

The Canada Emergency Wage Subsidy – Employee Perspectives

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COVID-19 Emergency Response Act No. 2.¹ was tabled for first reading on Saturday April 11, 2020. The Act is the legislation that creates the Canada Emergency Wage Subsidy (“CEWS”), announced by the Government of Canada on March 27, 2020. This program expanded the previous program providing small businesses a 10% wage-related subsidy,² and has since been expanded twice to now run to the end of 2020.

This is the largest wage subsidy program in Canada since WW II. The subsidy was initially projected to cost approximately \$73 billion, and more recently estimated at \$83.6 billion. The intent behind the second expansion of the CEWS program appears to be to shift individuals from receiving CERB and have them receiving CEWS through an employment relationship.

The Government of Canada published a [website](#) with summary information about the program, including application procedures and an [online calculator](#) for determining the amount of the subsidy. We expect this calculator to be updated to reflect the new rules in effect from July 5, 2020.

On July 27, 2020 Bill C-20 received royal assent.³ Bill C-20 significantly expanded and amended the CEWS program, including the following changes:

- extending CEWS until November 21, 2020, with possible extensions by regulation to December 31, 2020;
- increasing the number of employers eligible for CEWS by providing a graduated subsidy to all eligible employers that are experiencing any decline in revenues in 2020, and not just those with a 30% reduction in revenues (the prior threshold); and

¹ COVID-19 Emergency Responses Act No. 2, Bill C-14: <https://www.parl.ca/DocumentViewer/en/43-1/bill/C-14/first-reading>.

² *COVID-19 Emergency Responses Act*, S.C. 2020, c. 5. The program is called a “wage subsidy”, and that is the policy intent. However, the program transfers amounts directly to employers, who may only receive it to the extent they are paying “eligible remuneration”. There is no direct transfer to employees.

³ *An Act respecting further COVID-19 measures*, S.C. c. 11 (Royal Assent July 27, 2020).

- introducing a top-up subsidy of up to an additional 25% of eligible remuneration of employees for employers that have been most adversely affected during 2020.

Bill C-20 essentially creates two forms of CEWS: one that applies to the four qualifying four week periods between March 15 and July 4, 2020, and one that applies for the five four-week periods between July 5 to November 21, 2020. The eligibility and amounts for periods 5-9 are significantly more flexible and complicated. We have revised our memo to describe both program details for periods 1-4 and 5-9 accordingly.

Note that the filing deadline to claim any CEWS subsidy has been extended to January 31, 2021.

Overview of the Subsidy

The CEWS is intended to prevent layoff and encourage re-hiring laid off employees, and to shift individuals from receiving the Canada Emergency Response Benefit (“CERB”) to CEWS and eventually normal employment. Roughly speaking, the maximum CEWS subsidy should pay individuals more, after tax, (e.g., a the maximum \$847 per week gross which could net \$600-\$650 net per week), than the CERB (\$500 per week net).

For the periods 1-4 (March 15 through July 4), CEWS provides a subsidy directly to eligible employers in an amount of up to 75% of eligible employees’ remuneration up to \$847 per week.

For the periods 5-9 (July 5 to November 21), CEWS provides an enhanced subsidy to a wider group of employers for the months of July and August, and a slowly reducing subsidy amount for the periods September, October, November and December. The CEWS subsidy is made up of two parts, a “base amount” and a “top up amount”, the intent of which is to provide a greater subsidy for the most severely affected employers. The purpose of the graduated subsidy as a whole appears to be to provide an incentive to recall and retain employees as the CERB benefit is eliminated.

In addition, for employees on paid leave (not working, but remaining on payroll), CEWS also provides for 100% refund of employer-paid contributions to Employment Insurance (“EI”) Canada Pension Plan (“CPP”), Quebec Pension Plan (“QPP”) and Quebec Parental Insurance Plan (“QPIP”). Employee contributions to EI, CPP, QPP and QPIP must continue.

