The Canada Emergency Wage Subsidy Comes Into Force

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On April 11, 2020, Parliament enacted the Canada Emergency Wage Subsidy ("**CEWS**") into law, and it is significantly broader than the framework released by the Department of Finance last week. Most notably, the legislation relaxes the revenue test for the month of March and provides flexibility in determining revenue.

What is the CEWS?

The CEWS provides a qualifying entity with a wage subsidy of up to 75% of eligible remuneration paid to an eligible employee in a week for the period between March 15 to June 6, 2020, up to a maximum of $847 per week.

Who is eligible to receive the CEWS?

Eligible employers that experience a prescribed reduction in revenue (e.g. generally 15% in March and 30% in April and May) may receive the CEWS.

The following is the list of eligible employers:

1. a corporation (other than a tax-exempt corporation or public institution);
2. an individual;
3. a registered charity (other than a public institution);
4. a person that is tax-exempt because of paragraph 149(1)(e), (j), (k) or (l) of the *Income Tax Act* (Canada) (other than a public institution);
5. a partnership, all of the members of which are described in this paragraph or in any of paragraphs (a) to (d); or
6. a prescribed organization.

The list is incredibly broad as all taxable corporations other than public institutions (e.g. Crown corporations, universities, hospitals) may qualify. This includes public corporations and Canadian corporations controlled by one or more non-resident persons.

Turning to the required revenue reduction, the employer must experience a 15% reduction in qualifying revenue for March 2020 compared to March 2019 and a 30% reduction in qualifying revenue in April and May 2020 compared to April and May of 2019, respectively. Alternatively, an employer may elect to use the average revenues earned in January and February 2020 as the baseline instead of March, April and May 2019 in making the comparison. An employer must elect to use average revenues for January and February 2020 for all three months of the program. Businesses that did not operate a year ago do not need to elect. This overall regime should be welcome news for new businesses, startups and businesses that have grown or expanded in the past year leading up to the pandemic.

Eligibility for the CEWS is based on three four-week periods beginning on March 15. If an employer is eligible for a particular period, it will automatically qualify for the next period of the program. For example, an employer with a revenue drop of more than 15% in March will qualify for the first and second periods of the program, covering remuneration paid between March 15 and May 9. Similarly, an employer with a revenue drop of 30% in April will qualify for the second and third periods of the program, covering remuneration paid between April 12 to June 6.

Administratively, the employer must: (A) file an application with the Canada Revenue Agency ("CRA") in respect of a qualifying period before October 2020; (B) attest that the application is complete and accurate in all material respects; and (C) have had on March 15, 2020, a business number registered with the CRA to make remittances for income tax source deductions.

How much is the CEWS?

The amount of the CEWS depends on whether the employee was employed before March 15, 2020 or is a new hire. The CEWS for a pre-existing employee is the lesser of: (A) the amount of remuneration paid, to a maximum of $847 per week, and (B) 75% of the employee's baseline weekly remuneration. The subsidy for a new hire is 75% of the amount of remuneration paid, up to a maximum of $847 per week.

The baseline weekly remuneration for a given employee is based on the average weekly remuneration paid between January 1 and March 15, inclusively, excluding any seven-day period in respect of which the employee did not receive remuneration.

Bill C-14 provides an additional amount to compensate employers for their contributions to the Canada Pension Plan, Employment Insurance, Quebec Pension Plan and Quebec Parental Insurance Plan paid in respect of eligible employees who are on leave with pay due to COVID-19 and not working at all.

Eligible remuneration means salary, wages or other remuneration such as taxable benefits, as well as fees, commissions or other amounts for employment services. These are amounts for which employers would generally be required to withhold or deduct amounts to remit to the Receiver General on account of the employee's income tax obligation. Eligible remuneration does not include a retiring allowance, severance pay or items such as stock option benefits or the personal use of a corporate vehicle. Also, it does not include any accelerated remuneration paid to an employee that is in excess of the employee's baseline remuneration where one of the main purposes for the accelerated payment is to increase the amount of the CEWS.

