

Help for Government Contractors Dealing with COVID-19 – CARES Act Section 3610 Ensuring Ready State

April 15, 2020

While much of the focus of the recently enacted CARES Act has been on providing loans and grants to help small businesses meet payroll and avoid layoffs, Section 3610 of the CARES Act provides critical support specifically to federal contractors who are impacted by the temporary closures of government facilities and other work sites. This is an important measure aimed at helping businesses who contract with the federal government avoid layoffs and furloughs and remain at a "ready state" (*e.g.*, "able to mobilize in a timely manner") through the COVID-19 disruption.

At a high level, Section 3610 permits federal agencies to use CARES Act funds to modify existing government contracts to allow contractors to seek reimbursement of certain paid leave (including sick leave) that a contractor provides to keep its employees or subcontractors in a ready state to protect life and safety of government and contractor personnel for the duration of the COVID-19 public health emergency.

Government guidance

On April 3, 2020, the Office of the Director of National Intelligence issued guiding principles for the intelligence community regarding the implementation of Section 3610 and strongly encouraged IC agencies to make full use of the flexibility it provides to contractors. Similarly, on April 8, 2020, the Department of Defense issued a memorandum providing guidance to procurement commands and contracting officers on how they can use Section 3610 to help contractors. The DoD memorandum attaches a copy of DFARS 231.205-79 ("CARES Act Section 3610 – Implementation").

Eligibility

To be eligible for relief under Section 3610, a contractor's employees must:

1. Be unable to perform work on a government-owned, government-leased, contractor- owned or contractor-leased facility or site approved by the federal government for contract performance due to closures or other restrictions; and
2. Be unable to telework because their job duties cannot be performed remotely during the COVID-19 crisis.

Limitations

It is important to note that the ability to charge paid leave costs to the government is subject to certain limitations. For example:

1. The contracting officer must have established in writing that the company seeking reimbursement is an affected contractor.
2. Reimbursement of leave costs is allowable only up to an average of 40 hours per week per employee and at minimum applicable billing rates.
3. Costs for which reimbursement is sought must have been incurred as a result of COVID-19 and not incurred in the normal course of business.
4. Reimbursement will not be provided for costs incurred after September 30, 2020, and any reimbursement will be subject to availability of funds.
5. Contractors may not double dip by receiving reimbursement under Section 3610 and financial assistance under other CARES Act relief programs (*e.g.*, under the Paycheck Protection Program) to the extent the

CARES Act financial assistance would cover the same costs for which it is seeking reimbursement under Section 3610. Accordingly, reimbursement for costs made allowable under Section 3610 must be reduced by the amount the contractor is eligible to receive under any other federal payment, allowance or tax or other credit allowed by law that is specifically identifiable to COVID-19.

Practical tips

1. Prior to pursuing reimbursement of costs under Section 3610 from your government customer, have a discussion with your contracting officer and ask them to confirm in writing that you are an affected contractor.
2. Remember that receiving financial assistance under a particular CARES Act program may prevent a contractor from pursuing other forms of CARES Act relief. Before pursuing Section 3610 relief, carefully consider the other financial assistance programs that may be available under the CARES Act (such as PPP loans, tax credits and deferrals, etc.).
3. Be prepared to act quickly, as reimbursement under Section 3610 will be unavailable for costs incurred after September 30, 2020, and in all cases will be subject to the availability of funds.
4. Keep accurate records of costs charged under each contract for which reimbursement is obtained under Section 3610 so that such costs and any applicable reimbursement can easily be identified in the event of an audit (especially if you plan to take advantage of any other financial assistance available under the CARES Act).
5. To the extent you are considering pursuing either a PPP loan or Section 3610 relief, be mindful of the key differences: PPP relief comes in the form of a loan (which should be largely forgivable) and requires lender approval and certifications by the applicant, including with respect to eligibility and the necessity of a loan. Section 3610 relief comes in the form of cost reimbursement under existing contracts, requires approval from only the contracting officer and allows reimbursement under existing contracts.

Note that further guidance on Section 3610 and other aspects of the CARES Act are being made available periodically, and we are continuing to monitor further updates.

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