Eligibility of Entities

The Act defines those employers eligible to receive the CEWS as an “**eligible entity**”, which includes individuals, partnerships and corporations, charities, and “**labour organizations**” as

defined in s. 149(k) of the ITA (trade unions and related entities) and “non-profit organizations” as defined in s. 149(l) of the ITA.⁴

“**Public institutions**” are excluded and not eligible for the CEWS. A public institution is:

- an entity described in s. 149(1)(a)-(d.6) of the ITA, which include employees of foreign countries, municipal authorities, crown corporations and their subsidiaries; and
- school boards, hospitals, health authorities, public universities or colleges.⁵

On May 15, the Government of Canada announced regulations clarifying and confirming certain entities as eligible, including: indigenous government-owned corporations that are carrying on a business, as well as partnerships where the partners are Indigenous governments and eligible employers; registered Canadian Amateur Athletic Associations; registered Journalism Organizations; and non-public colleges and schools, including institutions that offer specialized services, such as arts schools, driving schools, language schools or flight schools. The Government of Canada also announced proposed amendments to “better align trusts with corporations”.

Qualifying Entities

If an employer is an “eligible entity”, it must determine if qualifies for the subsidy. Qualification requires that it calculate the reduction in qualifying revenues it has experienced during qualifying periods. The Act contains definitions of “**qualifying entity**”, “**qualifying period**”, and “**qualifying revenue**”.

A “**qualifying entity**” is one that meets the following conditions:

- it files an application for the qualifying period and in that application attests to financial information in the application;
- its qualifying revenues are less than the prescribed percentage for the qualifying periods, which are,
 - a loss of 15% of qualifying revenues in March 2020;⁶

⁴ Trade unions often use “non-profit organizations” incorporated as non-share capital corporations to hold property and perform other functions for trade unions.

⁵ *COVID-19 Emergency Responses Act No. 2*, amending ITA to include a new s. 125.7. All references herein are to the ITA as amended by *COVID-19 Emergency Responses Act No. 2*. See definition of “eligible entity” and “public institution”, s. 125.7, ITA.

⁶ The periods April 12 to May 9, and May 10 to June 6, 2020 are subject to the 30% threshold. The definition of qualifying period provides that other periods may be prescribed.

- a loss of 30% of qualifying revenues in periods 2, 3 and 4 (April to July 4, 2020); and
- for the subsequent qualifying periods 5-9 (July 5 to November 21, 2020), **any decline in year over year revenues.**

Qualifying revenues are defined as the “inflow of cash receivables or other consideration arising in the course of the ordinary activities”, and subject to certain inclusions and exclusions. Trade unions and other not-for-profit entities may include revenues in the normal course of business such as membership fees or dues. Amounts excluded are funding received from government sources, “extraordinary items”, deemed overpayments (previous COVID-19 subsidy amounts).⁷

An eligible entity must compare the qualifying revenues for a “**prior reference period**” and the “**current reference period**”.

Eligible entities can elect which periods to use as prior reference periods: the same month in the previous year (e.g., March 2019 compared to March 2020) or the average of January and February 2020 to the current reference period (e.g., average of January and February 2020 compared to March 2020). You may choose to use a different prior reference period for periods 5-9 (as compared to the one used for periods 1-4).

Qualifying revenue is determined in accordance with its normal accounting principles and subject to several conditions on related entities.⁸ Importantly, eligible entities may elect to compute qualifying revenues on the accrual or cash method (but must use the same method for all qualifying periods).⁹

Subsidy Calculation, Delivery and Amount

The subsidy is delivered as a deemed overpayment of liability for tax by an eligible entities account with the Canada Revenue Agency.¹⁰

The rules for calculating the amount of subsidy differ significantly between periods 1-4 and 5-9. We set these out in turn below.

⁷ Extraordinary items are typically gains or losses that are unusual or infrequent in nature.

⁸ The cash method records transactions when they are executed (e.g. when an account is paid); the accrual method records transactions when the underlying transaction occurs (e.g., when an account is issued and due instead of when it is paid). The main difference for the purpose of this memo is that the cash basis permits eligible entities to qualify based on cash flow during a qualifying period, rather than being required to include accrued accounts receivable, which may not ultimately be paid. An eligible entity must elect one method and use that method for all qualifying periods.