A special rule will apply to employees that do not deal at arm's length with the employer. Family corporations and professional corporations are the most common examples. The CEWS amount for such employees will be limited to the eligible remuneration paid in any week between March 15 and June 6, 2020, up to a maximum benefit of the lesser of $847 per week and 75% of the employee's baseline weekly remuneration. The subsidy would only be available in respect of non-arm's length employees employed prior to March 15, 2020.

There is no overall limit on the CEWS amount that a qualifying employer may claim. However, any benefit received from the 10% Temporary 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. For employers and employees that are participating in a work-sharing program, EI benefits received by employees through the work-sharing program will reduce the benefit that the employer is entitled to receive under the CEWS.

Employers are expected to make their best effort to top-up employees' salaries to bring them to pre-crisis levels.

The CEWS would be considered government assistance and be included in the employer's taxable income for its current fiscal period.

How is revenue measured?

Revenue is generally to be determined on an accrual basis for each period measured, but the legislation contemplates that an employer may elect to use the cash method if that would produce a more favourable result. Corporate groups can choose whether to apply the combined group's results for each member, or alternatively allow each member of the group to determine results on a standalone basis. While revenue is generally defined to exclude internal group revenues and non-arm's length revenue, the legislation does provide a means of computing revenue reductions to account for these situations. The Department of Finance promised flexibility and, at first blush, it appears to have delivered.

Revenue for purposes of the CEWS means the inflow of cash, receivables or other consideration arising in the course of the ordinary activities of the employer–generally from the sale of goods, the rendering of services and the use by others of resources of the employer.

Revenue excludes extraordinary items and amounts derived from persons or partnerships not dealing at arm's length with the employer. However, if all or substantially all of an employer's qualifying revenue is from one or more particular persons or partnerships with which it does not deal at arm's length and each particular person or partnership jointly elects with the employer, then the employer's revenue from such non-arm's length sources may qualify as revenue if the non-arm's length person or partnership experiences a revenue loss from arm's length sources based on the applicable threshold amounts described above. This is intended to allow businesses to receive the CEWS where the employees are employed by a separate entity in the corporate group.

Revenue is to be determined in accordance with the employer's normal accounting practices, which typically (but not always) use the accrual method of accounting. However, the legislation offers some flexibility in determining revenue. First, an employer may elect to use the cash method of accounting for purposes of determining its revenues, but the cash method must be used throughout the program period. Second, if a group of eligible entities normally prepares consolidated financial statements, each member of the group may determine its qualifying revenue separately as long as each member of the group determines its qualifying revenue on that basis. Finally, if an eligible entity is a member of an affiliated group of eligible entities and each member jointly elects, the qualifying revenue of the group determined on a consolidated basis in accordance with relevant accounting principles may be used for each member of the group.

Non-profit organizations and registered charities may choose to exclude government assistance in revenues for the purpose of applying the revenue decline test. Once chosen, this approach must be maintained by the organization throughout the program period.

Anti-avoidance measures and penalties

Bill C-14 introduces two anti-avoidance rules that will deny the CEWS to an employer, if applicable.

The CEWS will be denied to an employer where: (A) a person or partnership not dealing at arm's length with the employer enters into a transaction or participates in an event (or a series of transactions or events) or takes an action (or fails to take an action) that has the effect of reducing the qualifying revenues of the employer for a reference period; and (B) it is reasonable to conclude that one of the main purposes of the transaction, event, series or action is to cause the employer to qualify for the CEWS.

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 CEWS amount claimed, in addition to the requirement to repay in full the CEWS that was improperly claimed.

How do employers apply for the CEWS?

Qualifying employers may apply for the CEWS through the CRA's *My Business Account* portal as well as a web-based application.

How do employers receive the CEWS?

The CEWS is deemed by the legislation to be an overpayment of tax by the employer. The legislation contemplates further that if at any time an overpayment under the CEWS is deemed to arise, the Minister may refund to the employer all or any part of it.

What are the compliance obligations of employers?

Employers must keep records demonstrating their revenue declines and remuneration paid to employees. Employers will not be expected to submit any paperwork to the CRA at the time of application, but may need to later to verify its attestation in the event of an audit by the CRA.

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