

Update: April 14, 2020

Canada Emergency Wage Subsidy Is Now Law!

What's New & Employment Law Considerations

On March 27th 2020 the Prime Minister announced a wage subsidy of 75% for qualifying businesses. This program is the most important and fundamental initiative in the Federal Government's COVID 19 strategy. The purpose of the program was to have employers avoid layoffs where possible, or return employees to payroll and begin paying them directly and to allow employers to get ready to be able to start up business again after the COVID 19 pandemic subsides and businesses (hopefully) start a return to normal. The CEWS will ensure that a meaningful connection between employers and employees would remain as we work through this crisis.

Since the Prime Minister's announcement the government and its ministers have been tweaking the program. Finally on Saturday April 11th 2020, with the consent and cooperation of the Opposition, the Government passed into law Bill C-14 *A second Act respecting certain measures in response to COVID 19* ("Bill C-14"). Bill C-14 received Royal Assent that same day.

The KSW Employment and Labour Group has been reporting on various employee plans such as EI, the \$2000 CERB, amendments to the Employment Standards Act to provide job security in certain circumstances, related employment issues and most particularly the development of the CEWS as the CEWS relates primarily to wages and employees. **Read our previous articles here:** <https://www.ksw.bc.ca/employment-labour-blog/>

Nevertheless the final version of Bill C-14 involves substantial amendments to the *Income Tax Act* as well as the *Financial Administration Act* and the *Canada Deposit Insurance Corporation Act*. Further the actual application form has not been finalized and that will be important to consider whether your business qualifies. As a result before a business decides to start putting employees on payroll, paying wages and then applying for CEWS, it will be wise to consult its accounting and tax professional advisors to ensure they and their employees are eligible and that they properly file for the subsidy.

There will also be a number of employment issues including practical issues such as whether the CEWS should be accessed in the first place and how are employees to be put back on payroll. Our Group can help you develop your strategies for your particular business.

In this article we will identify the 10 key changes and critical aspects of Bill C-14 and then offer some answers to the most common questions we have heard from you.

TOP 10 CHANGES TO THE CEWS FOUND IN BILL C-14

Given the nature of Bill C-14 and the myriad of questions that can arise it is not possible in this article to outline all the details of the legislation or the questions that potentially arise in your specific business. Further each case will be decided on its own facts. However we have identified what we see as the top 10 key changes found in Bill C-14 since the program was originally announced on April 1. This list is not exhaustive and we invite you to send us your specific questions which we will try to answer on an individual bases.

1. To qualify for the CEWS for March 2020, revenues must have decreased by 15% (instead of the previous 30%). This change was made to reflect the fact that many businesses did not start suffering losses until the middle of March. The required revenue decline for April and May continues to be 30%. It is important to note that nothing the legislation requires the revenue reduction be caused by COVID-19.
2. Employers may choose to calculate their decline in revenue for March, April and May 2020 against either an average of revenues for January and February 2020, or revenues from March, April and May 2019. Whatever option is used must be used as the benchmark for all qualifying periods. Where an employer did not carry on activities for all of January and February 2020, the revenues for the period that the employer did carry on activities will be averaged and applied to both months. The January/February 2020 reference is the only option for any employer not carrying on business on March 1, 2019. Note that the above-noted calendar month periods for qualifying revenue do not coincide with the four-week periods for which the subsidy can be claimed.
3. For calculating revenue decline, employers may calculate their revenues under the accrual method or the cash method (as per existing tax rules) but not a combination of both. Whichever method is chosen must be used for all relevant qualifying periods. Qualifying revenue means the inflow of cash, receivables or other consideration arising from the ordinary activities of the entity in Canada. This includes revenue from the sale of goods, the rendering of services and the use of resources by others. The definition excludes extraordinary items and amounts derived from non-arm's length sources, subject to certain exceptions. We expect there are a number of interpretive issues around the definition of qualifying revenue, which must be explored with your tax and accounting professionals.
4. An eligible employer that qualifies for the CEWS for one qualifying period will automatically be deemed to qualify for the next qualifying period. For example, if you qualify for the first period, March 15 to April 11, you will automatically qualify for the next period: April 12 to May 9; however you will still have to re-qualify for the third period: May 10 to June 6. If you do not qualify for the March period but qualify for April,

then you will automatically qualify for May. This change eliminates some of the uncertainty surrounding eligibility.

