

Coronavirus: Emerging Challenges

Deep Dive into the Department of Defense Implementation of CARES Act Section 3610

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

Meet your presenters



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Agenda

- CARES Act Section 3610 in Brief
- DoD Implementation of Section 3610
- Key Case Law
- Differences in Selected Civilian Agency Guidance
- Best Practices
- Questions

CARES ACT Section 3610 in Brief

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CARES Act Section 3610

Key Elements

- 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.”
- Does not preclude other avenues for reimbursement
 - Contractors may still request equitable adjustments under contract clauses, including stop-work, government delay, and changes clauses.

Agency Flexibility

- Reimbursement is discretionary, not mandatory.
- Agencies may modify terms of existing contracts, without consideration, to provide reimbursement.
- Reimbursement “at the minimum applicable contract billing rates” not to exceed an average of 40 hours per week for paid leave, including sick leave.

Limitations

- Expenses result from an inability to perform work
 - Closure of a Federally approved site and
 - Inability to work remotely
- Covers expenses from 1/31/20 to 9/30/20
- Reimbursement must be offset by other credits (e.g., tax credit for paid sick and paid family and medical leave)

Support Contractor Resiliency

- Carefully consider if reimbursing paid leave to keep the contractor in a ready state is in the best interest of the Government for meeting current and future needs
- Be mindful of the challenges faced by small businesses

Exercise Good Stewardship

- Maintain mission focus and evaluate use of section 3610 in the broader context of all strategies to promote contractor resiliency
- Follow restrictions in section 3610
- Work with the contractor to secure necessary documentation to support reimbursement and prevent duplication of payment
- Track use of section 3610

- Ambiguous terms from section 3610 remain undefined
- Appears to limit reimbursement for “workers’ lost time” from March 27 to September 30
- Broad discretion is left to agencies
- Emphasizes contractors carry the burden for substantiating and documented impacts for reimbursement

Polling Question

The CARES Act modifies existing government contracts to entitle contractors to reimbursement for eligible costs.

A. True

B. False

DoD Implementation of Section 3610

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DoD's Long, Winding Road

DoD's Defense Pricing and Contracting Section 3610 Approach

March 30, 2020

Policy memo outlining existing avenues for handling impacts to due COVID-19, including stop work orders, requests for equitable adjustment and other contractual mechanisms.

March 31, 2020

DPC requests input for implementation approach of the CARES Act through an Early Engagement Opportunity

April 8, 2020

"Policy Framework" published – Class deviation to the DFARS released in Federal Register with new cost principle implementing 3610

April 9, 2020

Guidance memo for contracting officers published which outlines considerations for differing contract types

April 9 to April 24, 2020

DPC publishes, and revises, FAQs for the Class Deviation and Implementing guidance

May 1, 2020

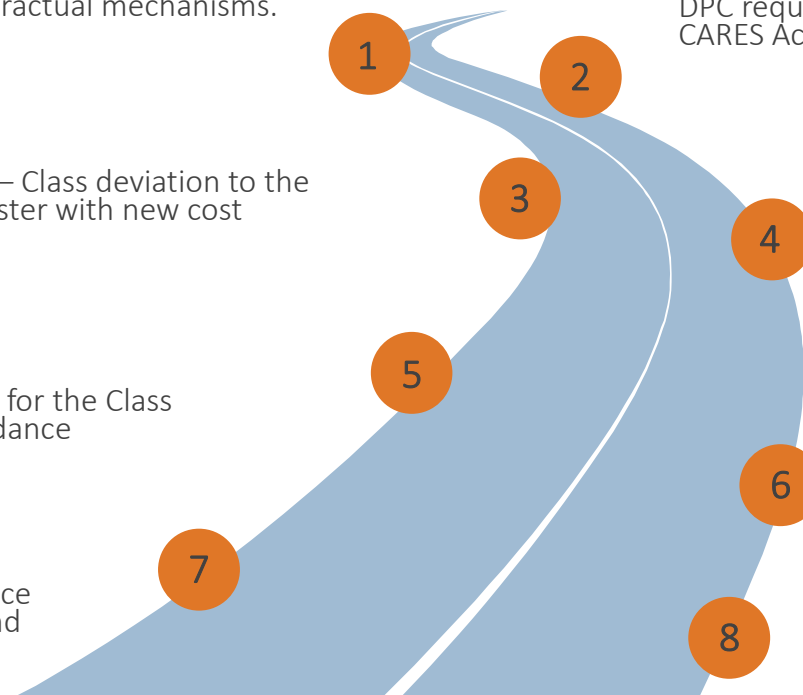
DPC announces effort to create agency wide process for handling 3610 reimbursements

