



COVID-19 Legal Alert

As we all make our way through these unsettling and anxious times, I am reminded that we are living history. Governments are acting in unprecedented ways to flatten the pandemic spread. States of emergency have been declared in every province, and stimulus packages have been passed to try to stem the impact that this extraordinary situation is having and will continue to have on most businesses and people. Everyone has been impacted by COVID-19. Employers are trying, as best they can, to carry on. I am humbled from the many questions I have received over the past few weeks to see how truly caring my clients are as they try to do right by the business and their employees. They are struggling with the unprecedented decisions they have had to make.

I have written and posted a number of articles in my Journal and you can access all the COVID-19 articles at this [link](#). You can also see information at the [Fitzgibbon Workplace Law Twitter feed](#).

This Update relates to the [Canada Emergency Wage Subsidy](#) that was passed into law on Saturday, April 11, 2020 and will, hopefully, provide some relief to many employers and employees in the challenging times ahead.

Be well, stay safe, and my best wishes to you all.

A handwritten signature in black ink, appearing to be 'Mike', is written in a cursive style.

CANADA EMERGENCY WAGE SUBSIDY IS NOW LAW - A PRIMER FOR EMPLOYERS

The House of Commons unanimously passed Bill C-14, *A second Act respecting certain measures in response to COVID-19* (also known as the Canada Emergency Wage Subsidy) (“CEWS”) and the government has a [Revised Background](#). Of note is that the CEWS is retroactive to March 15, 2020.

ELIGIBILITY

Eligible Employers

Eligible entities (employers) include individuals, trusts, taxable corporations, non-profit organizations and registered charities.

The following may be eligible entities (it would be important to review the relevant section of the *Income Tax Act*):

- ◆ an agricultural organization, a board of trade or a chamber of commerce (see s. 149(1)(e) of the *Income Tax Act*);
- ◆ a corporation that was constituted exclusively for the purpose of carrying on or promoting scientific research and experimental development (see section 149(1)(j) of the *Income Tax Act*)
- ◆ a labour organization or society or a benevolent or fraternal benefit society or order (see section 149(1)(k) of the *Income Tax Act*)
- ◆ a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) of the *Income Tax Act* and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada

Partnerships can participate provided all of the members are eligible employers.

The CEWS is not available to public employers such as municipalities, public universities, schools or hospitals.

Eligible Employee

Eligible employees means an individual employed in Canada by an eligible entity in the qualifying period, other than an individual who is without remuneration by the eligible entity in respect of 14 or more consecutive days in the qualifying period.

WHAT DOES THE ELIGIBLE EMPLOYER HAVE TO SHOW?

In applying for the subsidy, employers are required to attest to a baseline decline in gross revenue.

Although the government initially proposed that employers had to show a 30% decline in gross revenue in each of the applicable periods, this was amended for March as most employers did not see a meaningful decline until mid-March, 2020. As such, employers need only show at least a 15% decline in gross revenue for the month of March 2020. Thereafter, demonstrating a 30% decline in gross revenue is required.

The government provided the following guidance:

The amount of wage subsidy (provided under the [COVID-19 Economic Response Plan](#)) received by the employer in a given month would be ignored for the purpose of measuring year-over-year changes in monthly revenues.

- For example, if revenues in March 2020 were down 20 per cent compared to March 2019, the employer would be allowed to claim the CEWS (as calculated above) on remuneration paid between March 15 and April 11, 2020.
- Alternatively, this employer could use its average revenue from the months of January and February 2020, instead of March 2019, to determine if it is eligible for the CEWS.
- Once an approach is chosen, the employer would have to apply it throughout the program period.
- The table below outlines each claiming period, the required reduction in revenue and the reference period for eligibility.

| | <i>Claiming period</i> | <i>Required reduction in revenue</i> | <i>Reference period for eligibility</i> |
|-----------------|------------------------|--------------------------------------|--|
| <i>Period 1</i> | March 15 to April 11 | 15% | March 2020 over: <ul style="list-style-type: none"> • March 2019 or • Average of January and February 2020 |
| <i>Period 2</i> | April 12 to May 9 | 30% | April 2020 over: <ul style="list-style-type: none"> • April 2019 or • Average of January and February 2020 |
| <i>Period 3</i> | May 10 to June 6 | 30% | May 2020 over: <ul style="list-style-type: none"> • May 2019 or • Average of January and February 2020 |

The government has also announced that, in order to provide certainty to employers, once an employer is found eligible for a specific period, the employer would automatically qualify for the next period.

