

Legal update

Canada enacts wage subsidy legislation

April 12, 2020

Tax

Employment and labour

Charities and tax-exempt organizations

On Saturday, April 11, legislation was enacted to implement the Canada Emergency Wage Subsidy (CEWS) that was announced by the federal government on [April 1](#), further details of which were provided on [April 8 and April 9](#).

Overview of CEWS

The CEWS is a key measure in Canada's COVID-19 response plan. It provides an incentive for employers to continue paying employees, including those who are either not working (whether for health and safety reasons or due to lack of work) or whose hours have been reduced, and to rehire workers previously laid off.

Subject to limited exceptions, employers of all sizes and across all sectors of the economy are eligible for the CEWS, provided their revenues have decreased by 15% or more for March and 30% or more for April and May. The CEWS is generally available at a rate of 75% of eligible remuneration paid to employees, up to a subsidy of \$847 per week, per employee. The wage subsidy will initially be in place for a 12-week period, from March 15 to June 6, 2020. The legislation permits the government to extend the CEWS for additional periods up to September 30, 2020.

On April 8 and April 9, the federal government provided further details of the CEWS, including that the reduction in revenue could be measured against the average of gross revenue for January 2020 and February 2020, instead of the corresponding months of 2019. As well, it was announced that employers eligible for the CEWS would also be entitled to receive a 100% refund for certain employer-paid contributions to Employment Insurance, the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan paid for employees on paid leave. These measures were adopted in the April 11 legislation.

For our legal update relating to the April 1 announcement and a detailed list of questions and answers relating to the CEWS, see [our prior bulletin](#) and [the Q&A](#).

What has changed?

The legislation passed on April 11 included the following key changes since the program was originally announced on April 1:

- To be eligible for the CEWS for March 2020, revenues must have decreased by 15% (instead of the previously announced 30%). The required revenue decline in April and May is still 30%.

- 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.
- For calculating the decline in revenue, employers are allowed to calculate their revenues under the accrual method or the cash method, but not a combination of both.
- An eligible employer that qualifies for the CEWS for one qualifying period will automatically be deemed to qualify for the next qualifying period. This change eliminates the retrospective uncertainty of the subsidy.
- The rules provide greater flexibility for corporate groups to compute their decline in revenue on a consolidated or disaggregated basis.
- Joint ventures and entities that earn revenue from non-arm's length sources may now qualify for the CEWS.
- Employers eligible for the CEWS are now also entitled to receive a 100% refund for certain employer-paid contributions to Employment Insurance, the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan.
- The government may extend the CEWS program by regulation for the period June 6, 2020, to September 30, 2020.
- The legislation specifically gives the Minister of National Revenue the authority, but not the obligation, to publicize the name of any person or partnership that has claimed the CEWS.

What are the conditions for eligibility for the CEWS?

Generally, an employer must apply for the CEWS and pay eligible remuneration to an eligible employee during a period in which the employer suffered the required reduction in arm's-length gross revenue from its activities in Canada. There are specific eligibility requirements for both employers and employees, and rules regarding computation of the decline in arm's-length gross revenue and remuneration, all of which are outlined in greater detail below.

In addition to these requirements, the employer must have had a business number and related payroll account registered with the Canada Revenue Agency (the CRA) as of March 15, 2020.

Notably, if an employer satisfies the revenue decline test for one qualifying period, the employer will automatically be deemed to have satisfied the revenue decline test for the next qualifying period. The qualifying periods and the reference periods against which the decline in revenue is to be measured are outlined below.

What employers are eligible?

An employer that has employees working in Canada will generally be eligible for the CEWS (an Eligible Employer) if it has experienced a decline in gross revenue from arm's-length sources in the course of its activities in Canada of 15% or more in March 2020 or 30% or more in April or May 2020, as compared to either the same month in 2019, or to an average of its monthly gross revenue earned in January and February 2020. Where the employer did not carry on activities for all of January and February, its revenues will be extrapolated across both months.

An Eligible Employer must be an "eligible entity," which is defined to mean a corporation (other than a corporation that is tax exempt or a public institution), an individual, a registered charity (other than a public institution), certain non-profit organizations and partnerships all of the members of which are eligible entities. Eligible entities may be private or public, formed in Canada or elsewhere, and may also be foreign owned or controlled. The legislation also permits additional organizations to be prescribed as eligible entities.

