

The Canada Emergency Wage Subsidy

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Lawyers You Should Know: Jack Siegel

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On April 11, Parliament adopted the new Canada Emergency Wage Subsidy (CEWS), which will reimburse employers for 75% of their employees' salaries, up to a limit of \$847 per week, for those businesses that qualify. This will apply for a twelve week period, running retroactive to March 15 and continuing to June 6, 2020.

The program is intended to prevent – or at least reduce – further job losses as a result of the COVID-19 pandemic, to encourage employers to recall workers laid off as a result of the crisis, and facilitate a return to normal operations once that becomes possible.

Although there is an \$847 per employee limit on the CEWS, there is no overall limit on the subsidy amount that an eligible employer may claim. Accordingly, the total amount of the CEWS that an employer may claim is limited only by the number of employees it has.

Eligibility

Employers who may benefit from the subsidy include individuals, corporations, partnerships, non-profit organizations and registered charities. However, public bodies such as municipalities, local governments, colleges and universities, schools, hospitals, and Crown corporations are not eligible for the subsidy.

As stated, the 75% subsidy has a maximum per-employee limit of \$847 per week, and is calculated as the greater of:

- 75 per cent of the amount of remuneration paid, up to a maximum benefit of \$847 per week; and
- the amount of remuneration paid, up to a maximum benefit of \$847 per week or 75 per cent of the employee's pre-crisis weekly remuneration, whichever is less.

The first of these two options is not available for employees who do not deal at arm's length from the employer. It is likely that the reason for this is to prevent an employer from simply adding a family member onto the payroll and claiming a subsidy, given that the second option is

calculated on **pre-crisis** income, thereby leaving new hires out of the equation. As well, this second option gives rise to the possibility of the CEWS constituting 100% of the remuneration to be paid to an employee. This fact is implicitly recognized in numerous government statements to the effect that “employers are expected where possible to maintain existing employees' pre-crisis employment earnings.” In short, for pre-crisis employees, the 25% spread between the subsidized wage and the full wage is at the discretion of the employer. Accordingly, an employer who simply cannot afford any employment costs at present still has the ability to participate in the program.

Eligible remuneration to be used in these calculations may include salary, wages, and other remuneration, including that which is paid to new employees. These are all amounts that are usually subject to withholding or deductions that are to be remitted to the Receiver General in respect of the employee's income tax obligation. Eligible remuneration does not, however, include severance pay, or items such as stock option benefits or the personal use of a corporate vehicle.

Added Relief for Paid Leaves of Absence

Over and above the CEWS itself, the program also provides for a 100% refund of the employer share of Employment Insurance premiums and Canada Pension Plan contributions for any week over the course of which an employee performs no work for the employer but is paid nevertheless. This provides a level of relief for employers who keep employees on payroll at 75% of pre-crisis salary (or re-hire them) despite having no work available in a particular week.

Determining Revenue Reduction

In order to qualify for the CEWS, an employer must have seen a reduction in revenue of 15% in March of this year, or 30% in April or May. This is determined based upon either a comparison of revenue for a particular month to the corresponding month in 2019, or to the employer's average monthly revenue over the two-month period from January 1 to February 29, 2020. As originally proposed, the program only allowed for the year to year comparison as a basis for eligibility, however in order to accommodate start-ups, high-growth undertakings and sectors that had faced more ordinary difficulties in 2019, the latter approach was added, and although employers are free to choose which benchmark to use, it is important to recognize that the same approach must be used by an employer throughout the duration of the program.

For the purposes of determining CEWS eligibility, an employer's revenue is its revenue from business carried on in Canada earned from arm's length sources. It excludes, however, the revenue from extraordinary items and amounts on account of capital. Employers are not limited to their ordinary accounting method in calculating revenue; they are free to do so under the accrual method or the cash method, but once having done so, are tied to that method for subsequent applications under the program. Revenue calculations for non-profits and charities will be made with respect to their specific circumstances.

Apply for One Month, Receive Two Months of CEWS

Eligibility for the CEWS is based on a single pre-defined four week period (March 15 to April 11, April 12 to May 9, May 10 to June 6) and the determination is based on calendar month revenue reductions in March, April and May 2020, respectively. But rather than requiring employers to re-apply every four weeks In order to provide greater certainty to employers in these very uncertain times, once an employer is found eligible for a specific period, it automatically qualifies for the next period.

