

CALCULATING THE CEWS: MEANING OF "LEAVE WITH PAY" LEAVES QUESTIONS UNANSWERED

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The Canada Emergency Wage Subsidy program (the "**CEWS**") provides qualifying employers with the opportunity to claim a base subsidy of up to 75% of eligible remuneration paid to eligible employees.^[1]

As part of the CEWS, employers with eligible employees on "leave with pay" can potentially claim an increased subsidy in respect of amounts equal to the employer's premiums paid under the *Employment Insurance Act* (Canada) and employer contributions paid under the *Canada Pension Plan*, certain provincial pension plans, and the *Québec Act respecting parental insurance*.

According to the Canada Revenue Agency (the "**CRA**"), if an employee is paid by his or her employer, but does not perform any work during the relevant payment period, the employee is considered to be on "leave with pay".^[2] However, the CRA offers no additional guidance on the circumstances under which an employee may rightfully be considered to be on "leave with pay" for the purposes of the CEWS.

The phrase "leave with pay" is not expressly defined in the *Income Tax Act* (Canada) (the "**Tax Act**") or any other federal statute. Nevertheless, an interpretive benchmark can potentially be derived from the *Canada Labour Code* (the "**Code**").

The Code makes reference to leaves with pay in several different contexts. The common theme that ties each of the referenced circumstances together is that they each entail a defined period away from work, for reasons outside of the employee's absolute control, during which the employee continues to receive his or her regular wages. For instance, the Code expressly references a number of circumstances under which an employee may take personal leave, including to: (i) treat the employee's illness or injury, (ii) carry out responsibilities relating to the health or care of a family member, (iii) carry out responsibilities relating to the education of dependent family members, and (iv) address urgent personal or family matters.^[3] All federally regulated employees are entitled to five such personal leave days per year and those with at least three months service are entitled to be paid for three of those five days.

The Supreme Court of Canada has stated that language used in the Tax Act must be interpreted in a textual, contextual and purposive way.^[4] On that basis, an argument can be made that the phrase "leave with pay", as

used in the enacting CEWS legislation, should be interpreted purposively to cover circumstances under which an employee temporarily ceases to work on account of circumstances beyond his or her control, but continues to be paid. For example, “leave with pay” in the context of the CEWS could arguably apply to employees that are unable to attend at their places of work due to the mandatory closure of non-essential businesses, a mandatory self-isolation order due to recent travel, or self-quarantining as a result of contact with someone who has COVID-19. This would be consistent with one of the apparent purposes of the CEWS: to provide support to employers with the goal of ensuring that workers continue to receive employment remuneration.

Absent further express guidance from the Government, it is hoped that the CRA will administer the CEWS in a purposive fashion and not seek to define the concept of “leave with pay” in a manner that frustrates the underlying policy motivations of the program.

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[1] For more information on the CEWS, please see “[The Canada Emergency Wage Subsidy: Increased Assistance on the Horizon](https://www.mcmillan.ca/The-Canada-Emergency-Wage-Subsidy-Increased-Assistance-on-the-Horizon)”

<https://www.mcmillan.ca/The-Canada-Emergency-Wage-Subsidy-Increased-Assistance-on-the-Horizon>.

[2] Government of Canada, “Canada Emergency Wage Subsidy (CEWS): [Calculate your subsidy amount](https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy/cews-calculate-subsidy-amount.html)” (21 April 2020)

<https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy/cews-calculate-subsidy-amount.html>.

[3] *Canada Labour Code*, paragraphs 206.6(1)(a)-(d)

[4] *Canada Trustco Mortgage Co v R*, [2005] 2 SCR 601 at para 11, 259 DLR (4th) 193.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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