A "public institution" is generally defined to include municipalities and local governments, Crown corporations, wholly owned municipal corporations, public universities, colleges, schools, school boards, hospitals and health authorities. In addition, the employer must be a distinct entity such that a particular division of a business does not qualify as an Eligible Employer separately from the remaining divisions of the same entity.

What is an eligible employee?

An Eligible Employer cannot benefit from the CEWS unless it pays eligible remuneration to an eligible employee. An eligible employee (an Eligible Employee) is an individual employed in Canada by the Eligible Employer during the qualifying period. However, an employee will not be an Eligible Employee in a qualifying period if he or she did not receive remuneration from the Eligible Employer for 14 or more consecutive days in the qualifying period. Such employees would be eligible for the Canada Emergency Response Benefit (CERB).

How is the per-employee amount of the CEWS calculated?

An Eligible Employer's entitlement to amounts under the CEWS is determined on an employee-by-employee basis. The per-employee amount of the CEWS will depend on certain prescribed factors including the amount of eligible remuneration paid to an Eligible Employee as compared against the Eligible Employee's baseline (or pre-crisis) remuneration and whether the Eligible Employee deals at arm's length with the Eligible Employer.

- **Where an Eligible Employee deals at arm's length with the Eligible Employer and there has been no decrease in the Eligible Employee's eligible remuneration.** The amount of wage subsidy for that Eligible Employee for each week during a qualifying period will be equal to the lesser of (i) 75% of eligible remuneration paid to the Eligible Employee for that week and (ii) \$847.
- **Where there has been a decrease in the Eligible Employee's eligible remuneration of more than 25%.** The amount of the wage subsidy for that Eligible Employee for each week during a qualifying period will be equal to the lesser of (i) the amount of eligible remuneration paid to the Eligible Employee in the week and (ii) \$847.
- **Where the decrease in the Eligible Employee's eligible remuneration is equal to or less than 25%.** The amount of the wage subsidy calculated for that Eligible Employee will be the lesser of (i) 75% of the Eligible Employee's baseline remuneration and (ii) \$847.
- **Where the Eligible Employee does not deal at arm's length with the Eligible Employer, regardless of whether there has been a decrease in remuneration.** The amount of subsidy for that Eligible Employee for each week during a qualifying period will be the lesser of (i) the amount of eligible remuneration paid to the Eligible Employee in respect of that week; (ii) 75% of the Eligible Employee's baseline remuneration determined for that week; and (iii) \$847. The CEWS is not available for non-arm's length employees who were not employed by the Eligible Employer at any time after January 1, 2020, and prior to March 15, 2020.

The baseline remuneration for an Eligible Employee will be the average weekly eligible remuneration paid to the Eligible Employee during the period between January 1, 2020, and March 15, 2020 (excluding periods of seven or more consecutive days for which the employee was not remunerated). If no eligible remuneration was paid during this period, the baseline remuneration would be nil.

Eligible remuneration generally includes amounts for which the Eligible Employer has a withholding obligation (including non-cash benefits) but excludes (i) retiring allowances, (ii) stock option benefits; (iii) any amounts received that can reasonably be expected to be paid or returned (directly or indirectly) to the Eligible Employer, a person or partnership not dealing at arm's length with the Eligible Employer or another person or partnership at the direction of the Eligible Employer; and (iv) any amounts paid as part of an arrangement that exceed the baseline remuneration where, among other things, one of the arrangement's main purposes is to increase the amount of the CEWS that can be claimed.

Where an Eligible Employee is employed by two or more Eligible Employers who do not deal with each other at arm's length, the amount of the CEWS that may be received for that Eligible Employee's eligible remuneration is capped at the amount that would be available if the remuneration were paid by one Eligible Employer.

How much is the wage subsidy?

The aggregate amount that an Eligible Employer may receive is primarily based on the aggregate of the amount of the CEWS per Eligible Employee, as described above. However, this aggregate amount will be reduced by the total of deemed remittances made by certain employers pursuant to the 10% Temporary Wage Subsidy program as well as amounts received by Eligible Employees as work-sharing benefits under the *Employment Insurance Act*.