May 19, 2020

DPC publishes draft reimbursement process documentation, including overarching guidance and checklists for both contracting officers and contractors; feedback requested by May 22

J?? 2020

DPC publishes final reimbursement guidance



Fundamentals of DoD Implementation

- DoD has reiterated statutory elements (e.g., relief is permissive, not mandatory; subject to availability of funds; limited to 40 hours of paid leave per employee per week between 1/31/20 and 9/30/20; maximum recovery reduced by other credits).
- Centerpiece of DoD's implementation is new cost principle, DFARS 231.205-79.
 - 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.
- Contractor responsible for providing sufficient documentation to allow CO to (1) make "affected contractor" determination establishing eligibility for relief and triggering cost principle, and (2) quantify amount of reimbursement. DoD draft checklist describes information needed, but is not all inclusive, i.e., the CO can request other information.
- DoD will only reimburse the contractor for paid leave already provided **prior to the request.**
- DoD's draft guidance states relief may be provided through fixed-price CLIN, regardless of contract type.

***All highlighted text within the presentation is based on DPC 5/18 draft reimbursement guidance*

Establishing Eligibility for Relief

- DFARS 231.205-79 applies once the cognizant CO determines in writing that the contractor is an “affected contractor.”
- DFARS 231.205-79 does not define “affected contractor,” but DoD’s guidance suggests that to qualify as an affected contractor, the contractor must establish that:
 - One or more employees of the contractor and/or its subcontractors could not perform work on a Govt-owned, Govt-leased, contractor-owned, or contractor-leased facility or site approved by Govt for contract performance, due to closures and restrictions related to the COVID-19 PHE;
 - Those employees were unable to perform their duties remotely; and
 - Contractor incurred paid leave costs between 1/31/20 and 9/30/20 to keep those employees in a “ready state.”

Establishing Eligibility for Relief (Cont'd)

- 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.”
 - Contractor will be required to identify specific facility closures and restrictions, including date ranges.
- The burden is on the contractor to demonstrate eligibility. To do so, the contractor must provide a narrative to:
 - Describe the actions the contractor has taken to continue performing contract work;
 - Describe the circumstances that necessitated granting employee paid leave;
 - Explain why it was not feasible for employees to continue performing duties 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).

Quantifying Requested Relief

- DFARS 231.205-79 and associated DoD guidance require contractors to “clearly identify” eligible costs (e.g., use unique charge codes) and describe how such costs are “identified, segregated, recorded, invoiced, and reimbursed.”
- Contractor must describe the methodology used to develop the amount requested (rates, hours, etc.) and show its calculations in a spreadsheet or other format dictated by the CO.
- “Appropriate rates,” as used in DFARS 231.205-79(b)(1), can include the hourly labor rates, overhead, and G&A, but may not include profit or fee.
 - Contractor must provide actual, unburdened hourly labor rates paid to all employees for which relief is requested and, upon request, payroll records.
 - Rate paid to employee cannot exceed amount that would be provided but for COVID-19 PHE.

Quantifying Requested Relief (Cont'd)

- Contractor must identify by name each employee for which it is seeking reimbursement of paid leave costs and the number of hours of paid leave requested for each employee.
 - For each employee, the contractor must provide (1) average hours worked for the 3 months prior to 1/31/20, (2) hours actually worked during the period for which relief is sought and what the contractor charged the USG for those hours, (3) normal leave (e.g., annual leave) and sick, extended medical, and maternity/paternity leave taken during the period for which the contractor is seeking reimbursement; and must indicate whether the employee is charged direct to a single contract, direct to multiple contracts, or indirect.
 - Relief is capped at 40 hours per week of paid leave, reduced by hours of “paid work.”
 - Relief is allowed even for employees who have not yet exhausted other leave and for employees typically charged indirectly.
 - Relief is not allowed for employees furloughed or laid off, and relief for part-time employees is capped at the average number of hours typically worked by each employee prior to the COVID-19 PHE.

Polling Question

DoD's current implementation of CARES Act section 3610 requires an employee-by-employee analysis by contracting officers to determine if paid leave costs should be eligible for reimbursement

A. True

B. False

- DOD's draft guidance indicates that the contractor must:
 - identify the financial records relied upon,
 - state whether the records have been audited,
 - provide the status of its accounting system,
 - describe its normal treatment of leave costs (policies, procedures, indirect pools/allocation bases, disclosure statements),
 - provide company guidance on paid leave related to the COVID-19 PHE, and
 - identify its "non-Government commercial work over the period covered by the ... request, and describe the allocation and method of allocation of COVID-19 paid leave costs between Government and commercial customers."

