Canada Emergency Wage Subsidy Updates

The CEWS was originally introduced on April 11, 2020 and provided a 75% wage subsidy to eligible employers for up to 12 weeks, beginning on March 15, 2020. The program was subsequently extended by regulation until August 29, 2020. Further details about the original CEWS program can be found in our previous article.

In July 2020, the Government of Canada passed legislation to extend and redesign the CEWS program (the July Update).[1] The redesigned CEWS program will be available to a broader group of employers and has been extended until June 30, 2021. In November 2020, the Government of Canada passed legislation to further extend and amend the CEWS program (the November Update).[2] Additional details were released on January 6, 2021, February 24, 2021, with the latest update released on March 3, 2021, accompanied by draft legislation proposing additional claim periods and the rules applicable to these additional periods (the March 2021 Update).

The following is an overview of the key changes included in the July Update, the November Update, and the March 2021 Update.

NEW CEWS PROGRAM DETAILS

Extension of CEWS

The CEWS program will be extended until June 30, 2021. The CEWS claim periods, including those provided for under the original CEWS program are set out below:

Overview of Subsidy

For claim periods beginning July 5, 2020, the CEWS in respect of active employees (*i.e.,* those not on paid leave) will consist of two parts:

- A **base subsidy** available to eligible employers that have experienced any decline in monthly revenues, which will apply on a sliding scale depending on the employer's revenue decline (the Base Subsidy); and
- A **top-up subsidy** of up to 25% for Periods 5 to 10, and up to 35% for Periods 11 to 13 (and proposed for Periods 14 to 16), available to eligible employers that have been most adversely affected by COVID-19 who have

experienced a revenue decline of more than 50% (the Top-up Subsidy).

For Periods 5 to 13, an eligible employer's combined CEWS rate will be equal to the Base Subsidy rate plus the Top-up Subsidy rate. The same has been proposed for Periods 14 to 16.

Base Subsidy

The July Update eliminated the 30% revenue decline threshold for Period 5 and subsequent claim periods. Instead, the Base Subsidy applies on a sliding scale, depending on the employer's revenue decline. The Base Subsidy is applied at a specified rate on remuneration of up to $1,129 per week, with the specified rate determined based on the percentage decline in an eligible employer's monthly revenues.

The maximum Base Subsidy rate will apply where an employer experiences a revenue decline of 50% or more. The maximum Base Subsidy rate is gradually reduced from 60% in Periods 5 and 6 to 40% in Period 8 and onwards.

The Base Subsidy applies as follows:

Calculation of Revenue Decline & Reference Periods

In computing an eligible employer's revenue decline for purposes of the Base Subsidy for Period 5 and onwards, the employer may use either the "general approach" or the "alternative approach."

- **General approach**: an employer's revenue decline is equal to *the greater of* its percentage revenue decline when comparing the current month to the same month one year prior (or two years prior in the case of proposed Periods 14 to 16), and the previous month to the same month one year prior (or two years prior in the case of proposed Periods 15 and 16).
- **Alternative approach:** an employer's revenue decline is determined by comparing either the current month to the average of January and February 2020, or the previous month to the average of January and February 2020.

Employers that elected to use the alternative approach for Periods 1 to 4 may maintain that election for Period 5 onwards or may revert to the general approach. Similarly, employers that used the general approach for Periods 1 to 4 may continue using that approach for Period 5 onwards or may elect to use the alternative approach going forward. The chosen approach will apply for Period 5 onwards and will apply to the calculation of both the Base Subsidy and the Top-up Subsidy (if any).

Safe Harbour

For Periods 5 and 6, there is a "safe harbour" rule for eligible employers that would have been better off under the original CEWS rules. Thus, for Periods 5 and 6, an eligible employer who experienced a revenue decline of 30% or more and would have been better off under the CEWS rules in place for Periods 1 to 4 is eligible for the higher subsidy computed under the original program (in addition to the Top-up Subsidy, if applicable).

Top-up Subsidy

For Periods 5 to 7, a Top-up Subsidy of up to 25% is available for eligible employers that have experienced a three-month average revenue decline of more than 50%. The Top-up Subsidy rate is equal to 1.25 times the average revenue decline in excess of 50%, up to a maximum Top-up Subsidy rate of 25% (which is attained at a 70% revenue decline).

For Periods 8 to 10, the same Top-up Subsidy of up to 25% is available for eligible employers that have experienced either a three-month average revenue decline of more than 50% or a one-month revenue decline of more than 50%, whichever is greater. The Top-up Subsidy rate is equal to 1.25 times the revenue decline in excess of 50%, up to a maximum Top-up Subsidy rate of 25% (which is attained at a 70% revenue decline).

For Periods 11 to 13 (and proposed Periods 14 to 16), a Top-up Subsidy of up to 35% is available for eligible employers that have experienced a one-month revenue decline of more than 50%. The Top-up Subsidy rate is equal to 1.75 times the average revenue decline in excess of 50% up to a maximum Top-up Subsidy rate of 35% (which is attained at a 70% revenue decline).