In order to support employers who are paying remuneration to furloughed employees, the amount of the CEWS that can be claimed by an Eligible Employer will be increased by the total of all amounts payable by the Eligible Employer as employer premiums or contributions under the Employment Insurance Act, the Canada Pension Plan (or equivalent provincial plan) and Quebec's Parental Insurance Plan, for employees who are on leave with pay for that particular period.

Qualifying periods for the CEWS

The CEWS program will be in place for a minimum of 12 weeks, from **March 15 to June 6, 2020**, with retroactive effect. Eligibility for the CEWS for a particular qualifying period would generally be determined by the change in an employer's qualifying revenues for the calendar month in which the period began as compared to either (i) year-over-year revenue for the relevant month or (ii) if the employer elects, or was not carrying on business on March 1, 2019, its average revenue earned in January and February 2020. The table below outlines each qualifying period and the prior reference period for the gross revenue test.

	Qualifying period	Required reduction in revenue	Prior reference period to determine decline in revenue
Qualifying Period 1	March 15 to April 11	15%	March 2020 over: <ul style="list-style-type: none"> • March 2019 or • Average of January and February 2020
Qualifying Period 2	April 12 to May 9	30%	April 2020 over: <ul style="list-style-type: none"> • April 2019 or • Average of January and February 2020
Qualifying Period 3	May 10 to June 6	30%	May 2020 over: <ul style="list-style-type: none"> • May 2019 or • Average of January and February 2020

An Eligible Employer that satisfied the revenue decline test in one qualifying period will automatically be deemed to have satisfied the revenue decline test in the next qualifying period. For example, if an Eligible Employer satisfies the

revenue reduction for March such that it is eligible for the CEWS for the first qualifying period (i.e., the period from March 15, 2020, to April 11, 2020), the Eligible Employer will be deemed to have satisfied the revenue decline requirement for the second qualifying period of April 12, 2020, to May 9, 2020, regardless if the revenue reduction requirement is actually satisfied for the second qualifying period.

The legislation provides that additional qualifying periods could be added after June 6, 2020, provided that they end no later than September 30, 2020. If additional qualifying periods are added, the prior reference period will be as provided for by regulation.

What percentage reduction in revenue must be shown?

The required reduction of qualifying revenue is 15% for the qualifying period March 15, 2020 – April 11, 2020, and 30% for either of the qualifying periods April 12, 2020 – May 9, 2020, or May 10, 2020 – June 6, 2020. For qualifying periods after June 6, 2020, the required reduction in revenue will be as prescribed by regulation.

For what periods are revenues to be compared?

For purposes of determining whether the required percentage revenue decline has occurred, the eligible entity must compare its qualifying revenue for a qualifying period to the "prior reference period." The prior reference period for March 15, 2020 – April 11, 2020, is March 2019, for the period April 12, 2020 – May 9, 2020, is April 2019 and for the period May 10, 2020 – June 6, 2020, is May 2019.

However, an eligible entity may elect to use the average of revenues in January and February 2020 as a prior reference period, which, if so elected, must be used as a benchmark for all qualifying periods. Where an eligible entity did not carry on activities for all of January and February, its revenues for the relevant period will be extrapolated across both months. The January and February 2020 prior reference period will also apply as a benchmark for all qualifying periods if the eligible entity was not carrying on business on March 1, 2019.

Over what period is revenue calculated for the CEWS?

Qualifying revenue must generally be determined on a calendar month basis even though the CEWS is based on eligible remuneration paid during four-week qualifying periods (outlined above) that do not coincide with calendar months.

What revenue qualifies for the CEWS?

Qualifying revenue of an Eligible Employer means the inflow of cash, receivables or other consideration arising in the ordinary activities of the entity in Canada. Generally, this includes revenue from the sale of goods, the rendering of services and the use by others of resources of the employer and excludes specifically extraordinary items and amounts derived from persons or partnerships not dealing at arm's length with the employer (subject to certain rules described below).

The qualifying revenue is to be determined in accordance with the employer's normal accounting practices; however, it is possible to make an election to determine revenue based on the cash method (as described in existing tax rules). It is therefore possible to calculate revenue under the accrual method or the cash method, but not a combination of both. The same method must be used for all relevant qualifying periods.

