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DoD Issues Class Deviation to Address Contractor Reimbursement for Paid Leave Required to Maintain a Mission-Ready Workforce During the COVID-19 Outbreak Pursuant to Section 3610 of the CARES Act

To further assist the contractor community with the effects of the unprecedented Coronavirus Disease 2019 (COVID-19), the U.S. Department of Defense (DoD) issued on April 8, 2020 a Class Deviation authorizing contracting officers to use a new clause – DFARS 231.205-79, CARES Act Section 3610 Implementation – to address contractor reimbursement under Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136). Section 3610 allows agencies to reimburse paid leave, including sick leave, that a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, during the COVID-19 pandemic. Paid leave is reimbursable at the contractor's minimum billing rates under its contracts, and may be allowed for up to an average of 40 hours per week.

The Class Deviation, through DFARS 231.205-79, creates a new cost principle that makes paid leave incurred by the contractor as a result of COVID-19 an allowable cost. Below are some of the highlights of the DoD's Class Deviation and DFARS 231.205-79:

- To be eligible under the new cost principle, a contractor's employees or subcontractor employees:
  - (1) must not be able to perform work on "a government-owned, government-leased, contractor-owned, or contractor-leased facility" or other site approved by the Government for contract performance due to closures or other restrictions, and
  - (2) must not be able to telework due to the fact that their job duties cannot be performed remotely. DFARS 231.205-79(a)(1)(ii).
  - The cost principle's inclusion of "contractor-owned" and "contractor-leased" facilities resolves an apparent ambiguity present in the statutory language of Section 3610 of the CARES Act, which as enacted states it applies to sites that have been "approved by the Federal Government, including a federally-owned or leased facility or site." The addition of "contractor-owned" and "contractor-leased" facilities in DFARS 231.205-79 should remove any doubt that paid leave for work that cannot be performed at a contractor's own facilities due to COVID-19 also qualifies for reimbursement.

- The new cost principle further states that to be eligible for reimbursement, the contractor must be "established in writing to be an affected contractor" by the cognizant contracting officer. DFARS 231.205-79(a)(1)(i). The cost principle provides no further guidance on what "an affected contractor" means, although presumably it means a contractor whose employees or subcontractor employees cannot perform work on-site or telework due to COVID-19. The cost principle also does not set forth any procedures by which contracting officers are to "establish[] in writing" that a particular contractor is "affected." **Accordingly, contractors should be in communication with their contracting officers to ensure that the requisite writing establishing their affected status is executed**.

- Leave must be taken during the period of January 1, 2020 to September 30, 2020 to be covered under the new cost principle. The leave also must be taken by employees whose work cannot be performed because facilities have been closed or "made practically inaccessible or inoperable," or because other restrictions prevent work at the facility or site as a result of the COVID-19 national emergency. DFARS 231.205-79(b)(3)(i).

  - The cost principle clarifies that a facility is deemed "inaccessible" if "travel to the facility is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law." DFARS 231.205-79(b)(4). While this would seem to allow compliance with state and local orders to serve as a basis for reimbursement, the scope of this provision could be limited by exceptions in such state and local orders for "essential" or "national defense" work. **Accordingly, contractors are well-advised to review whatever state or local stay-in-place orders may be in effect in their jurisdictions before seeking reimbursement for paid leave under the new cost principle**.

- The new cost principle requires that, to be allowable, a contractor's paid leave costs "must be segregated and identifiable in the contractor's records so that compliance with all terms of this section can be reasonably ascertained." DFARS 231.205-79(b)(2). The cost principle states that such segregation and identification can be performed by "any reasonable method," as long as the results of the method "provide a sufficient audit trail." *Id.* **The inclusion of this language is an important reminder for contractors that even during times of extraordinary crisis, careful bookkeeping is essential for recovering costs**.

- Correspondingly, the new cost principle limits allowable paid leave costs to those incurred as a result of the COVID-19 national emergency and that would not be incurred in the normal course of the contractor's business. The cost principle also requires that any costs made allowable under it 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" with the COVID-19 national emergency, including the tax credit for paid leave allowed under Division G of the Families First Coronavirus Response Act (Pub. L. 116-127). DFARS 231.205-79(b)(6).

  - With respect to these requirements, the Class Deviation states that "[c]ontractors are responsible for supporting any claimed costs…with appropriate documentation and for identifying credits that may reduce reimbursement," and that "it is important that contracting officers 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…." **Consequently, contractors seeking to avail themselves of the reimbursement should exercise caution in supporting their requests for reimbursement, and in making any certifications or representations in connection with their requests, so as to mitigate the risk of disallowance claims, penalties for unallowable costs, and potentially False Claims Act liability**.

- The Class Deviation further states that "contracting officers shall consider the immediacy of the specific circumstances of the contractor" when implementing Section 3610. In particular, contracting officers should consider whether the contractor involved can conduct business and generate new revenue during the pandemic, as well as whether the contractor is facing any difficulties making payroll, retaining employees, and paying its expenses. **As such, contractors also should document and be able to demonstrate the immediacy of their need to justify prioritized reimbursement of paid leave for the contracting officer**.

As you are aware, things are changing quickly and there is no clear-cut authority or bright line rules in this area. This alert does not reflect an unequivocal statement of the law, but instead represents our best understanding of where things currently stand. Further, this alert does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay, and other issues.

For more legal insights visit our Coronavirus (COVID-19) page.

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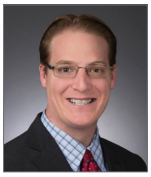

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