor Authority

- Section 3610 authorizes agencies to use any funds available to the agency to reimburse contractors for paid leave provided in connection with the COVID-19 public health emergency “to keep its employees or subcontractors in a ready state, including to protect the life and safety of government and contractor personnel.”
- This section applies “[n]otwithstanding any other provision of law,” meaning agencies can reimburse contractors for eligible costs regardless of any restrictions imposed by other statutes or regulations, including FAR Cost Principles, Cost Accounting Standards, appropriations restrictions, Uniform Guidance, etc.
- Section 3610 is not an exclusive remedy. Contractors may still request equitable adjustments under contract clauses, including stop-work, government delay, changes, and changes clauses.
 - Contractors must assess, based on their unique circumstances and the terms of each contract, whether it is more beneficial to pursue reimbursement under Section 3610 or other contract provisions.

Section 3610 Restrictions

- Section 3610 is not a “free for all,” there are numerous conditions:
 - Reimbursement is discretionary, not mandatory.
 - Agency is not obligated to provide relief.
 - Agencies may modify terms of existing contracts, without consideration, to provide reimbursement.
 - Potential for agency-by-agency and contract-by-contract analysis and differing results
 - Potential for differing approaches by contract type
 - Reimbursement “at the minimum applicable contract billing rates” not to exceed an average of 40 hours per week for paid leave, including sick leave.
 - Oblique about “billing rates”
 - The labor expense reimbursed must be to keep employees (or subcontractors) in a ready state (*i.e.*, to retain workforces).

Section 3610 Restrictions

- The reimbursable expenses must result from inability to perform work on a federally approved site due to closure or restriction *and* inability to work remotely due to nature of the job duties.
- Reimbursable costs are limited to those incurred between January 31, 2020, and September 30, 2020; and
- Maximum reimbursement under the section for such paid leave must be reduced by the amount of any credits the contractor "is allowed" under other sections of the CARES Act and Division G of the Families First Coronavirus Response Act (tax credit for paid sick and paid family and medical leave).

DoD Class Deviation: DFARS 231.205-79 and Frequently Asked Questions



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DFARS 231.205-79

- On April 8, DoD implemented CARES Act Section 3610 by issuing a class deviation to the Defense Federal Acquisition Regulation Supplement (“DFARS”) creating DFARS 231.205-79, Cares Act Section 3610 Implementation
- This provision is a new cost principle that allows contractors to charge certain paid leave costs incurred in connection with the COVID-19 pandemic
- A memorandum attaching the DFARS language contains guidance not specifically addressed in the DFARS provision that will affect its interpretation and implementation
- On April 9, DoD issued Frequently Asked Questions to clarify DFARS 231.205-79

DFARS 231.205-79 Eligibility for Reimbursement

Preliminary issues

- Why a cost principle?
 - DoD considers that costs of this nature are likely not allowable under FAR 31.205-6(m) for lack of policies providing for this type of leave
 - DoD is treating this a cost allowability issue

- Effectivity – is it retroactive?
 - Ordinarily, only regulations in effect at the time of contract award apply. DoD has expressly stated that it “could apply to contracts in place from January 30, 2020 to September 31, 2020”

DFARS 231.205-79

Eligibility for Reimbursement

- The contracting officer must establish in writing that the contractor is an “affected contractor.”
- DFARS 231.205-79 does not define “affected contractor,” but the DoD FAQs suggest that to qualify as an affected contractor, the contractor must establish that
 - Its employees are unable to work (including remote work) due to the COVID-19 public health emergency;
 - The contractor incurred paid leave costs (up to a maximum of 40 hours per week) between January 31, 2020, and September 30, 2020, to keep the employees in a “ready state”; and
 - The contractor has not been reimbursed for the leave costs through other federal programs.
- The Memorandum issuing the class deviation provides that the contracting officer
 - Consider the “immediacy of the specific circumstances of the contractor”
 - Not all contractors will be in the same position regarding the ability to generate revenue
 - Secure “representations” from a contractor – including an “attestation” regarding other relief sought or that the contractor will not seek relief from other sources.

