

## CARES Act Authorizes Reimbursement for Department of Defense Contractors' Paid Leave Expenses

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April 20, 2020

Section 3610 ("Federal Contractor Authority") of the CARES Act, signed into law on March 27, 2020, provides U.S. contracting agencies with discretion to modify the terms and conditions of government contracts to allow for contractor cost reimbursement for paid leave to keep their employees and subcontractors in a "ready state." On April 8, 2020, the Department of Defense ("DoD") approved a deviation from the DoD's traditional contract cost principles ("DoD Contract Cost Principles") under Defense Federal Acquisition Supplement ("DFARS") 231 to authorize DoD contracting officers to use the newly issued DFARS 231.205-79 as a means to implement the Federal Contractor Authority for defense contractors.

### *What Relief does the Federal Contractor Authority Provide?*

Under the Federal Contractor Authority, government funds may be used to modify the terms and conditions of a defense contract to reimburse a defense contractor for paid leave provided to keep employees or DoD subcontractors in a "ready state." The funds may be used by DoD contracting officers to reimburse defense contractors only for those defense contractor employees or DoD subcontractors that cannot perform work onsite, or telework during the public health emergency declared on January 31, 2020, for COVID-19.

### *What Are the Requirements for Reimbursement?*

In order for a defense contractor to receive DoD cost reimbursement under the CARES Act: (i) the defense contractor and the DoD contracting officer must alter the terms of the DoD contract to provide for such cost reimbursement; (ii) the DoD cost reimbursement must be used by the defense contractor to pay and maintain its employees or DoD subcontractors, in a "ready state"; (iii) the DoD cost reimbursement will be set at the minimum applicable DoD contract billing rates, which will not exceed an average of 40 hours per week for "ready state" paid leave; (iv) the worksite at which the defense contractor's employees or DoD subcontractors cannot perform work must be an "approved site"; and (v) "ready state" paid leave costs must be incurred by the defense contractor between January 31, 2020, and September 30, 2020.

### *What is a Ready State under the Federal Contractor Authority?*

A "ready state" is the ability to mobilize a defense contractor's employees and DoD subcontractors in a timely manner. The DoD cost reimbursement under the Federal Contractor Authority is applicable only to those defense contractor employees or DoD subcontractors that are unable to work, even remotely or through telework, during the public emergency, between January 31, 2020, and September 30, 2020. If a defense contractor's worksite remains open, certain defense contractor employees may still be unable to work, either at the worksite or remotely, such as for public health reasons, worksite safety protocols, or family care issues. In this case, "ready state" paid leave for the employee may still be warranted and the Federal Contractor Authority may still apply. However, defense contractors bear the burden of supporting the claimed costs for DoD reimbursement with appropriate employee payroll and DoD subcontract documentation.

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Importantly, while ordinary paid leave is an allowable cost under DoD prime contracts, it is unlikely that the defense contractor has an established provision in its compensation plan for granting leave for keeping employees or subcontractors in a “ready state” as contemplated by the CARES Act. Without such a provision, the paid leave costs incurred for “ready state” maintenance would not be an allowable cost. Thus, defense contractors must take care to separate costs that would be otherwise allowable under existing DoD Contract Cost Principles from those DoD reimbursable costs incurred which could be submitted to the DoD under the Federal Contractor Authority.

### *What is an Approved Worksite?*

An “approved worksite” under the Federal Contractor Authority is the defense contractor’s location and any other places of performance specifically identified in the DoD contract. This can include any defense contractor or DoD subcontractor facility at which contract administration services are performed in support of the DoD prime contract. This also includes locations cleared by the National Industrial Security Program Contract Classification System listed on a DD form 254 or electronic equivalent.

### *What Restrictions Exist under the Federal Contractor Authority?*

Any additional profit or fee is not allowed. Reimbursement of costs under the CARES Act is permissive, not mandatory. Additionally, except for the DoD Contract Cost Principles, nothing in the Federal Contractor Authority alters any applicable Federal Acquisition Regulation (FAR), DFARS, or any preexisting unique terms applicable to the defense contractor, such as those addressing cost or funding limits. Finally, the defense contractor may not receive duplicate reimbursements, including without limitation the Paycheck Protection Program (“PPP”) and Economic Injury Disaster Loan (“EIDL”).

### *Does the Federal Contractor Authority apply to DoD Subcontracts?*

The Federal Contractor Authority provides for DoD cost reimbursement for paid leave to keep both a defense contractor’s employees and its DoD subcontractors in a ready state. Although the Federal Contractor Authority applies only to defense contractors with DoD prime contracts, a DoD subcontractor seeking to maintain its ready state may request a similar contract amendment with the DoD prime contractor for reimbursement of such costs.

If you have questions regarding application of the Federal Contractor Authority to your DoD contract or subcontract, please contact the authors or **Miller Canfield's Export Control Practice Group**.

*This information is based on the facts and guidance available at the time of publication, and may be subject to change.*