



What's New in HR Law

UPDATED: Canada Emergency Wage Subsidy Legislation Receives Royal Assent

April 14, 2020

On April 11, 2020, Bill C-14, the *COVID-19 Emergency Response Act, No. 2* received Royal Assent after being passed by Parliament and the Senate. This Act implemented the Canada Emergency Wage Subsidy ("CEWS"), a 75% wage subsidy for eligible employers. This subsidy is available for up to 12 weeks, retroactive from March 15, 2020 until June 6, 2020.

The Federal Government first announced the CEWS on March 27, 2020 as an additional support for businesses and workers affected by the COVID-19 pandemic.

On April 8, 2020, the Federal Government announced additional details and changes to the CEWS, which revised the program's eligibility requirements and allowed for additional businesses to qualify for the wage subsidy program.

The *COVID-19 Emergency Response Act, No. 2* further expanded criteria to determine eligibility so that employers may be eligible for more than one period based on a single monthly revenue comparison. These amendments may allow additional employers to access the CEWS, as will be discussed below.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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Eligible Employers

Both large and small businesses, including individuals, taxable corporations, partnerships, non-profits and registered charities, may be eligible for the CEWS if they can establish the required declines in revenue due to COVID-19.

Businesses that are public institutions as defined by the *Income Tax Act*, including municipalities, local governments, Crown corporations, public universities, colleges, schools and hospitals, will not be eligible for the CEWS.

15% Decline Required for March, 30% for April and May

In order to qualify for the CEWS, a business must show a decline in revenue of at least 15% for March and at least 30% for April and May. When the program was initially announced, the criterion was a 30% decline in revenue for March, April, and May. However, the Federal Government has recognized that, for many businesses, the impact of the COVID-19 pandemic did not begin until approximately the middle of March.

When applying for the CEWS, the individual who has principal responsibility for the financial activities of the business will be required to attest that the application is complete and accurate in all material respects. Employers should keep detailed and thorough records as to how the decline in revenues was calculated, as well the amounts that were paid to employees, in case they are later called upon to justify their application for, or their use of, funds received through the CEWS.

Eligibility for a Prior Period Can Qualify for an Additional Claiming Period

The ability for employers to qualify for the CEWS was further expanded with the passage of the *COVID-19 Emergency Response Act, No. 2*. Now, if an employer meets the eligibility criteria for March, they can extend their eligibility into April on the basis of their March decline in revenue. Similarly, if an employer meets the eligibility criteria for April, they can continue to be eligible for the CEWS in May. This bridging eligibility may allow some employers who meet the required criteria for only one period to be able to utilize the CEWS for two months.

Eligibility Periods and Claiming Periods

For each eligibility period, there is a period of time (a "claiming period") during which an employer may claim the wage subsidy. Practically, this means that employers will have to re-apply for the wage subsidy each month. The chart below outlines each claiming period and the corresponding eligibility requirements for the claiming period.

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

Two Comparison Methods to Determine Eligibility

There are two possible methods to determine whether an employer is eligible for the CEWS:

1. A year-over-year comparison of monthly revenues (e.g., March 2020 over March 2019); or
2. A comparison of the employer's revenue against an average of their revenue earned in January and February 2020.

Employers will be required to select one of the two approaches, and will be required to use the same approach for their initial and any subsequent applications to the CEWS program. The wage subsidy received by an employer in a given month will not be counted as revenue for the purpose of measuring changes in monthly revenues.

Calculating Revenues: Cash or Accrual Method, Not Both

An employer's revenue for purposes of the CEWS will be revenue from business carried on in Canada earned from arm's length sources. Eligible revenue is defined as including the inflow of cash, receivables, and other consideration arising in the course of the ordinary activities of the eligible entity - generally from the sale of goods, the rendering of services and the use by others of resources of the eligible entity - in Canada in a particular period. Revenue excludes extraordinary items and capital amounts.

As clarified by the Federal Government on April 8, 2020, employers applying for the CEWS may calculate their revenues under either the accrual method or the cash method. A combination of both methods will not be allowed. Employers will need to select a method of revenue calculation and will be required to use that method for the duration of the wage subsidy program.

The *COVID-19 Emergency Response Act, No. 2* outlines specific rules applicable to affiliated employers. Specifically, affiliated employers that do not normally consolidate their financial reporting may elect to measure their revenue separately or on a consolidated basis for determination of CEWS eligibility. In order to measure revenue on a consolidated basis, all related entities must agree.

Registered charities and non-profits can choose whether to include revenue from government sources in their calculations. Similar to the requirement for private sector employers, charities and non-profits will be required to choose one approach for the duration of the wage subsidy program.

Amount of the Subsidy

The amount of any wage subsidy will be calculated on a per-employee basis, and will be based on the individual employee's eligible remuneration. Any wage subsidy is to be provided for the benefit of employees.

Eligible remuneration includes salary, wages, fees and commissions, as well as most other taxable benefits that are subject to withholding tax. Items excluded from the definition of eligible remuneration include retiring allowances, stock option benefits, loans made by the employer to an employee, or the personal use of a corporate vehicle.

Specifically, the subsidy amount for each employee will be the greater of:

- 75% 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% of the employee's pre-crisis weekly remuneration, whichever is less.

