

GOVERNMENT PROPOSES FUNDAMENTAL CHANGES TO THE CANADA EMERGENCY WAGE SUBSIDY

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Background

On May 15, 2020, the federal Department of Finance (“**Finance**”) announced the extension of the Canada Emergency Wage Subsidy (the “**CEWS**”) program by an additional 12 weeks to cover periods through August 29, 2020. At the time of the announcement, Finance also initiated a consultation process with key business and labour representatives (the “**Consultations**”) to canvass potential adjustments to the CEWS program, including the possibility of changing the 30 percent revenue decline threshold for eligibility to claim the CEWS (the “**30% Threshold**”).

On June 10, 2020, the government further announced that the same eligibility criteria that had applied to the CEWS program to date would apply in respect of the fourth period of the program (i.e., the period from June 7, 2020 to July 4, 2020). (You can access our past bulletins on the CEWS program [here](#) under “Tax”.)

On July 13, 2020, Prime Minister Justin Trudeau indicated that the duration of the CEWS program would be extended to December 2020. The details of this second extension, as well as the adjustments to the program to be made as a consequence of the Consultations, were formally announced by Finance on July 17, 2020 (the “**Proposed Changes**”).

The Proposed Changes

The Proposed Changes fundamentally alter the scope of the CEWS program and the eligibility criteria to claim the CEWS.

At a high level, the Proposed Changes apply on a going-forward basis (i.e., commencing with the fifth Qualifying Period (as defined below) that started on July 5, 2020) and are intended to broaden the reach of the CEWS program and provide more extensive support to targeted sectors that have been most affected by the COVID-19 pandemic.

On July 20, 2020, the Proposed Changes were introduced in Parliament in Bill C-20, *An Act respecting further COVID-19 measures*. It is anticipated that the Canada Revenue Agency will administer the CEWS program in a

manner consistent with the Proposed Changes starting immediately.

Revised Parameters of the CEWS

During the Consultations, Finance received feedback that the 30% Threshold was an arbitrary point of demarcation that may promote inefficiencies. Certain stakeholders expressed concern that the 30% Threshold is too stringent and does not address the significantly negative impact that businesses with less than a 30% decline in revenue have experienced. Conversely, some stakeholders asserted that the existing CEWS regime did not adequately address the circumstances of business sectors that have been hit particularly hard by the COVID-19 pandemic.

Based on the feedback received by Finance, the Proposed Changes will generally replace the 30% Threshold for CEWS eligibility with more nuanced, incremental eligibility criteria.

Qualifying Periods

Employers will recall that the CEWS program is administered on a period-by-period basis, with each period spanning 4 weeks (each, a “**Qualifying Period**”). The Proposed Changes generally apply in respect of the following Qualifying Periods: Period 5 (July 5 to August 1, 2020), Period 6 (August 2 to August 29, 2020), Period 7 (August 30 to September 26, 2020), Period 8 (September 27 to October 24, 2020), and Period 9 (October 25 to November 21, 2020).^[1] While Finance has announced that the CEWS program will be extended through a tenth Qualifying Period (November 22, 2020 through December 19, 2020), the government has not released details on how the CEWS program will be administered in respect of the tenth Qualifying Period.

Eligible Employers and Employees

The CEWS may only be claimed in respect of “**eligible employees**”, generally defined as individuals employed in Canada in a Qualifying Period. The Proposed Changes do not generally alter this definition. However, for Qualifying Periods after Qualifying Period 4, the government proposes to remove the requirement that employees not be without remuneration for 14 or more consecutive days in a Qualifying Period in order to be “eligible employees”.

The Proposed Changes expand the list of eligible employers (referred to as “eligible entities” under the CEWS program). “Eligible entities” are defined to include (i) corporations or trusts (other than tax-exempt corporations or trusts), (ii) individuals (other than trusts), (iii) registered charities (other than “public institutions”), (iv) certain non-profit and tax-exempt organizations (other than certain “public institutions”) and (v) partnerships, all of the members of which would qualify as “eligible entities”.

The Backgrounder to the Proposed Changes clarifies that eligible entities also include:

- Partnerships that are up to 50 percent owned by non-eligible members;
- 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.

Eligible Remuneration

The Proposed Changes do not alter the definition of what constitutes “eligible remuneration”. “Eligible remuneration” includes most salary, wages and other remuneration payable to an employee, including most fees, commissions or other amounts payable in respect of services. Certain notable exclusions from the definition of “eligible remuneration” include “retiring allowances” (e.g., certain non-statutory severance payments), most equity-based compensation, including most amounts in respect of stock options, and benefits from the personal use of an employer-owned vehicle.

For purposes of computing the amount of the CEWS for Qualifying Periods subsequent to Qualifying Period 4, the Proposed Changes provide that the measure of the amount of remuneration paid to active, arm’s length employees will be based solely on the actual remuneration paid to such employees.^[2] Under the original CEWS rules, the amount of the remuneration of an employee used to compute entitlement to the CEWS was generally permitted to potentially be based on the employee’s pre-crisis weekly remuneration.^[3]

Proposed Changes to the Computation of the CEWS

Broadly speaking, the Proposed Changes will adjust the computation of the amount of the CEWS in two principal ways: (1) the applicable rate structure will differ in its application to active and furloughed employees, and (2) the CEWS will consist of a “Base Subsidy” and a “Top-Up Subsidy”.