As with the Base Subsidy, the Top-up Subsidy is calculated on a maximum remuneration of up to $1,129 per week.

The Top-up Subsidy is calculated as follows:

Calculation of Revenue Decline & Reference Periods

For Periods 5 to 7, eligibility for the Top-up Subsidy is determined based on an employer's three-month average revenue decline, using either the general approach or the alternative approach:

For Periods 8 to 10, eligibility for the Top-up Subsidy is determined based on *the greater of* an employer's three-month average revenue decline or the one-month revenue decline, using either the general approach or the alternative approach:

For Periods 11 to 13 (and proposed Periods 14 to 16), eligibility for the Top-up Subsidy is determined based on the one-month revenue decline, using either the general approach or the alternative approach:

The approach chosen (i.e., general or alternative) for Period 5 onwards will apply to the calculation of the Base Subsidy and the Top-up Subsidy.

Eligible Remuneration and Eligible Employees

Elimination of 14-Day Rule

Prior to the July Update, the definition of “eligible employee” excluded any employee who had been without remuneration from the eligible employer in respect of a period of 14 or more consecutive days in the claim period. n the July Update, the definition of “eligible employee” was amended such that, effective July 5, 2020, employees who are without remuneration for 14 or more consecutive days in an eligibility period are no longer excluded from the subsidy. In other words, any employees employed in Canada can properly be considered in the subsidy calculation, even if they are not actively working during all or part of a claim period. This allows for the possibility of recouping a subsidy for employees recalled for a short period of time (or for those recalled at the end of a claim period).

Employed Primarily in Canada

The November Update amended the definition of “eligible employee” such that the employee must be employed “primarily in Canada” throughout the qualifying period. The Canada Revenue Agency has generally interpreted “primarily” to mean more than 50%.

Definition of “Eligible Remuneration” Unchanged

The definition of “eligible remuneration” remains unchanged. For active arm’s length employees, the amount of remuneration in Period 5 and subsequent periods will be based on actual remuneration paid for a particular period, without reference to “pre-crisis” remuneration. For active employees who do not deal at arm’s length with the employer, the wage subsidy is based on the employee’s weekly eligible remuneration or pre-crisis remuneration, whichever is less, up to a maximum of $1,129. The CEWS is only available for non-arm’s length employees who were employed prior to March 16, 2020. See below for further information on calculating an employee’s pre-crisis remuneration.

Employees on Paid Leave (Furloughed Employees)

The Base Subsidy and Top-up Subsidy will not apply to employees on paid leave. However, for Period 5 and subsequent periods, the CEWS for employees on paid leave will nonetheless be available for eligible employers that otherwise qualify for the subsidy. An employer’s entitlement to the subsidy for an employee on paid leave is calculated based on the employee’s current remuneration and their baseline (i.e., pre-crisis) remuneration. For Periods 5 to 13, an employee’s baseline remuneration is the average weekly eligible remuneration paid between January 1, 2020 to March 15, 2020, with any period of seven or more consecutive days where the employee was not remunerated being excluded from the calculation. An employer may elect to use an alternative baseline period of July 1, 2019 to December 31, 2019, or for Periods 14 to 16, the period of March 1, 2019 to June 30, 2019.

The subsidy in respect of employees on paid leave in Periods 5 to 6 will remain the same as for Periods 1 to 4, and is equal to the greater of:

- For arm’s length employees, 75% of the amount of remuneration paid, up to a maximum of $847 per week; and
- 75% of the employee’s pre-crisis remuneration up to a maximum of $847 per week or the amount of remuneration paid, whichever is less.

For Periods 7 and 8, the subsidy in respect of employees on paid leave will equal the greater of:

- For arm’s length employees, 75% of the amount of remuneration paid, up to a maximum of $847 per week; and
- 75% of the employee’s pre-crisis remuneration up to a maximum of $847 per week or the amount of remuneration paid, whichever is less;

unless the amount of remuneration paid is lower, in which case the amount of remuneration paid will be the amount of the subsidy.

Beginning in Period 9, the subsidy in respect of employees on paid leave has been adjusted to align with the benefits provided under the Canada Emergency Response Benefit and/or Employment Insurance.

For Periods 9 and 10, the subsidy in respect of employees on paid leave is equal to the lesser of:

- the amount of eligible remuneration paid in respect of the week; and
- the greater of
  - $500; and
  - 55% of the employee’s pre-crisis remuneration, up to a maximum subsidy amount of $573.

For Periods 11 to 13 (and proposed Periods 14 to 16), the subsidy in respect of employees on paid leave is equal to the lesser of:

- The amount of eligible remuneration paid in respect of the week; and
- The greater of
  - $500; and
  - 55% of the employee’s pre-crisis remuneration, up to a maximum subsidy amount of $595.

