Overview

For additional guidance, please refer to Steptoe’s COVID-19 Resource Center.

The economic stimulus legislation, known as Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), provides economic relief to a variety of businesses facing economic hardships caused by COVID-19, including an avenue for some federal contractors and subcontractors idled by COVID-19 to recover certain labor costs. Specifically, Section 3610 of the act (entitled Federal Contractor Authority) provides federal agencies the discretion to modify contracts, without consideration, in order to reimburse contractors at the minimum applicable contract billing rates for any paid leave, including sick leave, that the contractor or subcontractor provides its employees, subject to a not-to-exceed amount of an average of 40 hours per week.

The purpose of Section 3610 is to keep contractors vital to the federal government in a ready state. This relief is available to federal contractors and subcontractors performing work on government-owned, government-leased, contractor-owned, or contractor-leased facility or any other site approved by the federal government for contract performance. Although the provision provides a lifeline to struggling contractors, Section 3610 and the subsequent guidance are not without restrictions, giving rise to important compliance considerations. This advisory provides a summary of initial guidance issued by the federal government last week.

On April 8, 2020, the Department of Defense (DoD)’s Defense Pricing and Contracting (DPC) office issued a class deviation (linked here) to the Federal Acquisition Regulation and a new Defense Acquisition Regulation Supplement (DFARS) entitled, “CARES Act Section 3610 Implementation” (DFARS § 231.205-79) and issued responses to “Frequently Asked Questions” (linked here) in order to provide much needed guidance to the contractor community. In issuing this class deviation, DoD acknowledged the “need for additional guidance” and stated that it will “provide additional implementation information and guidance as appropriate.” On April 9, 2020, DPC also issued additional “Implementation Guidance for Section 3610” (linked here). On the same day, April 9, 2020, the Office of the Director of National Intelligence publicly released its own set of “Guiding Principles” for the “Intelligence Community” on implementation of CARES (linked here).

Eligibility Requirements
Applies to contractors and subcontractors, regardless of business size or contract type.

- By its terms, Section 3610 provides procuring agencies the authority to "modify the terms and conditions of a contract, or other agreement." In its FAQs, DoD even addressed commercial items contract and said that "Section 3610 does not prohibit reimbursement of COVID-19 paid leave costs under contracts for commercial items." At the same time, the FAQs emphasize that Section 3610 "is permissive and not mandatory" and that there will be more guidance forthcoming.

- Reimbursement must be necessary to keep employees in a "ready state."

**Contractor Must Be Sidelined:** Covered paid leave is limited to leave taken by employees who otherwise would be performing work on a site that has been approved for work by the federal government, including on a government-owned, government-leased, contractor-owned, or contractor-leased facility approved by the federal government for contract performance; but

- The work cannot be performed because such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work at the facility or site as a result of the COVID-19 national emergency; and
- Paid leave is granted because the employee is unable to telework because their job duties cannot be performed remotely.

- The facility at which work would otherwise be performed is deemed inaccessible because travel to the facility is prohibited or made impracticable by applicable federal, state, or local law, including temporary orders having the effect of law.

**Limitations and Restrictions**

- **Time Period:** Recovery is limited to costs incurred between January 31, 2020, and September 30, 2020, and contingent upon the availability of funds.
- **Discretionary:** Reimbursement is discretionary, not mandatory. The class deviation directs contracting officers to assess the immediacy and the specific circumstances of the contractor's need.
- **No Double Dipping:** The class deviation directs contracting officers to secure representations from contractors regarding any other relief claimed or received stemming from COVID-19, including an affirmation that the contractor has not or will not pursue reimbursement for the same costs accounted for under their request, to support their requests for reimbursement under Section 3610. The class deviation specifically notes that contractors that obtain relief under the small business Paycheck Protection Program should not seek relief under Section 3610.

What should contractors do now?

- Federal contractors or subcontractors that have been affected by COVID-19 should gather evidence supporting their eligibility for relief, including documentation of the reasons why work could not be performed at the site and why teleworking was not available, supporting any claimed costs, including claimed leave costs for their employees, and identifying credits that would reduce reimbursement under Section 3610.
  - The FAQs state that, in submitting requests for determinations of affected contractor status, contractors "should describe the actions the contractor has taken to continue performing work under the contract, the circumstances that made it necessary to grant employee leave, an explanation of why it was not feasible for employees to continue performance via telework or other remote work, and how the leave served to keep employees in a ready state."
- If a contractor or subcontractor is eligible, they should ensure that their accounting system records, tracks, and, as necessary, segregates costs.
- Contractors and subcontractors must be sure to disclose other government benefits that they are claiming and receiving and, as appropriate, deduct those amounts from any request for payment under Section 3610.

Open questions

- What constitutes a "ready state?"
  - Neither the CARES Act nor the class deviation define "ready state." In its FAQs, DPC explains that this "refers to a contractor's ability to mobilize and resume performance in a timely manner." Although this provides some guidance on those terms, the application may depend on the types of contracts at issue, the efforts needed to resume performance, and the practical alternatives available.
  - This will likely be resolved in a case-by-case basis with the contracting officer.

Practices

**Government Affairs & Public Policy**

**Government Contracts**