

Legal update

Canada Emergency Wage Subsidy update: April 1

April 2, 2020

Tax

Employment and labour

On March 30, the federal government announced it is expanding the scope of wage subsidy benefits for small and medium-sized businesses affected by COVID-19, previously announced on March 27, to include most businesses of all types and sizes, as long as their gross revenues have decreased by 30% or more due to COVID-19. Click [here](#).

On April 1, the government provided further details regarding the Canada Emergency Wage Subsidy. While many questions remain following the press conference, the Canada Emergency Wage Subsidy is an important step in assisting businesses to keep and return employees to their payrolls despite the challenges posed by the COVID-19 pandemic. Draft legislation has not been released nor has a specific timeline been set for releasing this draft legislation. We continue to watch tax and legal issues related to the Canada Emergency Wage Subsidy and will provide further information and clarification as it becomes available.

What employers are eligible?

Eligible employers include individuals, taxable corporations, and partnerships consisting of eligible employers, as well as non-profit organizations and registered charities. They are eligible regardless of their size, whether public or private, and whether Canadian or foreign controlled.

Public bodies are not eligible for this subsidy. Public bodies include municipalities and local governments, Crown corporations, public universities, colleges, schools, and hospitals.

What constitutes a decrease in gross revenue by 30% or more?

Currently, there is no specific requirement to prove that the decrease in gross revenue is attributable to the COVID-19 crisis. The mechanics to measure a 30% decrease in gross revenue remain unclear.

An employer's gross revenue means its gross revenue from its business carried on in Canada earned from arm's-length sources. The arm's-length requirement, combined with the fact that employer gross revenue is to be calculated on an entity by entity basis, will present a significant obstacle for many corporate groups or partnership structures where the employer may often not be the entity with the arm's-length revenues.

Revenue is calculated using the employer's normal accounting method, and excludes revenues from extraordinary items and amounts on account of capital. It is also important to note that under the current proposals revenue is to be calculated on an entity by entity basis rather than on consolidation of corporate groups or branch accounting.

The subsidy must be applied for monthly and is available for March, April and May as described in further detail below. An employer is an eligible employer where it can demonstrate that its monthly gross revenues for the particular month have decreased by 30% or more, as compared to its gross revenues for the same month in 2019.

It would seem that where (and only where) an employer did not have any activities in the relevant month in 2019 it can use some other reasonable basis for comparison, giving some flexibility. Some examples given of a reference period that could be reasonable in certain circumstances are the previous month or some other month the employer reasonably considers to be comparable. The fact no similar flexibility seems to be afforded to employers having revenues in the same period in 2019 may unduly restrict access to the subsidy.

One can imagine many situations where an employer's gross revenues in the relevant month in 2019 are not a reasonable basis against which to measure reduction in gross revenues. Consider, for example, an employer with a significant increase in its gross revenues in the latter half of 2019, which could be attributable to additional hiring, a plant expansion or acquiring additional business assets. It is hoped that these situations and others will be considered in fashioning the legislation.

For charities and non-profits, the government has stated it will work with the sector to ensure that gross revenue is defined in a way appropriate to their specific circumstances. Further, the government indicated it is considering supplementary changes to support non-profits and charities, and that it will announce details soon.

Can employers receive wage subsidies for employees who were laid off and are already being supported by employment insurance?

No. Canada's Emergency Wage Subsidy is intended to support employers for wages paid to employees they currently employ. If an employee has been laid off due to the COVID-19 crisis, the employer must re-employ the employee in order to seek wage subsidy benefits for that employee. However, there is apparently no need for employees to actually be performing employment duties, provided they are on the employer's payroll.

Quantum of the wage subsidies

Eligible employers can receive, for a given employee receiving eligible remuneration paid between March 15 and June 6, 2020, a wage subsidy on the first \$58,700 of an employee's salary equal to the greater of: (i) 75% of the amount of remuneration paid, up to a maximum benefit of \$847 per week; and (ii) the lesser of the amount of remuneration paid, up to a maximum benefit of \$847 per week, and 75% of the employee's pre-crisis weekly remuneration. Consequently, if an employer has previously reduced an employee's remuneration from its pre-crisis level, it may be possible to obtain a subsidy calculated on the higher pre-crisis remuneration.

It is also worth noting that a subsidy would appear to be available even if an employee's salary exceeds the \$58,700 threshold and there would appear to be no cap on the aggregate subsidy that an eligible employer may claim.

How will an employee's wages be calculated for the purpose of the 75% wage subsidy?