Under the Proposed Changes, the total amount of the CEWS in respect of an eligible employee for a week in a Qualifying Period will generally be equal to the “CEWS Rate” multiplied by the eligible remuneration, up to a maximum of \$1,129 per week, paid to the eligible employee in respect of the week in the Qualifying Period. The “CEWS Rate” is equal to the sum of the “base percentage” and the “top-up percentage” in respect of the eligible entity, as discussed in greater detail below.

Base Subsidy

Under the revised CEWS program, the Base Subsidy will generally be available to all qualifying entities that incur a qualifying drop in revenue. The amount of the Base Subsidy in respect of a Qualifying Period will be a

function of the qualifying entity’s “base percentage” for the Qualifying Period.

The maximum “base percentage” that may be claimed in respect of a Qualifying Period will decline over time. The maximum “base percentage” that may be claimed in respect of (i) Qualifying Periods 5 and 6 is 60%, (ii) Qualifying Period 7 is 50%, (iii) Qualifying Period 8 is 40%, and (iv) Qualifying Period 9 is 20%.

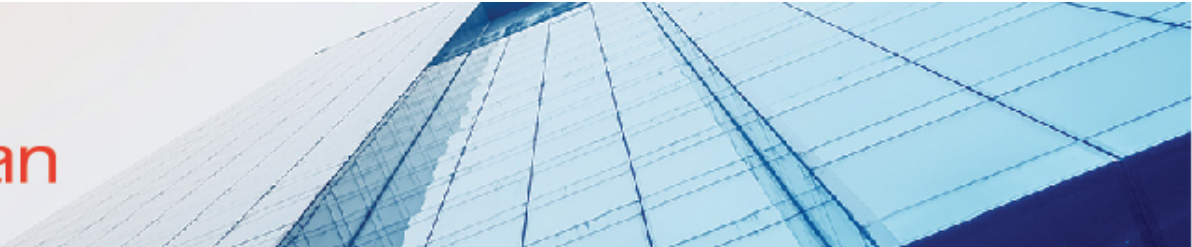
The “base percentage” of a qualifying entity for a Qualifying Period will be dependent on the qualifying entity’s “revenue reduction percentage” for the Qualifying Period. The “revenue reduction percentage” of a qualifying entity will generally reflect the reduction in the qualifying entity’s qualifying revenue for the “current reference period” relative to the qualifying revenue of the qualifying entity for the applicable “prior reference period” as illustrated in Table 1 below.^[4]

Table 1: Relevant time periods for the Base Subsidy

Qualifying Period	Prior Reference Period under General Approach	Prior Reference Period under Alternative Approach
Qualifying Period 5	July 2020 over July 2019 <u>or</u> June 2020 over June 2019	July 2020 <u>or</u> June 2020 over average of January and February 2020
Qualifying Period 6	August 2020 over August 2019 <u>or</u> July 2020 over July 2019	August 2020 <u>or</u> July 2020 over average of January and February 2020
Qualifying Period 7	September 2020 over September 2019 <u>or</u> August 2020 over August 2019	September 2020 <u>or</u> August 2020 over average of January and February 2020
Qualifying Period 8	October 2020 over October 2019 <u>or</u> September 2020 over September 2019	October 2020 <u>or</u> September 2020 over average of January and February 2020
Qualifying Period 9	November 2020 over November 2019 <u>or</u> October 2020 over October 2019	November 2020 <u>or</u> October 2020 over average of January and February 2020

Generally, employers with revenue declines of 50 percent or more will be entitled to claim the Base Subsidy based on the maximum permitted “base percentage” for the Qualifying Period (as identified above), whereas employers with less than a 50 percent decline in revenues will be eligible to claim the Base Subsidy based on a lower “base percentage” determined on the basis of a formulaic sliding scale. More particularly, those qualifying entities that are not entitled to utilize the maximum permitted “base percentage” for a Qualifying Period will generally compute the applicable “base percentage” based on the formulae set out in Table 2 below.

Table 2: Computation of Sliding Scale “Base Percentage”



Qualifying Period	“Base Percentage” Formula
Qualifying Periods 5 and 6	1.2 multiplied by the “revenue reduction percentage”
Qualifying Period 7	1.0 multiplied by the “revenue reduction percentage”
Qualifying Period 8	0.8 multiplied by the “revenue reduction percentage”
Qualifying Period 9	0.4 multiplied by the “revenue reduction percentage”

Top-Up Subsidy

The Top-Up Subsidy will generally provide an additional subsidy to eligible entities that are most adversely affected by the COVID-19 pandemic.