⁹ See s. 125.7(4)(e) “computation of revenue”.

¹⁰ The refund amounts are funded through the Consolidated Revenue Fund.

Periods 1-4 (March 15 to July 4)

For all periods the subsidy is available in respect of “eligible employees”. In periods 1-4, eligible employees are individuals employed in Canada by the eligible entity, and who have not been without remuneration by the eligible entity for a period of more than 14 consecutive days in the qualifying period. This rule is intended to make employees eligible for the subsidy as long as they are employed for 14 days out of a four week period (and otherwise, it is the policy intent that the employee receive CERB).

The amount of the subsidy during the first four periods is calculated as follows.

For these first four periods, the amount of the subsidy is:

- the lesser of is 75% of “eligible remuneration” or \$847 per week; less
- amounts deemed remitted under the *COVID-19 Emergency Response Act* (the first wage-related subsidy amounts); less
- amounts received as a work-sharing benefit under EI; plus
- employer contributions to EI or CPP in respect of persons on paid leave.

Eligible remuneration is defined as amounts described in s. 153(1)(a) or (g) of the ITA,¹¹ but not including retiring allowances or amounts payable under s. 7(1)(a) to (d.1) of the ITA,¹² amounts repaid or repayable to an eligible entity, or amounts in excess of “baseline remuneration” (including amounts reducing baseline remuneration following qualifying periods).¹³

Baseline remuneration means the average weekly eligible remuneration paid to the eligible employee by the eligible entity during the period that begins on January 1, 2020 and ends on March 15, 2020, excluding any period of seven or more consecutive days for which the employee was not remunerated.

The refunded amounts of the employer-paid EI and CPP contributions for employees on paid leave are only available for full weeks of paid leave, not partial weeks.

Periods 5-9 (July 5 – November 21)

¹¹ Section 153(1)(a) is “salary, wages or other remuneration” but excluding foreign employment and section 153(1)(g) is “fees, commissions or other amounts for services”.

¹² Value of securities issued to an individual (e.g., stock options).

¹³ 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. However, it does not include severance pay, or items such as stock option benefits or the personal use of a corporate vehicle.

For periods 5-9, the 14-day rule for “eligible employee” has been eliminated. The intent appears to be to be more flexible in including eligible employees, and to harmonize the availability of CEWS with the termination of the CERB.

In addition, for these periods, the concept of “baseline remuneration” has also been eliminated (except insofar as it is needed to calculate a figure with reference to periods 1-4).

The first calculation for these periods is to determine the “revenue reduction percentage”, which establishes the reduction in qualifying revenues. It is the percentage drop in revenues between the prior and current periods of qualifying revenues (expressed in the definition as $1 - A/B$, where A is the current qualifying revenues and B is the prior qualifying revenue).

For these periods, there are two calculations to perform to determine the amount of subsidy an employer may be eligible for, being the “base percentage” and the “top up percentage”. The base percentage applies for employers with a drop in qualifying revenue of 50% or less, and the top up percentage applies in addition to employer with a drop in qualifying revenues of 50% or more. In the case of the top up percentage, an employer must compare the prior three month qualifying revenues in the current year, or three month revenues over the same period in 2019.

The base percentage is calculated by multiplying the revenue reduction percentage by various factors depending on the periods referred to, and subject to a cap. For example, for July 2020, the base percentage could be calculated as $1 - (\text{July 2020 qualifying revenues} - \text{July 2019 qualifying revenues}) \times$ a benefit factor of 1.2 but subject to a cap of 60% or \$677 per employee per week.