Eligible remuneration includes salary, wages, and other remuneration. These are amounts for which employers would generally be required to withhold or deduct amounts at source to remit to the Receiver General. However, it does not include severance pay, or items such as stock option benefits or the personal use of a corporate vehicle. It is unclear to what extent other non-monetary taxable benefits would be included.

A special rule will apply to employees that do not deal at arm's length with the employer. The subsidy will only be available if the employee was already an employee of the eligible employer on March 15, 2020. The subsidy amount for such employees will be limited to the eligible remuneration paid in any pay period between March 15 and June 6, 2020, up to a maximum benefit of \$847 per week or 75% of the employee's pre-crisis weekly remuneration.

Further guidance on how to define pre-crisis weekly remuneration for a given employee will be provided in the coming days.

Are eligible employers obligated to "top up" an employee's salary to 100% after receiving wage subsidy benefits from the government?

No. While we understand 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. It is unclear how the presence, or absence, of best efforts will be determined and whether there will be any sanction, but the government has indicated that eligible employers will not be required to demonstrate or prove to the government that they are financially unable to top up employees' salaries.

Can I reduce my employee's pay and continue to benefit from the 75% wage subsidy?

Under the guidance provided by the Minister of Finance, an employer may reduce an employee's pay and continue to benefit from the 75% wage subsidy. However, 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. 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 was effectively reimbursed to the employer through the subsidy.

Is the wage subsidy taxable?

Yes. The wage subsidy would normally be treated as government assistance and included in the income of the eligible employer, although this income inclusion would 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.

Start and end of wage subsidies (eligibility periods)

The Canada Emergency Wage Subsidy program will be in place for 12 weeks, from **March 15 to June 6, 2020**. In other words, wage subsidies will be retroactive to **March 15, 2020**. Subject to the comments above regarding the baseline against which revenues are to be tested, eligibility would generally be determined by the change in an eligible employer's monthly revenues, year-over-year, for the calendar month in which the period began. The table below outlines each claiming period and the reference period for the gross revenue test. The table was posted [here](#).

	Claiming period	Reference period for eligibility
Period 1	March 15 – April 11	March 2020 over March 2019
Period 2	April 12 – May 9	April 2020 over April 2019
Period 3	May 10 – June 6	May 2020 over May 2019

Mechanics of paying employees and receiving wage subsidies

Eligible employers will be able to apply for the Canada Emergency Wage Subsidy through the Canada Revenue Agency's "My Business Account" portal, as well as through a web-based application to be made available within the next four to six weeks. Employers must keep records demonstrating their reduction in arm's-length revenues and the remuneration paid to employees. More details about the application process are expected shortly.

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 a claim with the Canada Revenue Agency using the portal described immediately above. Eligible employers will be required to prove they paid an employee and the appropriate wage subsidy will be paid by the Receiver General to the eligible employer. Further details are expected as to when employers can expect to receive wage subsidy payments after paying their employees.

Interaction with the 10% wage subsidy announced on March 18, 2020

On March 18, the Prime Minister announced a temporary 10% wage subsidy. For employers eligible for both the Canada Emergency Wage Subsidy and the 10% wage subsidy for a given period, any benefit from the 10% wage subsidy for remuneration paid in a specific period would generally reduce the subsidy available under the Canada Emergency Wage Subsidy for that same period.

Interaction with the Canada Emergency Response Benefit announced on March 25, 2020

An eligible employer would not be eligible to claim the Canada Emergency Wage Subsidy for remuneration paid to an employee in a week that falls within a four-week period for which the employee is eligible for the Canadian Emergency Response Benefit. Employers not eligible for the Canada Emergency Wage Subsidy would still be able to furlough employees who will receive up to \$2,000 a month.

Ensuring compliance with Canada's Emergency Wage Subsidy program

The government has indicated repeatedly that Canada's wage subsidy program must be accessed in good faith and there would be serious consequences 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, eligible employers will be required to repay amounts paid under the Canada Emergency Wage Subsidy if they do not meet the eligibility requirements and pay their employees accordingly. Penalties may apply in cases of fraudulent claims. Anti-abuse rules will also be proposed to ensure the subsidy is not inappropriately obtained and employees are paid the amounts they are owed. The government is considering proposing new offences that will apply to individuals, employers or business administrators who provide false or misleading information to obtain access to the subsidy or who misuse any funds obtained under the program. The penalties may include fines or even imprisonment. These details have yet to be officially announced.

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