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ALERT

# Effective Immediately: Final DOD Guidance on Section 3610 Reimbursement

August 20, 2020

**WHAT:** Almost five months after the enactment of the Coronavirus Aid, Relief, and Economic Security (CARES) Act—which included a provision allowing government contractors to seek reimbursement of costs for paid leave associated with the coronavirus (COVID-19) pandemic—the U.S. Department of Defense (DOD) has issued a class deviation providing guidance for contracting officers reviewing contractors' payment requests. As we've previously discussed, Section 3610 of the CARES Act authorizes (but does not require) 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. DOD officials have publicly stated that the department does not have enough funding to pay all expected contractor reimbursement requests.

DOD's class deviation, which supersedes its prior guidance, is available here.

**WHEN:** The class deviation was issued August 17, 2020. It is effective immediately.

**WHAT DOES IT MEAN FOR INDUSTRY:** Contractors seeking reimbursement of Section 3610 costs should pay close attention to DOD's class deviation to ensure their requests comply with DOD's requirements. Contractors should also reach out to their contracting officers as early as possible to ensure that they are providing the information the contracting officer needs to approve a reimbursement request.

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## Practice Areas

Government Contracts

See below for key aspects of the class deviation that contractors should keep in mind when seeking reimbursement under Section 3610.

- Checklists for Different Scenarios: DOD has created three checklists for contractors that describe the types of information the contracting officer will need to assess reimbursement requests. In general, DOD wants contractors to identify the relevant contract, provide a narrative explaining why it was necessary to provide paid leave to keep employees in a ready state, and describe the accounting of the cost of the leave payments.

The checklists cover three scenarios in which contractors may be seeking reimbursement:

1. Abbreviated Reimbursement Checklist: Used for reimbursement under a single contract of direct charged employees when the amount of the request is under $2 million.
2. Multipurpose Reimbursement Checklist: Used for reimbursement when the other two checklists are not appropriate. Requests should relate to a single contract or a homogeneous group of contracts, such as those with a single DOD component.
3. Global Reimbursement Checklist: Used for reimbursement requests at a company or business unit level.

Even if the contractor provides all the information on the relevant checklist, however, a contracting officer can still request additional information that is not required by the checklist. The contracting officer can also tailor a checklist to fit a contractor's unique circumstances, and contractors should consider requesting modifications to meet specific circumstances if the checklist requirements are too burdensome.

- Requests Must Include Specific Representations: All requests must include the following representations or should explain why the contractor cannot make the representation:
  - All paid leave included in the request for reimbursement was specifically paid to keep the employees and/or subcontractors in a ready state;
  - The contractor segregated and reported the actual costs of the Section 3610 paid leave payments, traceable to the individual employee charges;
  - The Section 3610 reimbursement request excludes any paid leave costs associated with the contractor's work as a subcontractor to another contractor;
  - All impacted subcontractors have been afforded an opportunity to submit a request for reimbursement of Section 3610 paid leave costs, and eligible subcontractor Section 3610 reimbursement requests received and as appropriate are incorporated into the contractor's Section 3610 reimbursement request for the contractor to pay to the subcontractor;
  - The Section 3610 reimbursement request has been reduced by any applicable credits or loan forgiveness the contractor has received that is/are specifically identifiable to the public health emergency declared on January 31, 2020, for COVID-19;

  - The costs included in the Section 3610 reimbursement request have not been requested elsewhere in another Section 3610 reimbursement request; and
  - The Section 3610 reimbursement request is made in good faith, and the supporting data is accurate and complete to the best of the contractor's knowledge.
- Effective Date of March 27, 2020: Contrary to its earlier guidance, which suggested that contractors could seek reimbursement of ready state costs from the start of the pandemic in January 2020, the class deviation states that DOD will not approve costs for paid leave prior to March 27, 2020, when the CARES Act was signed into law. This change aligns DOD's guidance with that issued by the Office of Management and Budget (OMB). The class deviation does note, however, that contracting officers could reimburse costs for earlier paid leave using other contractual authorities, if applicable.
- Individual vs. Consolidated Submissions: The guidance explains that a contractor can submit a reimbursement request for a single contract, multiple contracts, or an entire business unit. Regardless of how the requests are submitted, DOD can choose to group together separate requests.
- Submission of Additional Requests: For those contractors that have already submitted an initial request under Section 3610, the DOD guidance allows contractors to submit additional requests for paid leave costs incurred after the submission of the initial request. The guidance cautions contractors to ensure their later requests are consistent in the methodology used to calculate the amount sought.
- Subcontractor Requests Should be Submitted to Prime: The class deviation requires subcontractors to submit their requests for Section 3610 reimbursement to their prime contractor. The prime contractor should include subcontractor costs in its request to the Government.
- Contractors Must Segregate Costs: The costs of paid leave must be segregated within the contractor's accounting system. Those costs must be for leave that was paid to employees who could not work due to facility closures and cannot include leave that employees were otherwise entitled to receive absent the COVID-19 pandemic. The Multipurpose and Global Reimbursement Checklists also require contractors to show how they have revised their indirect rates to exclude charges included in their Section 3610 reimbursement requests.
- Profit/Fee Excluded: DOD's guidance definitively states that profit or fee will not be paid under Section 3610. Contractors may add overhead and general and administrative (G&A) expenses to the applicable labor rates.
- Notification of Duplicate Costs: Contractors must notify the contracting officer within 30 days of receiving any credits for the same paid leave costs that were reimbursed under Section 3610.

Wiley's cross-disciplinary team will continue to monitor developments regarding implementations of the CARES Act and its impact on contractors.

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