5. There is now more flexibility for related corporate groups. For example, a group of affiliated eligible entities may now elect to determine their qualifying revenues together on a consolidated basis. As a result, each individual member of the group could take advantage of the total consolidated revenue decline and qualify for the CEWS when they otherwise would not. Affiliated persons under the *Income Tax Act* include common law partners, spouses and various others. Similarly, a group of eligible entities that normally prepares consolidated financial statements may jointly decide for each member of the group to determine its qualifying revenue individually. These are highly technical issues and we strongly recommend seeking tax and accounting advice if these issue affect you. To the disappointment of many, a single corporate entity with multiple divisions cannot separate the individual divisions for the purpose of calculating revenue decline. We understand that this issue is currently under discussion between industry and the government.
6. The legislation has added greater flexibility for employers and joint ventures that earn non-arm's length revenues. For example, if all or substantially all of the revenues of an eligible entity are from non-arm's length persons or partnerships, that entity may jointly elect with all those persons or partnerships to calculate the revenue reduction based on a weighted average formula. Again, this is an extremely technical tax matter that goes beyond the scope of this article and requires specialized advice.
7. Eligible employers who receive the CEWS on wages paid to workers who are simply on leave with pay but not actually working (referred to by the government as furlough) are now entitled to receive a 100% refund for the employer-paid contributions to Employment Insurance and the Canada Pension Plan on those wages. For example, if the employer pays Worker A his regular salary of \$50,000 during the March 2020 qualifying period and remits CPP and EI contributions on that money, but Worker A does not perform any work, the employer will be entitled to claim not only the 75% subsidy on the \$50,000, but the total of the CPP and EI contributions remitted as well.
8. The legislation contains an anti-avoidance provision which disqualifies an employer from eligibility for the CEWS where the employer carries out a transaction or action that has the effect of reducing qualifying revenues and it is reasonable to conclude that one of the main purposes of the transaction or action was to cause the employer to qualify for the subsidy. It should also be noted that employers will be required to repay amounts paid under the CEWS if it is later determined they fail to meet the eligibility requirements. Further, employers will be liable for penalties of up to 50% of the wage subsidies received where the employer knowingly or is grossly negligent in submitting an application under CEWS containing false or misleading information.

9. The new provisions allow the government to extend the date of the CEWS program by regulation up to September 30, 2020. This would add up to 3 more months of eligibility if the Government deemed they were warranted. If additional qualifying periods are added, the prior reference period to be used will also be determined by regulation.
10. The legislation gives the Minister of National Revenue the authority to publicize the name of any person or partnership that has claimed the CEWS. While no information regarding the use of this policy has been made available, we believe it may be used to identify employers that have committed violations. We therefore recommend that you do your due diligence and proceed cautiously when determining if you qualify.

CEWS—10 FREQUENTLY ASKED QUESTIONS

1. Is the CEWS right for my business and my employees?

The first thing employers must do is to find out if they are an eligible employer under the CEWS and whether their employees are eligible. As noted Bill C-14 has a great deal of criteria and conditions that must be met before an employer is entitled to be reimbursed by the Government for 75% of the wages paid. There are also a number of penalties that might apply if an application is not properly made so caution at this first step is very important.

