

ALERT

OMB Releases Guidance on Implementing CARES Act Provision Permitting Reimbursement of Paid Leave for Government Contractors Related to COVID-19

April 20, 2020

WHAT: In a recent client alert, we discussed guidance issued by several agencies, including the U.S. Department of Defense (DOD), on Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Section 3610 authorizes agencies to reimburse contractors for the costs of paid leave incurred to keep contractor or subcontractor personnel in a “ready state” if those personnel are (i) unable to access a government-approved facility, and (ii) unable to telework because their jobs cannot be performed remotely. On Friday, April 17, 2020, the Office of Management and Budget (OMB) issued a memorandum to Executive agencies addressing Section 3610. Unlike the more detailed instructions issued by DOD, OMB’s memorandum 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.

The memorandum sets forth several “guiding principles” for agencies on the use of Section 3610, organized into two general categories (“Support contractor resiliency” and “Exercise good stewardship”), the application of which “will support rationally based decisions that reflect the best interest of the government in any situation, fully supported by contractor records that are subject to oversight, and that safeguard the taxpayers funding these efforts.” It reminds agencies that Section 3610 authorizes them to reimburse contractors for paid leave costs incurred to keep personnel in a “ready state, including to protect the life and safety of government and contractor

Authors

Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

Practice Areas

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personnel," but also notes that the statute "provides agencies with considerable discretion to treat paid leave as a reimbursable cost" and that Section 3610 does not mandate the reimbursement of paid leave costs. To this end, OMB directs contracting officers to consider "the funding they have available," "the impact of funding or of not funding additional paid leave," and "the mission impact of each alternative," and also to evaluate whether other relief mechanisms may be available to contractors requesting the reimbursement of paid leave costs under Section 3610.

The memorandum also advises that contractors carry the burden of properly documenting their costs, including both the costs of paid leave and any other credits that the contractor has taken advantage of that may reduce reimbursement under Section 3610 (such as the Paycheck Protection Program). OMB emphasizes that "[f]ully supported documentation, which may involve representations, will help to prevent incidence of double-dipping" by contractors and will "be necessary to offset credits in accordance with the requirements" of Section 3610.

Finally, OMB states that agencies "are permitted to . . . reimburse at contractor billing rates, which might include certain overhead costs in addition to labor, but shall not include profit or fees." According to OMB, Section 3610 authorizes reimbursement "only . . . at the actual amount paid but not more than the minimum applicable contract billing rates up to an average of 40 hours per week." Notably, this restriction on reimbursing profit or fees does not appear in the CARES Act itself.

WHEN: OMB released its guidance on April 17, 2020. The memorandum states that agencies are permitted to reimburse contractors for coronavirus (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.

WHAT IT MEANS FOR INDUSTRY: While it is less detailed than DOD's parallel guidance, OMB's memorandum provides the general framework that most civilian agencies will use to analyze requests for reimbursement of paid leave costs under Section 3610 of the CARES Act. 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. As such, contractors and subcontractors impacted by the closure of government-approved facilities because of COVID-19 should continue to communicate with their contracting officers about receiving reimbursement of qualifying paid leave costs and closely track the costs incurred to keep their employees in a "ready state," as well as other potential avenues of monetary relief that they have identified.

OMB's guidance can be found [here](#).

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