We summarize the calculation in the following chart:

BASE PERCENTAGE

CEWS Period	Current Qualifying Revenue (A)	Prior Qualifying Revenue (B)	Revenue Reduction % (RR)	Benefit Factor	Base Percentage	Cap
1 (Jul 5 – Aug 1)	July 2020	July 2019 or Jan/Feb 2020	$1 - A/B$	1.2	$RR \times 1.2$	60% / \$677
2 (Aug 2 – Aug 29)	August 2020	August 2019 or Jan/Feb 2020	$1 - A/B$	1.2	$RR \times 1.2$	60% / \$677
3 (Aug 30 – Sep 26)	September 2020	September 2019 or Jan/Feb 2020	$1 - A/B$	1.0	$RR \times 1.0$	50% / \$565

4 (Sep 27 – Oct 24)	October 2020	October 2019 or Jan/Feb 2020	$1 - A/B$	0.8	RR x 0.8	40% / \$452
5 (Oct 25 – Nov 21)	November 2020	November 2019 or Jan/Feb 2020		0.4	RR x 0.4	20% / \$226

The top up percentage only applies to employers whose revenue reduction percentage is greater than 50%. It is calculated by multiplying the revenue reduction percentage (determined with reference to a different qualifying revenue period) by a top-up factor and again subject to a cap. We summarize again in a chart for ease of reference:

TOP UP PERCENTAGE

CEWS Period	Current Qualifying Revenue (A)	Prior Qualifying Revenue (B)	Revenue Reduction % (RR)	Benefit Factor / Top up Percentage	MAX SUBSIDY / week / employee (combined BASE + TOP UP)
1 (Jul 5 – Aug 1)	April-June 2020	April-June 2019 or Jan/Feb 2020	$1 - A/B$	$1.25 \times (RR-50\%)$	85% / \$960
2 (Aug 2 – Aug 29)	May-July 2020	May-July 2019 or Jan/Feb 2020	$1 - A/B$	$1.25 \times (RR-50\%)$	85% / \$960
3 (Aug 30 – Sep 26)	June-August 2020	June-September 2019 or Jan/Feb 2020	$1 - A/B$	$1.25 \times (RR-50\%)$	75% / \$847
4 (Sep 27 – Oct 24)	July-September 2020	July-October 2019 or Jan/Feb 2020	$1 - A/B$	$1.25 \times (RR-50\%)$	65% / \$734
5 (Oct 25 – Nov 21)	September-November 2020	August-November 2019 or Jan/Feb 2020	$1 - A/B$	$1.25 \times (RR-50\%)$	45% / \$508

Once these two calculations are performed, the total amount of CEWS subsidy for **active employees** is:

- the **base percentage**,
- PLUS the **top up percentage**,
- multiplied by the lesser of:

- the actual weekly eligible remuneration, and
- \$1,129 per week per eligible employee.

For employees on paid leave status, the CEWS subsidy for the periods 5-9 is the lesser of the actual eligible remuneration and for periods 5 and 6, \$847 per week, and thereafter, as set by regulation, plus the employer contributions to EI/ CPP (as in prior periods).

For periods 5 and 6 (July and August), if the preceding rules would make an employer eligible for a subsidy less than the amount they were eligible for in June, 2020, and they would otherwise have a revenue reduction factor of 30%, then the June 2020 amount is the “floor”.

Payment, Anti-Avoidance and Enforcement

The Government of Canada announcement states that “employers will do their part by using the subsidy in a manner that supports the health and well-being of their employees” and “employers are expected to make their best efforts to top-up employees’ salaries to bring them to pre-crisis levels.”¹⁴

The announcement is misleading in that employers pay all employee compensation, and do not “top up” any other amount. Employers only receive a payment from the Government of Canada to the extent they actually pay remuneration to employees. There has been considerable confusion in workplaces about this issue.

The Canada Revenue Agency will enforce this program in a similar way to its enforcement of other incentives delivered through the tax system. A new provision of the ITA would examine transactions made that would reduce qualifying revenue for the purpose of qualifying for the CEWS, and penalties may apply.¹⁵ To the extent that eligible entities apply for the subsidy but do not pay eligible remuneration, they may be liable for repayment of the subsidy and penalties or fraud.