DFARS 231.205-79

Eligibility for Reimbursement

- The employees cannot work on a federally approved site due to closures or other restrictions
 - DoD interprets federally approved site to mean “the contractor’s location and any other places of performance specifically identified in the contract.”
 - Notably, DoD explains this includes any facility “at which contract administration services are performed in support of those contracts.”
- The employees cannot telework because the job duties cannot be performed remotely
- The burden is on the contractor to demonstrate that it is eligible for reimbursement. To satisfy this requirements, the contractor must, when requesting relief:
 - Describe the actions the contractor has taken to continue performing contract work;
 - Describe the circumstances that necessitated granting employee leave;
 - Explain why it was not feasible for employees to continue performing remotely; and
 - Explain how the leave served to keep the employees in a “ready state” (*i.e.*, able to be mobilized and able to resume performance in a timely manner.”

Substantiating Cost Impacts

- Contractors must document and segregate (e.g., use unique charge codes) **all increased costs**, including paid leave, stemming from the COVID-19 pandemic.
- DFARS 231.205-79 and associated DoD guidance require contractors to “clearly identify” eligible costs and describe how such costs are “identified, segregated, recorded, invoiced, and reimbursed.”
- However, in focusing on paid leave that may be reimbursable under Section 3610, contractors should not ignore other increased costs because, as explained, contractors may be entitled to recover increased costs beyond paid leave under other contract clauses.

Other Available Relief

- DFARS 231.205-79(b)(6) provides that cost recovery must be reduced by the amount the contractor is “eligible to receive” under any other federal payment, allowance, tax, or other credit specifically identifiable with the COVID-19 public health emergency.
 - DoD’s FAQs state that the “cost principle is inapplicable” where “the contractor has been or can be reimbursed for employee leave costs by other means.”
 - DoD’s guidance, however, also contemplates that a contractor can provide an attestation to the contracting officer that it “has not or will not pursue reimbursement for the same costs accounted for under their request” through other channels, seeming to suggest that such an attestation will suffice to address the section 3610 limitation.
- While it might be preferable for contractors to have the option to circumvent the limitation by committing to forgo opportunities under other specified programs, agencies may decide they would prefer to force contractors to exhaust other funding sources to protect other appropriations.

DoD's April 9 Guidance

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- DoD has directed contracting officers to apply Section 3610 and DFARS 231.205-70 by contract type, with specific instructions for cost-reimbursement contracts, fixed-price contracts, and time-and-materials (“T&M”) and labor hours (“LH”) contracts.
- **Cost Reimbursement Contracts**
 - DFARS 231.205-70 will not apply automatically – written determination required.
 - Contracting officers must work with contractors to establish cost procedures, adjust estimated costs (with the section 3610 costs segregated), provisionally approve and pay interim vouchers, and retain the contractor’s supporting documentation for the audit.
 - Allowable paid leave costs may be charged directly or indirectly to the contract depending on the specific circumstances.

Fixed-Price Contracts

- DoD's guidance states: "[f]ixed-price contracts and CLINS remain fixed-price."
- DoD recognizes COs may provide relief through modifications to fixed-price contracts/CLINs.
- DoD contemplates that contractors will submit REAs seeking relief for impacts resulting from the COVID-19 public health emergency under fixed-priced contracts and has provided direction to CO.
- DoD has directed contracting officers to establish a "special CLIN," which can be fixed-rate, and to exclude profit from any REAs.
- No clause or guidance on how a fixed-rate CLIN would operate.

Time-and-Materials & Labor-Hour Contracts

- DoD's limited guidance on T&M and LH contracts suggests that they should be treated similarly to cost-reimbursement contracts.
- DoD expects contractors to submit interim vouchers for payment of increased paid leave costs, and DoD directs COs to review and, if acceptable, provisionally approve and pay them.
- Given the hybrid nature of T&M and LH contracts, contractors might consider asking their COs for leave to treat the adjustment to those types of contracts along the lines outlined for fixed-price contracts, with the addition of a fixed-rate CLIN dedicated to compensation for paid leave associated with the COVID-19 public health emergency.