An employee's pre-crisis remuneration will be based on the average weekly remuneration paid to the employee from January 1, 2020 to March 15, 2020, excluding any seven-day periods where the employee did not receive any remuneration. Practically, this means that an employer may be eligible for a subsidy of up to 100% of the first 75% of pre-crisis wages for existing employees.

Employers will also be eligible for a subsidy of up to 75% of salaries and wages paid to new employees.

There is no overall limit on the subsidy amount that an eligible employer may claim.

Employees not at "Arm's Length" with the Employer

Special rules exist for employees who do not deal at arm's length with their employer (e.g., family members employed by a family business). For these employees, the subsidy amount available is limited to the eligible remuneration paid to the employee in any pay period between March 15th and June 6th, up to a maximum benefit of the **lesser** of: (i) \$847 per week or (ii) 75% of the employee's pre-crisis remuneration. The wage subsidy is available only in respect of non-arm's length employees employed prior to March 15, 2020.

100% Refund for EI, CPP, QPP and QPIP: Only for Employees on Leave with Pay

Employers may be eligible for a 100% refund for employer-paid contributions to Employment Insurance, Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan. This refund is applicable only to those employees who are on leave with pay. If the employee is on leave with pay for a portion of the week, and actively performing work for the employer for the remainder of the week, the employer would not be eligible for this refund.

Any refund will not be subject to the maximum weekly benefit of \$847 under the CEWS; it will be in addition to that amount.

Employers Must Make "Best Efforts" to Top-Up Wages

Although not expressly included in the legislative body of *COVID-19 Emergency Response Act, No. 2*, the Federal Government's published materials on the CEWS continue to outline that employers will be expected to make best efforts to pay the remaining 25% of employee wages. The Federal Government is aware that this may not always be possible, but requests that, where employers are able, they top up the wage subsidy.

Risk of Significant Penalties

If an employer claims the CEWS but does not meet the eligibility terms of the program, they will be required to repay any amounts received. For those businesses that engage in artificial transactions to reduce their revenue for the purpose of claiming the CEWS, they will be subject to a penalty of 25% of the subsidy claimed on top of the requirement to repay in full the amounts received.

In a press conference on April 8, 2020, Finance Minister Bill Morneau announced that the government is contemplating penalties of up to 225% of what the business received and up to 5 years in jail for those who engage in fraudulent claims or do not pay the claimed amounts to their employees. These contemplated penalties were not a part of the *COVID-19 Emergency Response Act, No. 2*, nor mentioned in the Government's updated publications regarding the CEWS.

Eligible Employees - The Interaction Between the CEWS and the CERB

An eligible employee is simply an individual who is employed in Canada. The CEWS is not available to employers for an employee who has been without remuneration for 14 or more consecutive days during each eligibility period. An employee without remuneration for 14 or more consecutive days may be eligible for the Canada Emergency Response Benefit ("CERB").

It was previously announced that an employer was not allowed to collect the CEWS in respect of an employee who was also collecting the CERB. However, the Federal Government has made it clear that employers are encouraged to rehire employees as quickly as possible. Given that an employee who has been laid off may have already applied to receive the CERB, the Federal Government has indicated it is considering adding a process to avoid duplicative payments. This process may include allowing employees who are rehired to cancel their CERB claim, receive the CEWS through their employer instead, and repay any overlapping amounts.

In order to have a clear demarcation between when the employee was collecting the CERB and when the employer can claim the CEWS for remuneration paid to the employee, employers may consider rehiring employees at the start of a work week rather than mid-week.

The 10% Wage Subsidy

Those businesses that do not qualify for the CEWS may continue to qualify for the previously announced wage subsidy of 10% of remuneration paid from March 18 to June 19, 2020, up to a maximum subsidy of \$1,375 per employee and \$25,000 per employer.

Employers who are eligible for both programs will see any benefit paid under the 10% Wage Subsidy reduce the amount available for reimbursement under the CEWS during the same period of time.

Interaction with the Work-Sharing Program

An employer who is utilizing a Work-Sharing Agreement may still be eligible for the CEWS. Any Employment Insurance benefits received under a Work-Sharing Program will reduce the subsidy amount an employer can receive under the CEWS.

Tax Implications for Employers

The CEWS will be considered taxable income for employers who receive it. However, CEWS payments received will not be included in an employer's revenue when determining its eligibility to participate in the wage subsidy program.

Timelines for Application and Receipt of the CEWS

While exact timelines have not yet been released, Employment Minister Carla Qualtrough announced during an interview with CTV on April 9, 2020 that it could be two to four weeks before funds are received by employers. The Federal Government has indicated that it plans to have the application process open in one to two weeks through the Canada Revenue Agency's *My Business Account* portal, with funds being released to employers shortly after applications are submitted. Employers are advised to have a direct deposit account with the CRA in order to ensure timely payment of the wage subsidy. Once applications are open, employers may apply for the CEWS at any time before October 1, 2020.

Publication of CEWS Applicants

Under *COVID-19 Emergency Response Act, No. 2* the Minister of Revenue has the authority (but not the obligation) to make available to the public the name of any person or partnership that applies for the CEWS.

Future Updates

Filion Wakely Thorup Angeletti LLP continues to closely monitor the developments surrounding the COVID-19 outbreak and will provide additional updates as new information becomes available.

Need more information?

For more information regarding workplace management amidst the COVID-19 outbreak, contact [Cassandra da Costa](#) at 519-435-6009, or your regular lawyer at the firm.



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