Apart from these anti-avoidance rules and the Government of Canada’s public statement that it will “ensure employees are paid the amounts they are owed”,¹⁶ there are otherwise no clear conditions in the legislation directing the use of the subsidy. It provides for the appointment of an official for the purpose of enforcement, which may be set out in greater detail in regulation or policy statements of the Minister or the CRA.

¹⁴ Government of Canada, Canada Emergency Wage Subsidy, online: <https://www.canada.ca/en/department-finance/economic-response-plan/wage-subsidy.html>.

¹⁵ See ITA, s. 125.7(6), 163(2.9).

¹⁶ See Government of Canada, Canada Emergency Wage Subsidy, online: <https://www.canada.ca/en/department-finance/economic-response-plan/wage-subsidy.html>.

Questions?

How does this program work with the EI workshare program or the Canada Emergency Response Benefit (CERB)?

Generally, amounts paid to an employee under the EI workshare program will reduce the amount available to be paid to the employee under the CEWS. Please see our [post on these benefits](#).

If an employee works for an eligible entity during a period in which they also receive the CERB, the eligible employer is able to make a claim for the portion of the period that the employee was working, notwithstanding their receipt of the CERB. If the periods covered by the two overlap, the employee may have to pay the CERB back in order to receive the CEWS.

Do employers still have to deduct and remit pension and benefit contributions, union or professional dues?

Yes. The legislation is clear that employee deductions at source, such as employee contributions to EI and CPP, are required to continue to be deducted and remitted.¹⁷ Other deductions, such as pension plan contributions or union or professional dues are not exempted from payment by the legislation. They continue to be legally enforceable obligations of all employers.

Some employers may take the position that deductions and remittances are only payable on the subsidized or non-subsidized portion of an employees' compensation when that employer is receiving the subsidy. This is not correct. There is no exemption or limitation in the legislation that would otherwise relieve an employer of the obligation to deduct and remit 100% of all required deductions

Does the subsidy apply to employees who make more than the maximum subsidy amount?

Yes. The subsidy is based on all "eligible remuneration" of all eligible employees. The subsidy is capped at 75% of that remuneration or \$847 per week in a qualifying period.

Do periods of paid leave qualify for the subsidy?

Eligible employees are those that means an individual employed in Canada by the eligible entity who have "not been without remuneration by the eligible entity for a period of more than 14 consecutive days in the qualifying period." In our view, an individual on paid leave or intermittent paid leave and reporting to work (or reduced work hours) is an eligible employee.

¹⁷ See Government of Canada, Canada Emergency Wage Subsidy, online: <https://www.canada.ca/en/department-finance/economic-response-plan/wage-subsidy.html>.

Their eligible remuneration includes amounts paid to the employee during the qualifying period.

Can an employer only pay pension and benefit contribution amounts for periods actually worked, and not periods of paid leave?

Each case may differ with the particular language of a collective agreement, employment agreement and pension or benefit plan text. Generally, however, in Ontario, all pension and benefit plan contributions must continue for statutorily protected leaves unless an employee elects in writing to discontinue coverage, and in our view, while receiving the subsidy, employers must continue such contributions and accruals for all paid leaves.

Can workers apply for EI now and then come back to work when the subsidy is available?

The first period of eligibility for CEWS is March 15 to April 11. Workers receive EI now (either CEBS or a work sharing EI payment) and if their employer qualifies for CEWS and recalls the employee, they can return to work at the wages the employer pays. Employees remain “eligible employees” under CEWS unless they are more than two weeks without remuneration from the employer. Also note that EI benefits (work sharing payments) reduce the amount of subsidy available for eligible employees.

Is an employer required to top-up the subsidy to 100% of pre-crisis remuneration?

The Government of Canada has urged employers to make their “best efforts” to top up all eligible employees to 100% of pre-crisis wages. However, there is no clear requirement in the legislation that the top-up be to 100%.

Can an individual receive the CERB then be recalled and participate in the subsidy scheme?

Yes, but to the extent that the application is retroactive, the CERB will likely be required to be repaid.