Under the Proposed Changes, an eligible entity with an applicable decline in revenue (computed as more particularly described below) of more than 50% may be entitled to claim a Top-Up Subsidy. The Top-Up Subsidy for a Qualifying Period will generally be an amount equal to the eligible remuneration for the Qualifying Period multiplied by the applicable “top-up percentage”. The applicable “top-up percentage” will

generally equal (i) 1.25 multiplied by (ii) the eligible entity’s “top-up revenue reduction percentage” for the Qualifying Period minus 50%.

The “top-up revenue reduction percentage” of a qualifying entity in respect of a Qualifying Period is computed differently than the “revenue reduction percentage” for a Qualifying Period that is used to compute the Base Subsidy. The “top-up revenue reduction percentage” in respect of an eligible entity for a Qualifying Period compares (i) the average monthly qualifying revenue of the eligible entity for the last three calendar months that ended prior to the “current reference period” with (ii) the average monthly qualifying revenue of the eligible entity for (A) if the applicable “prior reference period” is January and February 2020, January and February 2020, and (B) if (A) does not apply, the last three calendar months that ended prior to the applicable “prior reference period”.

The maximum “top-up percentage” that may be claimed in respect of a particular Qualifying Period will be 25% as set out in Table 3 below.

Table 3: Computation of “Top-Up Percentage”

3-Month Average Revenue Drop	“Top-Up Percentage” Formula
70% or more	25% (computed as, 1.25 x 70% - 50%)
65%	18.75%
60%	12.5%
55%	6.25%
50% or less	0%

Employers most affected by the COVID-19 pandemic will potentially be eligible to initially claim a maximum weekly CEWS in respect of an eligible employee of up to \$960, which is an increase of \$113/week or approximately 13% over the maximum CEWS entitlements under the original CEWS program.

Safe Harbour Rule for Qualifying Periods 5 and 6

To ensure that adjustments to the CEWS program under the Proposed Changes will not adversely affect employers in the short term, a safe harbor rule is proposed to apply in respect of Qualifying Periods 5 and 6 (i.e., through August 29). Pursuant to the safe harbor rule, for Qualifying Periods 5 and 6, eligible entities will generally be permitted to claim the CEWS at a rate that is the higher of the rates under the original CEWS rules and under the Proposed Changes.

Deemed Carry-Over Rule

Under the original CEWS rules, once an eligible entity met the applicable revenue reduction threshold for a

Qualifying Period, it was deemed to meet the threshold for the immediately following Qualifying Period. The Proposed Changes have retained elements of this rule, albeit in a modified and more constrained manner.

Specifically, when determining entitlement to claim the Base Subsidy under the CEWS program in respect of Qualifying Periods after Qualifying Period 4, an eligible entity will generally be permitted to use the greater of (i) its “revenue reduction percentage” in respect of the current period, and (ii) its “revenue reduction percentage” in respect of the immediately preceding period.

Furloughed Employees

The amount of the CEWS that may be claimed in respect of furloughed employees for Qualifying Periods 5 and 6 will generally remain the same as under the original CEWS rules.

However, beginning in respect of Qualifying Period 7, the CEWS that may be claimed in respect of furloughed employees will be adjusted to more closely accord with the benefits provided under the Canada Emergency Response Benefit and/or Employment Insurance. The specific rules that will govern the proposed adjustments in respect of furloughed employees will largely be prescribed by regulation. The terms of the applicable regulations have yet to be released.

Supplementary Changes

In addition to the foregoing, the Proposed Changes also:

- provide for an appeal process in respect of the CEWS to the Tax Court of Canada under the existing mechanisms that apply to notices of determination;
- provide rules for calculating an eligible entity’s revenue declines in certain cases where the eligible entity previously acquired all or substantially all of the assets used in carrying on the subject business;
- permit eligible entities to effectively change their election for what constitutes the applicable “prior reference period” for Qualifying Periods after Qualifying Period 4; extend the deadline for filing an application with the Minister of National Revenue to claim the CEWS to January 31, 2021;
- permit the potential claim of a CEWS in respect of an eligible employee where the payroll in respect of the employee was administered by a payroll service provider and certain specified conditions are satisfied; and
- permit an election to use accrual based accounting for entities that use the cash method of accounting.

[1] The draft legislation implementing the Proposed Changes would also legislatively confirm the extension of the CEWS program for Period 4 (June 7, 2020 to July 4, 2020).[ps2id id='1' target='']

[2] Special computational rules apply in respect of remuneration paid to employees who do not deal at “arm’s

length” with their employer (such as family members).[ps2id id='2' target="']

[3] In respect of Qualifying Period 4, employers are generally able to elect on an employee-by-employee basis to use one of the following periods for the purpose of computing the employee’s average weekly pre-crisis remuneration: January 1 to March 15, 2020, March 1, 2019 to May 31, 2019 or March 1, 2019 to June 30, 2019.[ps2id id='3' target="']

[4] As illustrated in Table 1, an eligible entity may elect for its “prior reference periods” to be determined under a general or an alternative approach. Once an election is made, it will apply in respect of Qualifying Periods 5 to 10.[ps2id id='4' target="']

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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