

**ALERT**

# Agencies Issue Guidance on CARES Act Section 3610 Authorizing Reimbursement of Paid Leave for Government Contractors Related to COVID-19

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April 13, 2020

*Wiley continues to closely monitor the COVID-19 crisis and will update this list as the situation unfolds. This alert was last updated on April 27, 2020.*

Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act authorizes agencies to reimburse contractors for the cost of paid leave incurred to keep contractor or subcontractor personnel in a "ready state" to the extent that the personnel were (i) unable to access a government-approved facility, and (ii) unable to telework because their jobs could not be performed remotely.

Over the last few weeks, several agencies issued guidance on Section 3610 to contracting officers on how to address contractor requests for reimbursement of paid leave costs. Contractors seeking payment under Section 3610 should be familiar with this guidance and be prepared to demonstrate compliance with applicable requirements when discussing requests for equitable adjustment with their contracting officers.

## U.S. Department of Defense (DOD)

On April 8, 2020, DOD issued a class deviation to the cost principles in Federal Acquisition Regulation (FAR) Part 31 and Defense Federal Acquisition Regulation Supplement (DFARS) Part 31 that provides a framework for contracting officers to authorize payment of paid leave (including sick leave) costs resulting from the COVID-19 crisis. To be eligible for reimbursement, the paid leave costs must have been

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## Practice Areas

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Government Contracts

incurred for the purpose of keeping employees and subcontractor employees in a ready state during the COVID-19 public health emergency or to protect the life and safety of government and contractor personnel against risks arising from COVID-19. The paid leave must be taken between January 31, 2020, the date the U.S. Department of Health and Human Services (HHS) declared a national public health emergency for the novel coronavirus, and September 30, 2020.

Costs eligible for reimbursement are limited to those that are incurred as a consequence of granting paid leave as a result of the COVID-19 emergency and that would not be incurred in the normal course of the contractor's business. Under the CARES Act, covered paid leave is limited to employees or subcontractors "who cannot perform work" on a site "approved by the Federal Government." The class deviation explains that those "who cannot perform work" include employees who cannot perform their work because "such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work," and are unable to telework because their job cannot be performed remotely during the COVID-19 health emergency. The class deviation also clarifies that a government-approved site includes both *government*-owned or leased sites and *contractor*-owned or leased sites. A separate FAQ document issued by DOD further explains that "any contractor or subcontractor facility at which contract administration services are performed in support of those contracts" would constitute a government-approved site as well.

The class deviation allows contractors to recover, as a direct charge, eligible paid leave costs "at the appropriate rates under the contract for up to an average of 40 hours per week." Separate guidance issued by Defense Pricing and Contracting provides specific instructions on how eligible paid leave costs should be reimbursed under fixed-price, cost-reimbursement and time-and-materials contracts. Contractors must segregate the costs of paid leave in their records. DOD's FAQs recommend that the costs be charged to a newly created cost category, Other Direct Costs (ODC) COVID-19, with costs from this pool "allocated to the applicable contracts based on some reasonable, agreed upon allocation."

In requesting equitable adjustments, the FAQs suggest that contractors describe the steps taken to continue performing work under the contract, explain why it was necessary to grant employee leave and why it was not possible for employees to telework, and describe how the leave granted helps to maintain those employees in a "ready state." Where the contractor is considered part of the essential critical infrastructure workforce, the contractor must demonstrate that all reasonable efforts were made to continue contract performance.

The memorandum accompanying the class deviation indicates that DOD believes it would be improper for a contractor to seek reimbursement of paid leave costs under Section 3610 if it is receiving compensation for the same costs under other provisions of the CARES Act, or other COVID-19 relief scenarios, such as through the Paycheck Protection Program. Thus, costs eligible for reimbursement under Section 3610 "are reduced by the amount the contractor is eligible to receive under any other Federal payment, allowance, or tax or other credit allowed by law" in connection with COVID-19.

### National Aeronautics and Space Administration (NASA)

NASA issued a general FAQ document geared towards helping contractors understand the agency's response to COVID-19. In its guidance, NASA explained that it does not view Section 3610 as requiring any additional processes beyond those present under existing authority. NASA points on-site contractors to NASA FAR Supplement 1852.242-72, which allows NASA to consider requests for equitable adjustments when the contractor is denied access to NASA facilities. For off-site contractors, NASA will rely on the remedies under the Stop Work Order clause at FAR 52.242-15 if a contractor informs the contracting officer that they cannot safely perform at their facilities.