To calculate the decline in revenue, employers will use their normal accounting method, and exclude revenues from extraordinary items and amounts on account of capital. Affiliated groups may be able to elect to compute revenue on a consolidated basis.

Given the complexities involved in calculating revenues and the decline in gross revenue as well as the amount of the wage subsidy, coupled with the fact that employers are required to attest to the decline and that they are

doing everything they can to pay the remaining 25% of their workers income, it is recommended that employers obtain the specific and comprehensive advice from their accounting advisors before making their application. This is all the more important given the severe consequences flowing from a misuse or abuse of the CEWS.

AMOUNT OF THE WAGE SUBSIDY

The subsidy amount for a given employee (including new employees) on *eligible remuneration* paid for the period between March 15 and June 6, 2020 is the greater of:

- ◆ 75% of the amount of eligible remuneration paid, up to a maximum benefit of \$847 per week or, if the eligible employee is not dealing at arm's length with the qualifying entity in the qualifying period, nil, whichever is less; or
- ◆ the amount of eligible remuneration paid to the eligible employee in respect of that week or 75% of baseline remuneration in respect of the eligible employee determined for that week or \$847, whichever is less.

The baseline remuneration (sometimes called pre-crisis remuneration in some government material) is based on the average weekly remuneration paid to the employee between January 1 and March 15 inclusively, excluding any seven-day periods in respect of which the employee did not receive remuneration.

ELIGIBLE REMUNERATION

Generally speaking, "eligible remuneration" includes those payments made to the employee from which the employer is required to withhold and remit to the Canada Revenue Agency ("CRA") income tax. This would include, for example, salary, wages, fees, commissions or other amounts for services, and other remuneration such as taxable benefits.

HOW TO APPLY

Employers will be able to apply for the CEWS through the Canada Revenue Agency's *My Business Account* portal or through an online portal.

According to the Minister of Finance funds under the CEWS will be available in 2-5 weeks, although Employment Minister Carla Qualtrough said, in an April 12, 2020 interview, that it could be 2 to 4 weeks before the funds are delivered.

Employers are encouraged to set up direct deposit if they have not already done so.

Employers should also be aware that Bill C-14 provides that the Minister of National Revenue may communicate or otherwise make available to the public, in any manner that the Minister considers appropriate, the name of any person or partnership that makes an application for the CEWS.

ENSURING COMPLIANCE

In order to maintain the integrity of the program, employers will need to keep records demonstrating their reduction in arm's-length revenues and remuneration paid to eligible employees.

Employers will be required to repay amounts paid, in full, under the CEWS if it is determined that they did not meet the eligibility requirements or used the funds for an improper purpose. In addition, employers are expected to make their best effort to top-up employees' salaries to bring them to their pre-crisis levels.

The government has also said that employers who abuse the CEWS will face severe penalties and that the government will take decisive action against employers who do not use the funds for the purposes for which they are intended. The government has said that:

Employers that engage in artificial transactions to reduce revenue for the purpose of claiming the CEWS will be subject to a penalty equal to 25% of the value of the subsidy claimed; in addition, they will be required to repay the improperly claimed subsidy in full.

The government is considering the creation of new offences that will apply to individuals, employers or business administrators who provide false or misleading information to obtain access to this benefit or who misuse any funds obtained under the program.

INTERACTION BETWEEN THE CEWS AND OTHER PROGRAMS

The CEWS is a different program from the 10 per cent *Temporary Wage Subsidy for Employers* (called the Temporary Business Wage Subsidy) that was announced by the Prime Minister on March 18, 2020. In fact, the government has indicated that:

For employers that are eligible for both the Canada Emergency Wage Subsidy and the 10 per cent wage subsidy for a period, any benefit from the 10 per cent wage subsidy for remuneration paid in a specific period would generally reduce the amount available to be claimed under the Canada Emergency Wage Subsidy in that same period.

Some employers have tried to avoid layoffs and have applied for a Work-Sharing arrangement under the *Employment Insurance Act*. For employers and employees that are participating in a Work-Sharing program, Employment Insurance benefits received by eligible employees through the Work-Sharing program will serve to reduce the benefit to which their employer is entitled under the CEWS.

The CEWS is certainly a measure that is intended to stave off layoffs and to return employees that have already been laid off to employment. It is a welcome initiative and is said to be the largest economic package since WWII coming with a cost of \$73 billion.

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