Key Case Law

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- *Raytheon STX Corp. v. Dep't of Commerce*, GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632
 - Government shutdown
 - Contractor mitigated costs by shifting employees to other work, including B&P; contractor paid full salary and benefits
 - Board held that costs were allowable
 - Representation that facilities would be available carried an implied promise that the Government would bear the cost if not accessible
 - Influenced by contractor mitigation
 - Cost was incurred to retain employees to be ready once facilities were again accessible
 - Costs were reasonable
- *Dynamics Research Corp.*, ASBCA No. 53788, 04-2 BCA ¶ 32,747
 - Government servers crashed and the government ordered contractor personnel to go home.
 - Contractor paid the employees as “a necessary cost of continuing to perform the contract and that neither it nor its subcontractors would be able to attract and retain qualified personnel if they furloughed the employees without pay in these circumstances.”
 - The Board permitted the idle labor costs and noted that the contractor was able to demonstrate that attracting and retaining its workforce was challenging, justifying the expense.

Other Agency Guidance

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Civilian Agency Guidance

Pre-CARES Act

- OMB
 - M-20-17 – Financial Assistance Awards (grants)
 - M-20-18 – Memo on Managing Federal Contract Performance
- NASA – 3/24/20 - Preserving Readiness of the Space Industrial Base and Mission Operational Readiness due to the Coronavirus (COVID-19) Situation

Post-CARES Act

- ODNI – 4/3/20 – IC Guiding Principles for the IC Acquisition & Procurement Community on Implementation of the Coronavirus Aid, Relief, and Economic Security Act
 - Applies March 27th forward
- USAID – 4/10/20 - COVID-19 Implementing Partner Guidance Frequently Asked Questions
 - Ongoing FAQs which have been regularly updated
- DHS – 4/15/20 – Frequently Asked Questions Concerning DHS Procurement during COVID-19 Response
 - 3610 guidance pending
- DOE – 4/15/20 – PF 2020-22 Guidance for using DOE's Clauses developed to implement Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

Best Practices – For Now

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- **Document!** Maintain contemporaneous documentation memorializing COVID-19 impacts on performance and cost.
 - Paid leave by employee – with rationale for decision to provide paid leave (e.g., closed facility or restrictions on access, absence of remote work options, health and safety concerns)
 - Extra training and other alternatives to productive work and quantifiable reduced productivity
 - Costs related to telework and information security
- Meticulously record and segregate costs tied to COVID-19 and further segregate section 3610 costs.
- Secure **written** determination from CO that contractor qualifies as “affected contractor” under DFARS 231.205-79 and DoD guidance.
- Seek and document contracting officer concurrence on the method for charging allowable costs - e.g., direct or indirect for flexibly-priced contracts; fixed-rate CLIN for fixed-price and T&M contracts.
- Bottom line: Best position yourself to respond to future CO and auditor disagreement.

- Review existing contracts to identify provisions allowing for equitable adjustments, and timely assert entitlement to relief under those clauses (FAR, FAR supplements, and agency-specific Section H clauses, etc.).
 - Do not assume section 3610 implementation is preferable, most advantageous.
 - Note strict deadlines for seeking relief (e.g., under a changes clause).
- Identify any other COVID-19 related relief available to contractor (including credits).
- Develop comprehensive plan for seeking relief (e.g., balance of existing contract provisions, Paycheck Protection Program, and section 3610 implementation).
- Assess funding “on contract” and provide notice when approaching exhaustion.
- Invoice on time. If including costs pursuant to DFARS 231.205-79, confirm amount sought complies with requirements, including that it is reduced by amount recovered under other relief provisions or limited to paid leave costs incurred between January 31, 2020, and September 30, 2020.

Questions

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Contact us

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