

CARES Act Guidance Outlines Ways for Government Contractors to Obtain Reimbursement for Paid Leave to Employees and Subcontractors

The Office of Management and Budget (OMB) and several federal agencies have issued guidance implementing a provision in the CARES Act that allows government contractors to be reimbursed for paid leave to employees and subcontractors unable to work during the COVID-19 crisis.

The [guidance](#) issued in recent days by OMB, the U.S. Department of Defense (DoD), the General Services Administration (GSA), and other agencies implements section 3610 of the CARES Act, which allows agencies to reimburse contractors whose employees and subcontractors are unable to access worksites or telework during the COVID-19 crisis and are being kept in a "ready state."

The agencies' actions highlight that contracting officers have discretion to provide relief under section 3610 to contractors, but will take into account various considerations, including the availability of funds and other options. According to the agencies' directions, contractors that may be eligible for reimbursement for paid leave should segregate and track their leave costs based on specific agency instructions and be prepared to document their requests as fair and reasonable.

This update provides an overview of section 3610 and its implementation. It also discusses key considerations for contractors interested in obtaining reimbursement under the statute.

Section 3610 of the CARES Act

Section 3610 of the CARES Act stimulus bill, which was enacted on March 27, 2020, is aimed at keeping the federal contractor workforce intact during the COVID-19 public health crisis.

Under section 3610, subject to the availability of appropriations, agencies may use funds available under the CARES Act and other statutes to modify existing contracts to reimburse contractors for "paid leave, including sick leave" used to keep employees and subcontractors "in a ready state," including to protect the life and safety of government and contractor personnel.

Reimbursement must be "at the minimum applicable contract billing rates" and may not exceed an average of 40 hours per week. The statute limits relief to costs incurred through September 30, 2020. As discussed below, the agency guidance is inconsistent on the time period of relief.

Reimbursement is available only to contractors whose employees or subcontractors "cannot perform work" on a site that has been approved by the federal government, including a federally owned or leased facility, due to facility closures or other restrictions, and "who cannot telework because their job duties cannot be performed remotely" during the COVID-19 emergency.

The section applies "[n]otwithstanding any other provision of law[.]" Thus, agencies may use section 3610 notwithstanding restrictions in the FAR or Cost Accounting Standards, for example.

The maximum amount of reimbursement must be reduced by any amount of credit a contractor is allowed under the Families First Coronavirus Response Act (Pub. L. 116-127) or the CARES Act.

OMB Guidance Identifies Factors for Agencies to Consider

OMB has [encouraged](#) agencies to use telework, time extensions, and other steps to avoid COVID-19-related disruptions for government contractors. Section 3610 can provide assistance to contractors for which remote telework and worksite access are not possible due to COVID-19.

OMB's April 16, 2020, guidance memorandum outlines considerations for agencies when determining "the appropriate role of section 3610" in supporting contractors and subcontractors.

OMB notes that section 3610 gives agencies "considerable discretion" to treat paid leave under the statute as a reimbursable cost. Noting that section 3610 "does not compel reimbursement" of paid costs, the guidance advises agencies to exercise "good stewardship" over relief funds. Reimbursement is appropriate "only" when agencies find it in the government's best interests to grant it and agencies should consider, for example, whether options exist to help contractors under the CARES Act, including Paycheck Protection Program (PPP) loans.

According to OMB, relief under section 3610 may apply to commercial and non-commercial contracts. Reimbursement at contractor billing rates can include overhead but must not include profit or fees. The guidance notes that contractors are responsible for supporting any claimed allowable costs with appropriate documentation and must identify any credits that may reduce reimbursement under section 3610.

Timing Questions Remain

The guidance is inconsistent as to the time period for which reimbursement is available. The statute does not specify the starting date for reimbursement. According to OMB, reimbursement is only available for workers' lost time from March 27, 2020—the date of the statute's enactment—to September 30, 2020. GSA's guidance is similar, but the guidance issued by DoD and the U.S. Department of Energy provide for reimbursement for paid leave going back to January 31, 2020. The Office of the Director of National Intelligence's guidance suggests a request for equitable adjustment could be made for costs incurred starting on January 31, 2020, when a national state of emergency was declared.

