



## News & Trending

PUBLICATIONS & ALERTS

### FEDERAL CONTRACTORS MAY SEEK REIMBURSEMENT FOR PAID LEAVE UNDER SECTION 3610 OF THE CARES ACT

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The coronavirus (COVID-19) epidemic has caused hardship to many employers and employees and is likely to continue to do so in the near future. In response, the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) was passed by Congress on March 27, 2020. Federal government contractors with employees (or employees of subcontractors) who are unable to work because of COVID-19 should give careful attention to Section 3610 of the CARES Act, which allows government contractors to be reimbursed for the costs of paid leave where the employees in question could not work due to impacts of the crisis.

The Office of the Under Secretary of Defense **issued a Class Deviation** to Federal Acquisition Regulation (“FAR”) Part 31 and Defense FAR Supplement (“DFARS”) Part 231 that added DFARS 231.205-79 to the Department of Defense’s (DoD) cost principles, outlining the framework for implementing Section 3610 of the CARES Act. In addition, the Office of the Under Secretary of Defense **issued a memorandum** providing guidance on implementing Section 3610 on April 9, 2020 and **published a set of frequently asked questions** (and answers) providing further guidance, with the most recent update issued on April 17, 2020.

While further guidance from the Government is expected, including from agencies other than DoD, the information provided by these resources should help government contractors know what to expect with respect to the implementation of Section 3610.

### The Intent Behind Section 3610

The overarching purpose of Section 3610 is to allow the Government to reimburse contractors for employee-leave-related costs that are made necessary by COVID-19.

According to DoD guidance, Section 3610 allows contracting officers to reimburse the costs of paid leave made necessary to keep contractors in a “ready state” (meaning able to mobilize and resume performance in a timely manner)[1] and that would not have been paid had the COVID-19 pandemic not taken place. The Government recognizes that “it is important that our military, civilian, and contractor communities work together to withstand the effects of COVID-19 and maintain mission readiness.”[2] However, the DoD has also made clear that it “is important that our contracting officers are good stewards of taxpayer funds while supporting contractor resiliency,” so there are limits on reimbursement allowed under Section 3610, and there are certain steps that contractors must take to be eligible to receive reimbursement.[3]

## What Costs May Be Reimbursed

Section 3610 gives contracting officers the flexibility to use any “funds made available to the agency” to reimburse contractors for COVID-19-related paid leave between January 31, 2020 and September 30, 2020. Contractors must prove that leave was provided to maintain a “ready state” and to protect their employees in light of COVID-19. It also allows contracting officers to modify contracts to provide for reimbursement of allowable paid leave costs without securing any additional consideration from government contractors. Put simply, this means that contractors can be reimbursed, at the rates identified in their contracts, for up to 40 hours per week, per employee on qualified leave.

Despite this broad authority, Section 3610 has clear limitations. It only allows reimbursement where the contracting officer has first established in writing that the contractor at issue is an “affected contractor.”

Contractors may only receive reimbursement if they can document that the employees: (1) but for the COVID-19 pandemic, would work on a site approved by the Government pursuant to the contract(s) under which the claimed costs are sought; (2) could not perform work on such Federal Government approved site due to closures or other restrictions resulting from the COVID-19 pandemic; (3) were unable to telework or otherwise work remotely under the applicable contract(s) during the COVID-19 pandemic; (4) received paid leave for some period between January 31, 2020 and September 30, 2020, and (5) were paid leave at rates calculated based on the rates the contractor would have paid the employees to whom it is providing paid leave, but for the COVID-19 pandemic.

Further, contractors cannot “double-dip” by recovering the same costs from another source. Contractors should declare that (1) the costs they are claiming are only for paid leave meeting all of the above-numbered conditions and (2) that their claimed costs constitute the only reimbursement they are receiving for this purpose and they are not being paid or reimbursed for the same costs via any other source or funding. Federal contractors should carefully track what assistance they have requested or received from the Government and should make sure that they do not inadvertently seek reimbursement for the same costs twice.

## How to Apply for Reimbursement

Before applying for relief, contractors should ensure that they are complying with all of the requirements of DFARS 231.205-79 and the latest interpretive guidance. In order to seek reimbursement from the DoD for approved costs under Section 3610, federal contractors must document the above factors in writing. They also must identify any applicable credits they are allowed to recover under CARES, the Families First Coronavirus Response Act, or any other state or local benefits that mitigate impacts from COVID-19. Contractors should also make sure that all costs for which reimbursement is sought under Section 3610 are segregated and identifiable in the contractor’s records so that compliance with Section 3610 can be easily ascertained.

After contracting officers have received written notification in accordance with the above, they may issue a determination that the contractor at issue is an affected contractor, that the costs sought by the contractor are appropriate, and that reimbursements of such costs will be subject to the provisions of the CARES Act Section 3610, FAR Part 31, and DFARS Subpart 231.<sup>[4]</sup> In such cases, the contracting officer may modify the contract to receive the reimbursements allowed under Section 3610.<sup>[5]</sup>

## Documentation and Communication Are Key, and Reimbursement Is Not Guaranteed

There are several takeaways that a government contractor seeking reimbursement under Section 3610 should consider.

1. Section 3610 is **permissive, not mandatory**. There is no guarantee that you will receive any payments or reimbursements under Section 3610. Contracting officers will be weighing the Congressional intent to reduce the impacts of COVID-19 against the financial limitations of the DoD. Requests will be considered on a case-by-case basis, and contractors with more immediate needs are likely to receive priority.
2. Keep detailed records of your COVID-19-related costs. Section 3610 allows for reimbursements for leave **made necessary** by COVID-19. You should keep track of actions you have taken to continue work, the reasons why employee leave was necessary in light of COVID-19, why employees for whom leave is sought could not work remotely, and how the leave serves to keep employees in a safe and “ready state.” Paid leave that was not made necessary by COVID-19 will not be reimbursed. On the other hand, DoD guidance recognizes that some contractor employees cannot be at the workplace or work remotely because of public health reasons or family care issues, even when the work site is open and accessible. Again, contractors bear the burden of supporting any claimed costs, which is why documentation is critical.
3. You cannot “double dip” by receiving reimbursement for the same costs more than once. The amount of eligible reimbursement will be reduced by any other credits or relief that you receive under state, federal, or local law that is related to COVID-19. For example, if a contractor receives a loan under the Paycheck Protection Program (PPP), the Government should receive a credit or reduction in billing for any PPP or loan payments allocable to costs allowed under a contract, regardless of whether that loan is ultimately forgiven. Similar reductions or credits are required for any other local, state, or federal COVID-19-related credit that a contractor may receive. If you plan to apply for, or have applied for, any other COVID-19 related credit, you should note this in your communication with your contracting officer.
4. There is no advance payment under Section 3610. Reimbursement must be provided after the contractor has already incurred costs.

If you have any questions related to this alert, please do not hesitate to contact any member of the Government Contracting group or your regular Smith Anderson lawyer. Please visit and bookmark our firm’s **Coronavirus (COVID-19) Business Resource Center**, which is regularly updated with useful materials and resources related to COVID-19. This tool has been made available to ensure that our clients and the broader business community stay informed on key issues that may impact their operations and to navigate the related business and legal issues during these challenging times.

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[1] *Id.* at 5.

[2] Class Deviation 2020-0013, at 1.

[3] *Id.* at 2.

[4] Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act, at 2.

[5] *Id.*

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Government Contracting