The employer portion of contributions in respect of the Canada Pension Plan, Employment Insurance, the Quebec Pension Plan and Quebec Parental Insurance Plan for employees on paid leave are refunded to the employer.

Application Deadlines

The deadline to apply for CEWS for Periods 1 to 5 is January 31, 2021. For periods 6 and onwards, the deadline to apply is 180 days after the end of the applicable qualifying period:

Certain Additional Legislative Changes

- **Payroll services.** An employer that does not have its own payroll program account and uses a payroll service provider to administer its payroll may qualify for the CEWS.
- **Accounting method.** Under the original CEWS legislation, employers that use accrual-based accounting were able to elect to use the cash method of accounting to compute their revenue for purposes of determining the revenue decline. Any eligible employer may now make an election, which will apply for all qualifying periods, to determine its revenue based on the cash method or the accrual method.

- A corporation formed by amalgamation is deemed, for purposes of the CEWS, to be the same corporation as, and a continuation of, each predecessor corporation, unless it is reasonable to consider that one of the main purposes of the amalgamation is to cause the new corporation to qualify for, or increase the amount of, the CEWS. This allows corporations that have been amalgamated to calculate their revenue decline using the combined revenues of the predecessor corporations, unless it is reasonable to consider that one of the main purposes of the amalgamation was to qualify for, or increase the amount of, the subsidy.
- **Continuity on purchase of a business.** Where an eligible employer has acquired all or substantially all of the assets of a business carried on in Canada by a seller during a qualifying period, the purchaser and the seller may file a joint election such that the purchaser may include the seller's revenue in its revenue in calculating the purchaser's revenue decline for purposes of accessing the CEWS in respect of the purchased business.
- The legislation provides for an appeal process for the CEWS to the Tax Court of Canada based on existing procedures for notices of determination.

CEWs Audits

The Canada Revenue Agency has begun auditing CEWS claims, and the information requests in respect of these audits are very onerous and the information must be provided within 10 business days. The following is a summary of the types of information that will be included in a CEWS information request:

- **Documents from minute books.** This will include governance documents that relate to the CEWS claim, any agreements or resolutions that demonstrate the decision-making process and approvals for making a CEWS claim, and information on any entities and businesses within the corporate group.

- **Revenues for the 2019 taxation year.** This will include general ledger data, year-end and monthly trial balances, and monthly sales reports that break down sales by revenue type and source.

- **Revenues for the 2020 taxation year.** This will include monthly ledger data, monthly trial balances, and monthly sales reports that break down sales by revenue type and source.

- **Information used to compute the CEWS revenue decline percentages.** This will include working papers substantiating the computation of qualifying revenue for the current reference period and prior reference period, revenue recognition policy, and a summary distinguishing between revenue earned in Canada and outside Canada.

- **General payroll/employee information.** This will include a detailed payroll journal separated by employee and their Social Insurance Number with working papers to reconcile payroll data to lines A to C on the CEWS application submitted, employment contracts, proof of payment to employees, and bank statements.

- **Information relating to other subsidies and government programs.** This will include supporting documents for the 10% temporary wage subsidy and Employment and Social Development Canada's Work-Sharing Benefit and working papers to reconcile the amount claimed on the CEWS application.

- **A signed copy of the Attestation filed with the CEWS application.**

- **Remuneration exclusions.** This will include lists of special categories of employees such as those who were not receiving eligible remuneration and those who were not dealing at arm's length with the employer and a summary of severance payments, retiring allowances, and stock option benefits.
- **Qualifying revenue exclusions.** This will include a breakdown of revenues from non-resident related parties, revenues from non-arm's length persons, extraordinary items and government subsidies.
- **Elections.** Where the non-arm's length election is made, the employer must provide the following information: the names and business account numbers for the non-arm's length entities, the financial statements for those entities, the information referred to above for non-arm's length entities, and working papers detailing how qualifying revenues were computed for the non-arm's length entities.

The author gratefully acknowledges the contributions of articling student Ashley Jung in the preparation of this article.

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Footnotes

[1] Bill C-20, *An Act respecting further COVID-19 measures*, received Royal Assent on July 27, 2020
[2] Bill C-9, *An Act to amend the Income Tax Act (Canada Emergency Rent Subsidy and Canada Emergency Wage Subsidy)*, received Royal Assent on November 19, 2020 and is now law. Additionally, new regulations amending the Income Tax Regulations were published in the Canada Gazette Part II, Volume 155, Number 1 on January 6, 2021 and came into force on December 20, 2020.
[3] Periods 14 to 16 were proposed in the March 2021 Update to continue in the same manner as Periods 8 to 13 with respect to the Base Subsidy.
[4] The same rates are proposed for Periods 14 to 16.
[5] The same calculations are proposed for Periods 14 to 16.