Agency-Specific Guidance

Several procuring agencies have issued their own guidance documents implementing section 3610. For example:

U.S. Department of Defense

On April 8, 2020, DoD issued a [Class Deviation](#) implementing section 3610. It later issued a guidance [memorandum](#) and FAQ. DoD's Class Deviation provides a new cost principle that makes the costs of paid leave as a result of the COVID-19 emergency an allowable cost under Defense FAR Supplement (FAR) 231.205-79. DoD emphasizes that the contract and supporting documentation should "clearly identify" the costs for reimbursement and how such costs are identified, segregated, recorded, invoiced, and reimbursed. The guidance directs contracting officers to establish separate contract line items for section 3610 COVID-19 payments to "ensure traceability" of expenditures and clarify payments.

DoD's FAQs, in effect as of April 17, 2020, offer further details. For example, they note that a contractor or subcontractor employee does not have to be unable to perform 100% of his or her normal schedule for leave paid to them to be eligible.

GSA

On April 21, 2020, GSA issued a [Class Deviation](#) implementing section 3610. Noting that GSA has avoided contractor disruptions by using accelerated payments, telework, and other steps, the agency notes that it does not expect significant use of the paid leave reimbursement authority. GSA's guidance states that relief under section 3610 should only be contemplated after other methods to keep contractors in a ready state have been considered. The availability of funding is also a consideration, as agencies must be able to provide funding from some existing source.

Office of the Director of National Intelligence

ODNI has issued a [guidance memorandum](#) "strongly encouraging" intelligence community agencies to make "full use" of the flexibility provided by section 3610. The memorandum notes that section 3610 became effective as of March 27, 2020, but that contractors with "COVID-19 related costs" dating back to the president's declaration of a national emergency on January 31, 2020, may submit a request for equitable adjustment. The memorandum further states that contractors should segregate and identify the time and expenditures billed under section 3610.

U.S. Department of Homeland Security

On April 16, 2020, DHS's chief procurement officer released a [letter](#) to contractors stating that agency contracting officers "will work closely" with them to determine the applicability of section 3610 to each contract and to develop the contract terms and conditions. The letter lacks details.

U.S. Department of Energy

DoE has issued standard clauses that implement section 3610 in its contracts. For fixed-price and time and materials contracts, reimbursement will be made by submitting a request for equitable adjustment. The clause indicates that the amount of the adjustment will be subject to negotiation.

Considerations for Contractors

The agency guidance highlights several practical considerations for contractors affected by the stay-at-home orders and other measures responding to the COVID-19 outbreak.

- Reimbursement under section 3610 is permissive, not mandatory. Contractors should communicate with responsible contracting officers if they believe section 3610 may apply to them.
- Contractors must be prepared to document and substantiate their requests with appropriate billing records and evidence that the eligibility criteria are met. For example, affected workers must be unable to access a government "approved" site, unable to telework, and must be kept in a "ready state," which according to OMB means the "ability to mobilize in a timely manner." Written confirmation from contracting officers as to the contractor's eligibility should be sought as well so that the contract documentation is unambiguous.
- Contractors should segregate and track those costs in accordance with agency guidance, taking into account the contract type. Prime contractors should advise their subcontractors to track their costs as well

to the extent that they have allowable leave costs.

- Given the inconsistent agency guidance as to the time period of relief, defense and intelligence agency contractors that have incurred paid leave costs prior to March 27, 2020, should be prepared to cite the DoD and ODNI-specific guidance with agencies.
- The general rule is that, to be allowable, costs must be, among other things, reasonable (FAR 31.201-2). Contractors seeking reimbursement of paid leave under fixed-price contracts should be prepared to negotiate with the government as to what is a fair and reasonable adjustment, taking into account that reimbursement must be "at the minimum applicable contract billing rates not to exceed an average of 40 hours per week."
- Reimbursement requests must be reduced by the amounts of any credits received under other provisions of the CARES Act, such as a PPP loan used to pay payroll and other expenses. Also, DoD's FAQs state that contractors should disclose any reimbursement for paid leave received from state or local governments and should not request duplicate reimbursement where "other bases for relief have been accepted."

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