

Update: April 3, 2020

Canada Emergency Wage Subsidy – What We Know and What We Don’t

On Friday March 27th 2020, the Prime Minister announced a wage subsidy of 75% for qualifying businesses. After much discussion and lobbying the government made changes to its proposal and on Wednesday April 1st 2020 the Department of Finance announced the new **Canada Emergency Wage Subsidy** (“CEWS”). The details were contained in a Press Release entitled [*“Government Announces Details of the Canada Emergency Wage Subsidy to Help Businesses Keep Canadian in their jobs”*](#)¹. As well the government provided [*details*](#)² on its web site. Most importantly Minister Morneau held a press conference April 1st 2020 where he provided [*important details*](#)³ and answered questions.

Normally when reporting to you about significant government policy we would wait for the actual legislation, regulations and would follow the debates on same in Hansard. While the Press Release, Government web site posting and Minister Morneau’s comments are very useful in understanding where the government wants to go with this program and while they provide some more important details, the fact is there is no draft legislation nor regulations and the House will have to sit at some point to pass the enabling legislation. Unfortunately there are many “interesting questions” that cannot be answered with certainty at this point. At the same time you want a summary of what we know today and where there may be issues to consider. Many businesses will decide to wait until they see the legislation before they take action; others will want to rely on what we know to date and begin the process of bringing employees back to work or discussing with their employees currently working how this subsidy will impact their jobs.

With that in mind and in order to bring you up to date on matters as they stand now, we offer the following analysis.

What We Know

The overall policy objective of the CEWS is to help businesses keep and return workers to their payroll through the challenges posed by COVID-19. As such, the wage subsidy aims to prevent further job losses, encourage employers to re-hire workers previously laid off, and help better position Canadian businesses to more easily resume normal operations following the crisis. As a result of information released over the course of the week, we now have a partial idea of how the CEWS will operate to achieve these objectives:

- Eligible employers include individuals, taxable corporations and partnerships, and non-profit organizations and registered charities; it does not include public employers, including schools and municipalities;

¹ Press Release: <https://www.canada.ca/en/department-finance/news/2020/04/government-announces-details-of-the-canada-emergency-wage-subsidy-to-help-businesses-keep-canadians-in-their-jobs.html>

² Website: https://www.canada.ca/en/department-finance/news/2020/04/the-canada-emergency-wage-subsidy.html?mc_cid=e830947bb6&mc_eid=97501e3d68

³ Press conference: <https://www.youtube.com/watch?v=4wW1EIIQWII>

- In order to qualify for the subsidy, an eligible employer must have suffered a decline in gross revenue of at least 30 percent during the eligible period being applied for; there are currently 3 eligible 4-week periods:
 - Period 1: March 15 to April 11, 2020;
 - Period 2: April 12 to May 9, 2020; and
 - Period 3: May 10 to June 6, 2020;
- Eligibility is generally determined by the change in monthly revenues, year-over-year, for the calendar month in which the period began. For example, if revenues in all of March 2020 were down 50 per cent compared to March 2019, the employer would be allowed to claim the CEWS on remuneration paid between March 15 and April 11, 2020 (Period 1 above). Similarly, a comparison between the month of April 2020 over April 2019 would be used for Period 2 and May 2020 over May 2019 for Period 3. Importantly, the amount of wage subsidy provided under the CEWS in any given month would be ignored for the purpose of measuring the decline;
- For businesses established after February 2019, eligibility will likely be determined by comparing monthly revenues to a reasonable benchmark, such as the previous month(s);
- A for-profit employer's "revenue" will be its revenue earned from business carried on in Canada from arm's-length sources; the employer's normal accounting method would be used to calculate revenue and extraordinary items and amounts on account of capital will be excluded from revenue. Employer will be required to attest to the decline in revenue in making the application;
- The definition of revenue for non-profits and charities will be determined on a case by case basis following consultation with each sector;
- The wage subsidy will cover up to 75% of an employee's wages on the first \$58,700 of annual salary (a maximum of \$847 per week). For example: a floral shop in BC has four full-time employees, each earning \$800 per week, and 6 part-time employees, each earning \$400 per week, for a total weekly payroll of \$5,600. The shop is closed during the pandemic and only fulfilling online orders. They are keeping all of their employees on the payroll at 100% wages, despite revenues being down by 30 percent. This business would be eligible for a weekly wage subsidy of \$4,200 (\$600 for each of their full-time employees and \$300 for each of their part-time employees);
- A special rule will apply to employees that do not deal at arm's length with the employer. The subsidy amount for these employees will be limited to the eligible remuneration paid in any pay period between March 15 and June 6, 2020, up to a maximum benefit of \$847 per week, or 75% of the employee's pre-crisis weekly remuneration; we expect there to be further clarification on this exception;
- Eligible remuneration appears to include salary and wages and other remuneration subject to tax withholding, and likely commission and bonuses, but does **not** include severance pay, or items such as stock options or personal use of a corporate vehicle;