In the case of registered charities, qualifying revenue includes gifts, revenue from a related business and other amounts received in the course of its ordinary activities. Registered charities may elect to exclude funding received from government sources in determining their qualifying revenue.

In the case of not-for-profit entities, labour organizations and certain other non-taxable entities, qualifying revenue includes membership fees and other amounts received in the ordinary course of their activities. Such entities may also elect to exclude funding received from government sources.

Greater flexibility for corporate groups

While qualifying revenues are to be determined in accordance with an eligible entity's normal accounting practices, the legislation provides some welcome flexibility for corporate groups.

First, if a group of eligible entities normally prepares consolidated financial statements, each member may nevertheless determine its qualifying revenue separately, provided that all members of the group do so.

Second, an eligible entity may jointly elect with each member of an affiliated group of eligible entities of which it is a member to determine their qualifying revenues on a consolidated basis in accordance with relevant accounting principles. This means that, where the election is made, the consolidated revenue decline of the affiliated group would then apply to each member of the affiliated group such that certain members who may not otherwise qualify for the CEWS could then qualify. Broadly speaking, affiliated persons under the *Income Tax Act* (Canada) include spouses, common law partners and persons under common control, with special rules for partnerships and trusts.

Third, in the case of an eligible entity owned by participants in a joint venture, if all or substantially all of the eligible entity's revenues are in respect of the joint venture, the qualifying revenues of the joint venture (as if it were an eligible entity) may be used as a proxy for the qualifying revenues of the eligible entity.

Unfortunately, not all issues of concern for corporate groups have been addressed, including the possibility of divisional calculations. Consequently, the CEWS may be more easily accessed by corporate groups that have their operating divisions structured as separate legal entities. Where divisions are grouped within the same legal entity, the revenue reduction test must be satisfied either by the legal entity itself or by the consolidated group of affiliated eligible entities as described above.

Greater flexibility in the context of non-arm's length revenues

If all or substantially all (generally, 90% or more) of the revenues of an eligible entity are from non-arm's length persons or partnerships, an eligible entity may jointly elect with all such persons or partnerships to have the revenue reduction of the eligible entity calculated based on the weighted sum of the reduction in the qualifying revenues of those non-arm's length persons or partnerships. The weighting is based on the proportion of the eligible entity's qualifying revenue that is received from each of those non-arm's length persons or partnerships. Additionally, and of particular importance, the revenue of the particular persons or partnerships does not need to be earned in Canada to be qualifying revenue for the purposes of this calculation.

For example, assume an eligible entity earns 50% of its revenues from each of two non-arm's length persons (Company A and Company B). Company A has suffered a 45% reduction in qualifying revenues and Company B has suffered a 25% reduction in qualifying revenues (noting that for this purpose, the revenues of Company A and B may be from activities outside Canada). If the eligible entity elects with both Company A and B, its reduction in revenue from the current reference period will be deemed to be equal to the weighted sum of the reductions in revenue of both Company A and B. In this case, because the eligible entity earns 50% of its revenues from each of Company A and Company B, the weighted effect of the reduction in Company A and B's revenues is half of 45% (which is 22.5%) and 35% (which is 12.5%), respectively, for a 35% weighted sum reduction of the eligible entity's qualifying revenues.

Anti-avoidance rule

The legislation also contains an anti-avoidance rule that deems there to have been no reduction in qualifying revenues where a transaction or event (or a series of transactions or events) or an action (or failure to take an action) has the effect of reducing qualifying revenues and it is reasonable to conclude that one of the main purposes of such transaction, event, series, or action is to cause an eligible entity to qualify for the subsidy.

How do I apply for the CEWS?

Applications for the CEWS are made online through the CRA's My Business Account portal or through a web-based application form, when available. Finance has not indicated when applications for the CEWS will be available, but has stated that more details will be shared shortly. The original guidance provided a timeline of four to six weeks from April 1, 2020.

All applications for the CEWS will need to be submitted by September 30, 2020, and an individual who has "principal responsibility" for the financial activities of the eligible entity will be required to attest to the completeness and correctness of the application submitted. A separate application must be submitted for each qualifying period for which an eligible entity is seeking the CEWS.