NASA's guidance requires contractors to identify paid leave taken as a result of COVID-19 as "weather and safety leave for charging and invoice purposes."

The NASA FAQ document also includes a detailed checklist of steps that contractors should take to notify it of COVID-19 impacts on business operations, and it makes clear that the effective date of this policy tracks the duration of the national public health emergency declared by HHS, and thus starts on January 31, 2020.

### Office of the Director of National Intelligence (ODNI)

ODNI released a short memorandum emphasizing its desire for the Intelligence Community to apply Section 3610 "to the greatest extent possible." While ODNI's memorandum mostly repeats the requirements of Section 3610, it also encourages contracting officers to be flexible in extending completion dates and acknowledges that "[i]f the delay was in response to the national emergency and the employee was unable to work remotely from home or work at a government facility, then the associated labor costs may be eligible for reimbursement under the CARES Act." However, unlike DOD, ODNI only allows intelligence agencies to reimburse contractors for paid leave costs incurred from March 27, 2020, the date that President Trump signed the CARES Act into law. Again, DOD permits contractors to reimburse paid leave costs incurred from January 31, 2020, onwards, the date that HHS declared a national public health emergency.

The memorandum also explains that contractors must "segregate and specifically identify the time and expenditures billed under this authority to allow for future review and analysis of COVID-19 related expenses."

### Department of Homeland Security (DHS)

DHS provided limited guidance on Section 3610, merely stating that in implementing the law, it would "work closely" with contractors "to determine the applicability of this relief to each contract, and to develop the implementing terms and conditions appropriate for this contract." The guidance also reminds contractors to segregate any costs they believe would be reimbursable under Section 3610.

### Office of Management and Budget (OMB)

OMB's guidance on Section 3610, unlike the more detailed instructions issued by DOD, provides only high-level guidance to agencies and leaves it up to the discretion of individual contracting officers to decide whether to reimburse contractors for covered paid leave costs. In short, the decision to reimburse paid leave costs is discretionary, will be determined on a case-by-case basis by individual contracting officers, and must be supported by adequate documentation. The memorandum states that agencies are permitted to reimburse contractors for COVID-19 paid leave payments made between March 27, 2020 and September 30, 2020. By contrast, DOD allows for reimbursement of qualifying paid leave between January 31, 2020, the date the U.S. Department of Health and Human Services (HHS) declared a national public health emergency for the novel coronavirus, and September 30, 2020.

A more detailed analysis of OMB's guidance is provided in a separate alert.

#### General Services Administration (GSA)

On April 21, 2020, GSA announced a class deviation from the General Services Administration Acquisition Regulation (GSAR) to provide guidance on its implementation of Section 3610 of the CARES Act. In announcing the class deviation, GSA emphasized that "[w]hether to reimburse, and how much to reimburse, are at the sole and absolute discretion of the Government," taking into account: (1) whether the contractor is eligible for reimbursable paid leave on a contract-by-contract basis; (2) whether it is in the Government's best interest to keep the contractor in a ready state (considering, for example, "the impact on the mission if contractors are unable to perform critical operations"); and (3) whether the amount of requested reimbursable paid leave on a contract is appropriate. GSA, however, does not expect to rely heavily on this class deviation, because "nearly all GSA contractors are able to continue to perform their work safely."

The class deviation largely tracks the statutory language and allows affected contractors to seek reimbursement of paid leave costs incurred to keep those employees and subcontractors in a "ready state." Only covered leave taken between March 27, 2020 and September 30, 2020 is eligible for reimbursement. Further, "[w]here practicable," reimbursements "shall not include profit or fees."

The new GSAR clause also provides key guidance to contractors seeking reimbursement, including the following provisions:

- Contractors may assume that "all contractor and subcontractor work sites are considered approved for the purposes of this clause," unless "the Contracting Officer identifies [the work site] specifically in writing as not approved."
- To request reimbursement from GSA, contractors must represent to the Contracting Officer that the request is made only in connection with leave for applicable work and that if the contractor receives credits under other sections of the CARES Act or under division G of the Families First Coronavirus Response Act of 2020 (FFCRA), they will timely notify the Contracting Officer.
- Contractors seeking reimbursement must "maintain records of the documentation supporting their request, including those requested by the Contracting Officer, in an auditable format, for three (3) years

after final payment on the contract.”

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