- Importantly, **entitlement to the CEWS will be based on the salary or wages actually paid to employees.** Therefore the employer must pay the employees first and receive the subsidy on remuneration actually paid and shown as such;
- There is no cap on the number or category of employees who can be subsidized nor on the overall amount an employer can claim;
- Employers will be expected to make “best efforts” to top-up employees’ salaries to 100% of the maximum wages covered and will be required to attest to this in the application;
- The amounts received under the CEWS would be included in the employer’s taxable income but presumably this would be offset by the additional salaries paid;
- Applications will be made through the CRA’s *My Business Account* portal as well as a web-based application; an employer must re-apply for the subsidy each additional month it is claimed for;
- It is expected that the portal will be opened for applications in three to six weeks;
- There will be anti-abuse rules and penalties proposed to ensure the subsidy is not inappropriately obtained and that employees are paid the amounts they are owed. The government may create new offences for individuals or businesses who provide false or misleading information to obtain access to the benefit or who misuse funds obtained under the program; the penalties may include fines or even imprisonment;
- Employers not eligible for the CEWS may still apply for the previously announced 10% wage subsidy from March 18 to June 20, which is limited to up to \$1,375 per employee and \$25,000 per employer. For employers eligible for both subsidies, any benefit from the 10% wage subsidy for remuneration paid in a specific period would generally reduce the amount available to be claimed under the CEWS in that same period;
- An employer will not be eligible for the CEWS in a week that falls within a 4-week period for which the employee is eligible for the \$2000 Canadian Emergency Response Benefit.

What We Don’t Know

There are many questions that remain unanswered which we hope will become clearer in the days and weeks to follow. These include:

- **When will the CRA portal be open, how long will the application process take, and what materials will be required?** It is likely that in order to streamline the delivery of funds, the government will only require an attestation now and require back-up later. The government has noted that if it approves an application but later determines an employer does not qualify, the employer will have to repay the subsidy. Employers are wise to keep good records of their calculations.
- **How long until funds are actually released to employers?** We expect that after the portal is opened in three to six weeks and applications are received, there will be some additional delay until the actual delivery of funds.

- **How does the retroactive portion of the subsidy work?** It would appear that making the subsidy retroactive to March 15, 2020 is intended to cover employers who have kept some or all of their employees on payroll since that date. We query whether or not wages paid to employees that have been recalled from layoff and then paid retroactively could also be subject to the subsidy. If the employees have already been paid EI benefits, this may complicate things.
- **Must employees actually perform work in order for the employer to claim the wage subsidy or can they simply be kept on payroll?** Based on the current information provided, it appears that performing work is not a requirement to receive the subsidy. What is required is that employees be on payroll and be paid.
- **If employees are simply put back on payroll and work is not available, must the employer still make best efforts to top-up wages?** The government has stated that it expects businesses to do everything in their power to top-up employee's wages to their full amount. That said, Minister Morneau appears to have recognized that this will not be possible in every situation.
- **What exceptions will be made for startups or small firms with highly variable income and how flexible will the test be to establish the decline in revenue?** Given the stated policy objectives, we expect the revenue comparison test to be reasonably flexible. As a result, businesses who might not qualify under the conventional test should think creatively about how they might show declining revenues.
- **Does the 30% decline in revenue have to be related to COVID-19?** At this time, there does not appear to be a requirement of a direct or indirect connection to COVID-19. We expect this will be a case-by-case determination.
- **Will the CEWS program be extended beyond 12 weeks?** Given that some provincial government officials have announced social distancing measures will likely continue into the summer months, it is possible that the government will consider extending the CEWS beyond 12 weeks. We will continue to monitor the situation carefully.

What You Can Do

- It appears that employers who wish to access the subsidy will have to incur payroll costs now and hope to receive the subsidy at a later date. Employers who want to retain their workforce in the face of significant revenue declines should carefully review the published criteria before making decisions about the workforce.
- The government has stated that: *“employers would have to keep records demonstrating their reduction in arm’s-length revenues and remuneration paid to employees”* As such, start reviewing and analyzing your financials now with a view to establishing the appropriate paper trail and due diligence for showing revenue decline and monies paid to employees for which you will seek the subsidy. This may include creating a Memo to File or consulting with your accountant or other professional.
- Analyze your current workforce and the work you have available. Communicate with any employees you have laid-off to determine who might be available to return to work and in what capacity. Find out how many employees have applied for the CERB and make note of

this. Consider how you can provide meaningful work to employees for which you intend to claim the subsidy.

- We have noted in our previous articles that layoffs, even temporary layoffs may be considered a constructive dismissal at common law or a termination under the *Employment Standards Act*. Be mindful that if you bring employees back to work under the subsidy but fail to top-up their salary to 100%, this may also trigger a constructive dismissal claim and/or a claim for termination pay under the *Employment Standards Act*. The same considerations apply if you substantially change an employee's position or duties. If the employee agrees to come back at a reduced wage or in a different position, carefully document this agreement.
- For employers that may qualify for both the 10% wage subsidy and the CEWS, it is worthwhile to take advantage of the 10% wage subsidy now as it will simply be deducted from any future CEWS payment for the same period. More details on this program here: <https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/frequently-asked-questions-wage-subsidy-small-businesses.html>
- Employers in need of additional financial relief pending approval of the CEWS may wish to consider availing themselves of the various new credit options being extended by the federal and provincial governments and other sources, including the new Canada Emergency Business Account. Various tax deferrals and other sources of credit have also been announced provincially and federally to give employers increased liquidity.
- As the economic downturn will likely continue past the timeline of the CEWS program, employers may wish to also consider the Federal Government's existing Work-Share and Supplemental Unemployment Benefits (SUB) Programs. Please contact us for further details on these programs.

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.