Timing of wage subsidy

The guidance suggests that CEWS will be paid to an Eligible Employer by the CRA shortly following the Eligible Employer's submission of a valid application.

Interaction with the 10% wage subsidy, the Canada Emergency Response Benefit and work-sharing benefit

As noted above, the amount of the CEWS that an Eligible Employer is entitled to receive will be reduced by the amount of benefits received or enjoyed in a particular qualifying period by that Eligible Employer under the 10% temporary wage subsidy program enacted in March 2020, or by its employees in respect of work-sharing benefits under the *Employment Insurance Act*.

The CERB, which provides individuals with up to \$2,000 a month if they have lost their employment due to COVID-19, is not intended to overlap with the CEWS benefit on the basis that the CERB generally requires individuals to be without employment for 14 or more consecutive days. Finance has indicated that it is considering approaches to limit duplication of the two programs, including in circumstances where individuals who are eligible for the CERB due to loss of employment are rehired by an employer. Employers not eligible for the CEWS will still be able to furlough employees who may be entitled to receive up to \$2,000 a month under the CERB.

Ensuring compliance with the CEWS program

The government has indicated repeatedly that the CEWS program must be accessed in good faith and serious consequences would follow for those who abuse the program, or who act dishonestly or fraudulently. Every dollar from the wage subsidies must go to employees. Eligible Employers are urged to make every possible effort to rehire all laid-off employees.

To maintain the integrity of the program and ensure it helps Canadians keep their jobs, employers will be required to repay amounts paid under the CEWS if they do not meet the eligibility requirements and pay their employees accordingly. In addition, penalties of up to 50% of the wage subsidies received will be imposed on an employer where the employer knowingly (or in circumstances amounting to gross negligence) submits an application under the CEWS containing false or misleading information.

Are eligible employers obligated to "top up" an employee's salary to 100% after receiving the CEWS?

No. While the government has stated that Eligible Employers are not legally required to top up employees' salaries to 100% of pre-crisis levels, Eligible Employers must make their best efforts to do so.

The legislation did not provide any clarity on how the presence, or absence, of best efforts will be determined. However, as noted above, 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 and we would expect the application to include details on those best efforts. It is also important to note the government previously indicated that Eligible Employers will not be required to demonstrate or prove that they are financially unable to top up employees’ salaries and there is nothing in the legislation that requires this.

When making the decision to top up an employee’s salary, Eligible Employers should be cognizant that the legislation specifically gives the Minister of National Revenue the authority, but not the obligation, to publicize the name of any person or partnership that has claimed the CEWS. No policy regarding the use of this power has yet been communicated.

Can I reduce an employee’s pay and continue to benefit from the CEWS?

An Eligible Employer may reduce an employee’s pay and continue to benefit from the CEWS. However, the amount the Eligible Employer may receive under the CEWS may be reduced accordingly (as described above). Before doing so, it is important to consider that a salary reduction may give rise to significant labour and employment considerations.

Does the wage subsidy have any impact on payroll taxes?

No. While amounts equal to certain payroll taxes for furloughed employees contribute to the amount an Eligible Employer may receive under the CEWS, payroll taxes will continue to be calculated as provided under applicable legislation. Total employer payroll will continue to be calculated in the same manner, even if a portion of the remuneration paid is effectively reimbursed to the employer through the CEWS.

Is the wage subsidy taxable?

Yes. The CEWS will be treated as government assistance and included in the income of the Eligible Employer, although this income inclusion should be offset by an equivalent deduction for the salary paid to employees, generally resulting in a “wash” or neutral effect. It is worth noting, however, that this income inclusion can affect the entitlement to or amount of other tax incentives available to the Eligible Employer, including, for example, in determining the amount of qualified expenditures giving rise to scientific research and experimental development tax credits.

Does the eligible employer pay employees or does the government pay employees?

Eligible Employers pay employees. After paying employees, Eligible Employers will be responsible for submitting an application with the CRA using the portal described above. Eligible Employers will be required to prove they paid an employee and the appropriate wage subsidy will be paid by the CRA to the Eligible Employer.

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