

# DoD Issues Class Deviation and Guidance to Implement CARES Act Relief for DoD Contractors under Section 3610

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Section 3610 of the CARES Act provides for funding to aid government contractors whose employees or subcontractors “cannot perform work on a site that has been approved by the federal government, including federally-owned or leased facility or site, due to facility closures or other restrictions” and cannot telework during the COVID-19 public health emergency. As noted in a previous [Stinson alert](#), section 3610 raised a number of questions. On April 8, 2020, DoD issued an immediately effective [Class Deviation](#) for section 3610 that attempts to strike a balance between the necessity of maintaining overall readiness and the importance of ensuring a responsible use of public funds for DoD contractors and subcontractors. [Related Implementation Guidance](#) and [Implementation Guidance FAQs](#) were issued the next day.

## Section 3610

Section 3610 of the CARES Act allows executive branch agencies, including DoD to fund certain contractor costs for payment of leave, and to retain readiness where the contractor’s or its subcontractor’s employees cannot perform due to “closures or other restrictions” and they are “unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020,” for the coronavirus (COVID–19). More particularly, the section facilitates, subject to the availability of funds, government reimbursement of a government contractor “at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave,” where the contractor expends such funds “to keep its employees or subcontractors in a ready state, including to protect the life and safety of government and contractor personnel, but in no event beyond September 30, 2020.”

## FAR Part 31 and DFARS Part 231 Class Deviation

Implementing section 3610 of the CARES Act, the new DoD Class Deviation to FAR Part 31 and DFARS Part 231 “authorizes contracting officers to use the attached DFARS 231.205-79, CARES Act section 3610 Implementation, as a framework for implementation of section 3610.” The Class Deviation 2020-O0013 directs that a new cost principle, DFARS 231.205-79, and accompanying CARES Act Section 3610 Implementation, be used by DoD contracting officers to appropriately balance flexibilities and appropriate limitations when implementing section 3610.

The Class Deviation expressly recognizes the imperative to support DoD contractors that are “struggling to maintain a mission-ready workforce due to work site closures, personnel quarantines, and state and local restrictions on movement related to the COVID-19 pandemic” when such issues cannot be overcome through remote work. But it also emphasizes the importance of contracting officers continuing to act as “good stewards of taxpayer funds while they support contractor resilience,” which means they will hold contractors responsible for supporting any claimed costs. In addition to appropriately documenting all claimed leave costs for their employees, contractors must be ready to identify credits that may reduce reimbursement under section 3610. Indeed, the Class Deviation directs

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contracting officers to secure representations from contractors regarding any other relief claimed or received, including an affirmation that the contractor has not or will not pursue reimbursement for the same costs accounted for under their request.

It also requires contracting officers to consider the immediacy of the specific circumstances of the contractor involved and respond accordingly. As the Class Deviation recognizes, some contractors will have more immediate needs than others, depending on the nature of their contracts and their performance requirements. For example, the impact of COVID-19 on a contractor providing janitorial services at a now-closed federal facility will be significantly more dire than that on a contractor whose employees are able to work from home. For this reason, the survival of many of the businesses the CARES Act is designed to assist may depend on the contracting officer's efficiency in this regard. Contractors should keep this in mind when seeking relief under section 3610—and tailor their request to contracting officers to highlight the immediacy of the coronavirus-related impacts they are experiencing.

- DFARS 231.205-79

The DoD Class Deviation establishes a new cost principle that applies only to a contractor (i) established in writing by the cognizant contracting officer to be an affected contractor; and (ii) whose employees or subcontractor employees cannot perform at a government-approved facility or site due to closures or other restrictions and are unable to telework because their jobs cannot be performed remotely. It also reiterates that the maximum reimbursement allowed under section 3610 will be reduced by the amount of any credits a contractor is allowed pursuant to laws specifically identifiable to the COVID-19 public health crisis declared on January 31, 2020, including the Families First Coronavirus Response Act (Pub. L. 116– 127), the CARES Act (Pub. L. 116-136), “or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19.”

Under the cost principle, "costs of paid leave (including sick leave), are allowable at the appropriate rates under the contract for up to an average of 40 hours per week, and may be charged as direct charges, if appropriate," so long as they are incurred either for the purpose of keeping contractor employees and subcontractor employees in a ready state notwithstanding risks arising from the COVID-19 public health emergency, or protecting the life and safety of government and contractor personnel against such COVID-19 risks.

Only costs "incurred as a consequence of granting paid leave as a result of the COVID-19 national emergency and that would not be incurred in the normal course of the contractor's business" are allowable. In addition, covered paid leave is limited to leave taken between January 31, 2020 and September 30, 2020 by employees who otherwise would be performing work on a site that has been approved for work by the federal government, but the work cannot be performed at such facility because it has been closed or made practically inaccessible or inoperable and the employees have been granted leave because their job duties cannot be performed remotely during the COVID-19 public health emergency. In this regard, the cost principle states that a facility "is deemed inaccessible ... to the extent that travel to the facility is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law."

Contractors seeking to take advantage of this cost principle must segregate and identify such costs in their records so that compliance with all applicable terms can be reasonably ascertained.

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- Implementation Guidance

The DoD Implementation Guidance issued on April 9 starts with the premise that contractors usually include leave costs as part of their indirect rates which are wrapped into their fixed price for a fixed price contract; labor rate for time and materials type contracts; or as a cost element under cost-reimbursement contracts.

For fixed price contracts, these adjustments are not to include any increase in profit, but are only to address increased costs of providing leave as permitted under section 3610. Where cost increases impact multiple contracts, then the contractor is required to “reasonably allocate” these increased costs across the affected contracts. These increased costs should be pursued through submission of a request for equitable adjustment and will need to be negotiated with the appropriate administrative contracting officer.