Requests Spanning Multiple Contracts

- Contractor may request reimbursement related to a single contract, multiple contracts, all contracts within a company or business unit, or all contracts for a multi-company enterprise.
- Contractor must identify all DoD contracts and orders for which it is seeking section 3610 relief (sortable by agency, buying activity, ACO/DACO/CACO/PCO, DUNS number, and CAGE code).
- Contractor must identify any other section 3610 requests that it is submitting, including those to non-DoD agencies.
- Contractor must exclude paid leave costs included in other section 3610 requests, including requests submitted by affiliates.
- COs directed to coordinate with DCMA and DCAA and, as necessary, with non-DoD agencies.

Administration By Contract Type

- DoD has directed COs to apply Section 3610 and DFARS 231.205-79 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 231.205-79 will not apply automatically—written determination required.
- COs 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.
- Contractor must disclose provisional billings rates, explain development of indirect rates prior to COVID-19 PHE, and show calculations to remove paid leave charges included in section 3610 request.

Administration By Contract Type (Cont'd)

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 COs.
- DoD has directed COs to establish a "special CLIN," which can be fixed-rate, and to exclude profit from any REAs. But no clause or guidance on how a fixed-rate CLIN would operate (e.g., payment, audit rights).
- Contractor expected to remove "sick leave costs" included in the indirect rates used to price FFP contracts.

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.

Avoiding “Double Recovery”

- 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 PHE.
 - DoD’s draft checklist requires that the contractor disclose (1) whether it requested relief under the CARES Act’s Paycheck Protection Program, the amount requested, and whether it anticipates meeting the conditions for loan forgiveness; and (2) whether it anticipates receiving tax credits under Division G of the Families First Coronavirus Response Act and/or any other credit allowed by law (including state and local laws) “specifically identifiable with” the COVID-19 PHE.
 - 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 previous guidance contemplated that a contractor could provide an attestation to the CO 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. DoD agencies may decide they would prefer to force contractors to exhaust other funding sources to protect other appropriations.

Mandatory Contractor Representations

- DoD's draft checklist would require a contractor must represent: "All information has been submitted to support this request for reimbursement in accordance with DoD Class Deviation 2020-O0013;" "The contractor's representations and certifications in [SAM] are current, accurate, and complete;" and "This request is made in good faith, and the supporting data is accurate and complete."
- COs directed to memorialize reliance on accuracy of contractor representations.
- Risk of False Claims Act allegations

Subcontractor Relief

- Contractor must provide the same information for any subcontractors for which it is seeking section 3610 relief, including the mandatory representations. Contractor must keep subcontractor information separate.
- The subcontractor may submit its supporting information directly to the CO if necessary to protect confidentiality.
- Where contractor submits the request on the subcontractor's behalf, it is responsible for "performing the same type of analysis" as the CO would perform for the prime contractor.

Polling Question

DoD's Class Deviation for CARES Act 3610 applies to:

- A. All Federal Agency Contracts
- B. All DoD procurement contracts
- C. All DoD procurement contracts except commercial item contracts
- D. Requests for section 3610 reimbursement on procurement contracts

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: costs were allowable -- (1) Representation that facilities would be available carried an implied promise that the Government would bear the cost if not accessible; (2) contractor mitigation; (3) cost incurred to retain employees to be ready once facilities were again accessible; (4) 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.”
 - Board held: idle labor costs recoverable and noted that the contractor was able to demonstrate that attracting and retaining its workforce was challenging, justifying the expense.
- *Pernix Serka Joint Venture, v. Dept. of State*, CBCA No. 5683 (April 22, 2020)
 - Ebola outbreak
 - Contractor sought guidance from DoS on Ebola outbreak – DoS gave no guidance. Contractor evacuated and later sought REA
 - Board held: FFP nature of contract put burden of loss on contractor; no cardinal or constructive change

Differences in Selected Civilian Agency Guidance

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Differences in Selected Civilian Agency Guidance

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; possibility for REAs for pre-March 27th remain

DHS

- 4/21/20 – Message from DHS Chief Procurement Officer for Implementing CARES Act Section 3610
 - Broad discretion left to contracting officers to determine approach for relief
 - REAs under the FAR changes clauses as remedies

GSA

- 4/21/20 - GSAR Class Deviation - CARES Act Section 3610 Implementation
 - “Does not expect significant use of the paid leave reimbursement authority”
 - Section 3610 authority applies at the order level, not the Indefinite Delivery Vehicle level (e.g., GWAC or FSS)
 - “Where practicable”, reimbursement shall not include profit or fee

Best Practices

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Best Practices

- **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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