Each employer will have different questions in considering whether it and its employees are eligible and for what period. Do I use the period March 2019 to compare to March 2020 or do I use the average of January/February 2020 to compare? Can I use the loss revenues in each division or must I take into account the entire entity? Should I calculate revenues under the accrual method or the cash method? Are my employees working in Canada? Do I take into account revenue I earn in the USA from sales of products produced here in BC?

If you are satisfied that you and your employees are eligible you can then look at some of the practical business questions that arise in considering if the CEWS is right for you and your employees. Must I apply each month? Can I afford the cash flow as reimbursement may take some time? Who will I bring back from layoff? Given the clear direction from the Government that the CEWS must be used in good faith, employers must be cautious if they decide to only bring some employees back to work and not others. Be sure that there is a clear rationale for doing so.

2. Who is an Eligible Employee?

An employer cannot receive reimbursement for wages paid under the CEWS unless it pays “eligible remuneration” to an “eligible employee”. An “eligible employee” must be

employed in Canada (although she not need be a Canadian citizen) by an “eligible employer” during what is defined as the “qualifying period”. An employee will not be eligible if she did not receive remuneration for 14 or more days during the qualifying period. An employer is not obligated to bring all of its employees back onto payroll in order to claim the CEWS. On the other hand, there is no cap on the number of eligible employees or the total amount of subsidy an eligible can claim for eligible employees. For example, Air Canada has announced it intends to re-hire 16,500 workers! It is also important to note that you can claim the subsidy for new employees hired after March 15, 2020.

3. Must the “eligible employee” actually be working?

The answer is no. The criteria remains that the employer must put the employee “on payroll” and must in fact pay them. The employee does not have to attend at and do work. This is consistent with the Government’s strategy to reconnect employees to their employer so that when the crisis passes and businesses can start up again, the employer is ready to go as the workforce is already in place. As noted above, the employer can claim back EI and CPP contributions for these furloughed workers.

4. Mike is my manager earning \$80,000 per year and has been working continually since January 1st 2020. Assuming I am an eligible employer and Mike is an eligible employee can I be reimbursed for Mike’s salary up to \$847 per week from March 15th 2020?

The answer is yes. Assuming both employer and employee are “eligible” as defined in Bill C-14 then the criteria for reimbursement have been met, namely Mike is on payroll and Mike has been paid. In fact, the Government will be happy that you kept Mike at his pre-crisis wage.

5. Mike’s fellow employee Chris was laid off March 15th 2020 and has been receiving EI since then—Can I pay Chris retroactively to March 15th 2020 and then be reimbursed under the CEWS?

No—retroactivity only applies to employees actually being paid during that qualifying period. You can recall Chris, put him back on payroll and pay him going forward and then apply for your CEWS, whether you bring him back to work or not.

6. In the lead up to Bill C-14 the Prime Minister and government officials were commenting that the eligible employer did not have to pay the 25% difference although they were encouraged to do so and it appeared an employer would have to

have reasonable grounds for not paying the 25% difference. Is this still the law under Bill C-14?

It appears that there was some confusion in the statements made regarding the “25% difference”. In our view, in most cases the employer will already have to pay the employee 25% more than the subsidy amount claimed in order to receive the 75% subsidy on the wages paid. For example, if Sally makes \$40,000 per year (or \$769 per week), then the employer will have to pay her \$769 per week in order to claim the subsidy of \$576 per week.

There are two exceptions to this.

If the employer has reduced the employee’s salary by more than 25% during the qualifying period, then the subsidy amount is actually the entire amount paid to that employee. For example, if Sally has been reduced by 50% to \$20,000 per year (or \$384 per week), then the employer can claim **100%** of the wages paid to Sally under the CEWS.

Finally, if the employer has reduced the salary by less than 25% during the qualifying period, then the subsidy amount is paid on Sally’s pre-crisis salary. For example, if Sally had been reduced by 10% to \$36,000 (\$692 per week) then the amount of the subsidy will be based on \$40,000 and not \$36,000. Therefore the subsidy amount would be \$576 per week.