For cost reimbursement contracts, the increased costs should be placed in a separate account and efforts to address such increased costs should be coordinated with the contracting officer.

For time and materials or labor hour contracts, a request for equitable adjustment must be prepared and a separate contract line item will be established to address these segregated costs.

Where cost impacts fall on a contractor’s fixed, time and materials, labor hour, and/or cost reimbursement contracts, segregation of costs and coordination with the contracting officer will be needed. Note that cost reimbursement will depend on the availability of funds in accordance with section 3610.

Whether fixed price, cost reimbursement, time and materials or labor contract contracts, it will be important for contractors to segregate, track and trace their costs to determine allowability and cost recovery terms.

- Implementation Guidance FAQs

DoD's [Implementation Guidance frequently asked questions \(FAQ\)](#) seeks to address some immediate questions about this new cost principle. It is expected that these FAQs will be expanded as new questions are asked and answered.

Among other things, the Implementation Guidance FAQs explain that the determination of whether to provide relief under section 3610 will vary based on contract type and the specific facts. A contractor seeking such relief "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." This is consistent with the statement in the Class Deviation that even contractors that are considered part of the essential critical infrastructure workforce, or that have been directed to implement the Continuation of Essential Services Plan in their contract must demonstrate that all reasonable efforts were made to continue contract performance.

Relief will be provided on a case-by-case basis. Contracting officers must consider the "particular circumstances of each contract, including, among other things, the impacts realized from COVID-19, Defense Industrial Base telework or remote work efforts, the availability of funds for reimbursement, applicable laws and regulations, and any relief the contractor has secured or may secure through the CARES Act and/or other laws enacted in response to this national emergency. It is also important to remember that relief under section 3610 is discretionary not mandatory, and in any event will be subject to availability of funds.

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The FAQs also provide that, in addition to FAR-based contracts, this form of section 3610 relief may be applied to other forms of agreements, including Other Transaction Agreements. It also leaves open the possibility that it could be applied to commercial item contracts.

The FAQs also address other important questions about DoD's implementation that are not clear from the terms of section 3610 or the implementing deviation:

- The Class Deviation does not provide advance payment relief; relief would be provided where the contractor has incurred the costs.
- For purposes of section 3610, the "approved" work site is broadly construed to include the contractor's location and any other places of performance specifically identified in the contract—and may include multiple work sites and/or locations.
- Relief under section 3610 may, in the contracting officer's discretion, be made available in cases where the work sites are open and accessible, but, for public health reasons or family care issues, contractor employees cannot be in the workplace and cannot otherwise work remotely. In this case, however, contractors bear the burden of supporting any claimed costs, including claimed leave costs for their employees, with appropriate documentation.
- Contractors should segregate costs that would be allowable under existing cost principles from leave costs that are only allowable if the leave complies with the new DFARS 231.205-79. Only allowable leave, that is compliant with the new cost principle, and which is not recovered through other means, e.g., existing leave, other credits or relief forms, may be included under this new cost category. The FAQs suggest that other relief that needs to be included may arise through state or local government reimbursement.

Despite DoD's having issued a policy, cost principle, guidance and FAQs on this relief form, questions still remain:

- Will other executive branch agencies issue their own implementing deviation and guidance to apply section 3610 relief?
- Will a contract clause be issued to be included in a contract so as to implement this type of relief, or will it be handled solely as a cost principle to be applied pursuant to another contract clause, such as one of the FAR clauses covering Changes, Excusable Delay, Allowable Cost and Payment, etc.?
- Will the costs of leave made allowable under section 3610 be charged as direct or indirect costs? Absent specific rule or guidance, it is likely that this will have to be addressed through negotiation, REA or claim avenues.
- How will contractors be required to allocate the relevant paid leave costs? FAQs suggest the costs should be included in a newly created cost category for negotiated allocation. Whether and how this will impact disclosed accounting practices and procedures, will need to be addressed in further guidance.
- How does this new cost principle impact the terms of any FAR, Defense Federal Acquisition Regulation Supplement (DFARS), or agency supplement clause, or any other preexisting contract unique terms that might exist, including those that address cost or funding limits?
- What of the situation where the contractor has already given notice, sought an REA, or filed a claim under the contract's pre-existing Changes, Excusable Delay, or other clauses of its contract? Will this cost principle impact recovery under those pre-existing situations?

Rather than providing specific relief to any contract or type of contract, the DoD Class Deviation authorizes reimbursement for certain COVID-19-related costs under certain conditions and provides authority for agencies to "modify the terms of a contract" to reimburse the described costs. Calculating the impacts and addressing them in an appropriate way for a contractor may be challenging given the potential number and complexity of the contractor's business organizations and contracts. Additionally, this is not a funded mandate in the CARES Act.

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Whether and to what extent relief will be forthcoming remains to be seen. Indeed, it is unclear whether other federal agencies will follow DoD's implementation and interpretative guidance, or if they will apply section 3610 differently. As of this date, there is no open FAR case on the provision. Last, and quite significant, contractors making assertions for themselves, or their subcontractors, need to remember that their submissions must be accurate and complete. Under the False Claims Act, each recorded assertion of impact and request for relief therefor may be considered an actual or implied certification of the accuracy, currency, and completeness of a claim. Severe penalties may be exacted if a claim is determined to be false or fraudulent. Care in tracking and documenting costs and asserting any request for relief are imperative. Fulsome disclosure and transparency will be important.

This is an area where further guidance is expected. We are watching developments closely. If you have questions about this alert, or have specific questions about obtaining or pursuing relief under this framework, please contact one of the authors listed below, the Stinson Coronavirus Task Force, or the Stinson LLP contact with whom you regularly work.

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