How to Apply

Although applications for the CEWS are not yet being taken, it is expected that the means of doing so will be put in place in the coming days, or possibly weeks. When the system becomes active, the Canada Revenue Agency *My Business Account* portal will provide the means of doing so. If the approach taken to the flood of CERB applications that started on April 6 is any indication, then it is possible that the process will be opened up on a staggered basis. Although it is also anticipated that level of detail that will be needed for an application will be relatively bare bones, nevertheless it will be essential for participating employers to maintain and have available for review, financial records to show both that the necessary revenue shortfall took place, and that employees have been appropriately paid.

Ensuring Compliance

Penalties may apply where a CEWS application is granted based on a fraudulent claim. As well, where an employer does not meet the eligibility requirements and pay its employees accordingly, it will be required to repay any amounts paid to it under the CEWS. In addition, anti-abuse rules are pending to ensure that the subsidy is not inappropriately obtained and that employees are paid the amounts they are owed.

If an employer goes so far as to engage in artificial transactions to reduce revenue for the purpose of claiming the CEWS, then in addition to being required to repay in full the subsidy received, there will be a penalty imposed equal to 25% of the value of the amount claimed.

Interaction with other Programs

The 10% wage subsidy that was included in earlier COVID-19 response legislation announced on March 18, 2020 will, in most cases, reduce the amount available to be claimed under the Canada Emergency Wage Subsidy in that same period.

In order to ensure no duplication of benefits relating to a single individual, the government intends to put an approach in place to address such a possibility, and has suggested that this could include the reversal and repayment of a CERB benefit already received.

The CEWS is government assistance. As such, it must be included in the employer's taxable income. Similarly, since it did not originate from the employer's pocket, any amounts received must be deducted from the payroll numbers that determine employer's eligibility for any other federal tax credits.

Employers eligible for the CEWS may already be participating in a work-sharing program as part of the Employment Insurance system. If so, then the EI benefits already being received by employees through that arrangement will reduce the benefit that the employer is entitled to receive under the CEWS.

Limitations

It should be pointed out that while the CEWS provides a very welcome benefit to a great many businesses, it is not of assistance to a business that pays no wages. A corporation that pays its owner a salary may claim the subsidy on that salary, but at the same time, a very similar corporation whose owner receives income by way of dividends from the corporation has no ability to claim the very same benefit. Similarly, the CEWS provides no relief to sole proprietors who earn self-employment income instead of wages. Given that the government continues to fine tune its COVID-19 response programs on an ongoing basis, it remains to be seen whether issues such as these will be addressed at a later date.

Alternatives to CEWS

Most businesses, whether or not they are eligible for the CEWS Program, may be well advised to consider whether they could nevertheless qualify for any of the following initiatives of the federal government.

Those businesses that carried a payroll between \$20,000 and \$1.5 million in 2019, may qualify for a Canada Emergency Business Account (CEBA). This account is offered by eligible financial institutions and Export Development Canada (EDC), so that a qualifying business can receive an interest free loan of up to \$40,000. A particular benefit of this loan program is that borrowers who repay the loan on or before December 31, 2022 will receive a loan forgiveness of 25% (up to a maximum of \$10,000).

As well, a New Loan Guarantee is being made available to small and medium enterprises (SMEs) through EDC. It will guarantee the new operating credits and cash flow term loans that financial institutions extend to SMEs, for up to \$6.25 million.

Third, a new co-lending program, also for SMEs, will see the Business Development Bank of Canada working together with financial institutions to co-lend term loans of as much as \$6.25 million. The BDC's portion of this program will cover a maximum of up to \$5 million per loan.

Finally, on April 16, the Prime Minister announced the Canada Emergency Commercial Rent Assistance program, which will provide relief to small businesses. This will provide loans and/or forgivable loans to commercial property owners who in turn will lower or forgo the rent of small businesses for the months of April (retroactively), May, and June. Still in the earliest stages of development, the government intends to implement this program through partnerships with provincial and territorial governments, given their primary responsibility for landlord and tenant relationships.

Keeping Up With Change

As Canadian individuals and businesses alike work to survive one of the most dramatic economic disruptions in our country's history, governments at all levels are adapting existing programs and introducing new ones at an unprecedented rate. The lawyers and staff of Blaney McMurtry are working daily to maintain a detailed awareness of this dynamic in order to be able to provide our clients with the most current and beneficial insights that they might require.

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