In all cases the maximum amount of the subsidy is \$847 per week per employee.

All of that said, the more recent language from the government is that employers receiving the subsidy must make best efforts to pay employees their pre-COVID-19 wages. So if your employee was laid off and prior to that was paid \$80,000 the government was trying to encourage employers to bring her back at full wages. But in order to get the full 75% subsidy the employer only needs to pay \$58,725 salary to receive the maximum subsidy of \$847 per week.

While there does not appear to be a legal requirement to “top up” employees to pre-crisis wages, the government has stated that the eligible employer must make best efforts to do so. The legislation requires the application for the CEWS to include an attestation from the person who has principal responsibility for the financial activities of the eligible entity as to the completeness and correctness of the application submitted. It is possible that the application will require the employer to provide details of the best efforts made.

Now employers have to be cautious in making changes to employees’ wages as such changes unilaterally imposed might be considered a constructive dismissal. The best solution would be to discuss a return to work (or payroll) with each employee and

ensure you have their agreement as to the wages. One scenario might be to bring the employee back to work (or at least on payroll) at the \$58,700 salary but agree with the employee that when business is back to 100% their salary will revert to the pre COVID 19 level.

7. Is an eligible employer entitled to the CEWS for eligible employees paid on commission and if so how is that calculated?

The answer is yes as the commission salesperson has the normal deductions from payroll such as income tax, CPP, EI etc.

Assuming an arm's length employment relationship we believe the CEWS would be the lesser of the average weekly earnings from January 1st 2020 to March 15th 2020 excluding periods of 7 or more consecutive days for which the employee was not remunerated or the actual commissions earned in the qualifying period.

8. How do I apply for CEWS?

The application must be filed with CRA. Eligible employers are only those that had on March 15th 2020 a business number registered with the CRA for remittances for income tax source deductions. As yet we do not have the actual application form from CRA. And as noted the CEWS is only available for employees of the eligible employer who on payroll and who have actually been paid. So there is a bit of a leap of faith here as employers risk putting employees on payroll and paying them but then finding their application for the CEWS is rejected.

9. My employees laid off have applied for CERB—can I still get CEWS?

No. If employees are receiving the \$2000 CERB the employer cannot start to pay them and then collect the CEWS. It is an "either or proposition". That is why it is important to talk to each employee who has been laid off and who might have applied for CERB (or in fact been paid same) to consider if she wants to come back on payroll and be paid by you. Also do the calculation and consider whether that employee may be better off just claiming the CERB. The government has stated that if an employee receives the CERB while being paid wages for which the CEWS is claimed, the employee will be responsible for repaying the CERB amounts. If you in fact have work for them and want them back they will need to forgo the \$2000 CERB. And it may be that some employees refuse to return to work in which case they will have in our view quit their employment and a new ROE should be issued.

10. What about employees who qualified for the leave of absence under the recent amendments to the Employment Standards Act and are now ready to return to work—can I reduce their income or not have them show up for work?

It is a bit unclear how the Employment Standards Act mandatory COVID-19 leave provisions (similar to maternity leave) will apply to employers trying to access the CEWS. The Act requires employers to put the employee back in the same or comparable position as they held at the time of the leave. It is not clear how the two Acts work together but in those circumstances it is our view the employer must take the employee back at their regular wage or lay them off.

Note to our Readers: Information regarding COVID-19 is rapidly evolving. We are working to bring you up-to-date articles as the legal issues unfold. This is not legal advice. If you are looking for legal advice or are dealing with an issue in relation to COVID-19, please contact our Employment & Labour Group or our Tax Group.

Labour & Employment Group

Chris Drinovz at cdd@ksw.bc.ca, Mike Weiler mweiler@ksw.bc.ca, Melanie Booth at mdb@ksw.bc.ca, or Jesse Dunning at jtd@ksw.bc.ca.

Tax Group

Kevin Scott: jks@ksw.bc.ca