Bill C-14 has become law: Are you eligible for the Canada Emergency Wage Subsidy?

April 15, 2020

On March 30, 2020, the Government of Canada announced that it would grant the Canada Emergency Wage Subsidy (the "**CEWS**") to qualifying entities, no matter their number of employees or their size.

Bill C-14 bringing into effect the CEWS, received royal assent on April 11, 2020.

The Government of Canada will subsidize 75% of the first $58,700 of each employee's wages, for a maximum amount of $847 per week.

This measure is retroactive to March 15, 2020. For now, the CEWS covers a 12-week period from March 15, 2020, to June 6, 2020, inclusive.

The Canada Emergency Wage Subsidy does not abolish the Temporary Wage Subsidy for Employers, but entities that receive it for a given period will see the CEWS reduced. For more information on the Temporary Wage Subsidy for Employers, click here.

Qualifying entities

Pursuant to subsection 125.7(1) of the *Income Tax Act*[1] (the "**ITA**"), to qualify for the CEWS, an entity must first be an "eligible entity."

Eligible entities are the following:

- Taxable corporations;
- Individuals;
- Registered charities (other than a public institution);
- Partnerships whose members are eligible entities;
- Agricultural organizations, boards of trade or chambers of commerce[2];
- Non-profit corporations for scientific research and experimental development[3];
- Labour organizations[4]; and
- Non-profit organizations[5].

Subsidies of foreign corporations are also eligible for the CEWS under the same conditions, provided they are incorporated under the laws of Canada.

Excluded entities

Public institutions[6], such as municipalities and local administrations, crown-controlled corporations, public universities, colleges, schools and hospitals, are not eligible for the CEWS.

As such, a partnership of which a member is an excluded entity, such as a crown-controlled corporation, would not be eligible for the Canada Emergency Wage Subsidy.

Eligibility criteria

To qualify for the CEWS, eligible entities will have until October 2020 to file an application for the qualifying periods. Filing will take place via a specific application process.

Additionally, a person who has the principal responsibility for the eligible entity's finances will have to attest that the Canada Emergency Wage Subsidy application is complete and accurate in all material respects.

In order to qualify for the CEWS, an eligible entity should also have had a business number before March 15, 2020, for source deductions[7] purposes.

An eligible entity will need to demonstrate a drop in revenue of at least 15% for the qualifying period of March 2020 and of 30% for each subsequent qualifying period.

Qualifying periods and reference periods for eligibility

Eligible entities must use one of two methods to attest to the drop in revenue. Eligible entities must compare a current qualifying period to a past qualifying period via either:

1. A year-to-year method (e.g., March 2020 compared to March 2019); or
2. The average of its revenue earned in January and February 2020.

An election will need to be made between these two methods in the entity's first CEWS application. Eligible entities will have to use the same method for the whole duration of the program.

Here is the list of the qualifying periods and the corresponding reference periods as announced on the Canada Revenue Agency's website[8]:

Claiming period	Reference period for eligibility
Period 1 March 15 – April 11 (reduction of 15%)	March 2020 over: March 2019; or Average of January and February 2020.
Period 2 April 12 - May 9 (reduction of 30%)	April 2020 over: April 2019; or Average of January and February 2020.
Period 3 May 10 – June 6 (reduction of 30%)	May 2020 over: May 2019; or Average of January and February 2020.

The law provides that additional qualifying (and reference) periods could be added via regulation until September 30, 2020.

Accounting method

The eligible entity's normal accounting method should be used to determine qualifying revenue. Entities can calculate their revenue according to either the accrual method or cash method but not a combination of both. Entities must choose an accounting method when filing their first CEWS application and will have to use the same method for the whole duration of the program.

The legislation defines qualifying revenue, for the purposes of the comparison between the prior reference period and the current reference period, as "*the inflow of cash, receivables or other consideration arising in the course of the ordinary activities of the eligible entity — generally from the sale of goods, the rendering of services and the use by others of resources of the eligible entity — in Canada in the particular period*"[9].

Revenue must be gained from business conducted in Canada and arise from arm's length sources.

Extraordinary items and sums obtained or derived from a non-arm's length person or partnership are excluded from the computation of revenue.

Non-resident entities are not eligible for the CEWS unless they are taxable in Canada. Revenue from sales or transfers between non-arm's length persons are excluded. An exception to this principle may apply to certain holding corporations.

The amount of the Canada Emergency Wage Subsidy received for a qualifying period is not included in the calculation of eligible revenue for the subsequent qualifying period, of course.

However, amounts received pursuant to the CEWS will reduce other incentives under tax legislation, like the SR&ED tax incentive program.

Registered charities and non-profit organizations

For registered charities, non-profit organizations, labour organizations, non-profit organizations for scientific research and experimental development, agricultural organizations, board of trades and chambers of commerce, the computation of revenue must include amounts received during its normal activities, which includes gifts and membership fees. These entities will be authorized to choose whether or not to include funds received from government. Once chosen, an accounting method must be applied for the whole duration of the program.

Computation of qualifying revenue

The calculation of qualifying revenue should normally be done entity by entity.

Consolidated financial statements

However, for an entity that is a part of a group of eligible entities that normally prepare consolidated financial statements, each member of this group may determine its qualifying revenue separately if it normally does so.

Also, each entity of an affiliated group can make an election to establish its qualifying revenue on an individual basis. For such an election to be valid, every entity of the affiliated group must elect to establish its revenue on an individual basis.

Joint ventures

The ITA allows for a flow-through mechanism for participants of a joint venture qualifying as an eligible entity even if this joint venture is otherwise considered distinct from its members: If all of the interests in an eligible entity are owned by participants in a joint venture and all or substantially all (meaning 90% or more) of the qualifying revenue of the eligible entity for a qualifying period is in respect of the joint venture, then the eligible entity may use the qualifying revenues of the joint venture.

Holding companies

A joint election may also be filed in cases where all or substantially all (meaning 90% or more) of an eligible entity's revenue arises from one or several non-arm's length persons or partnerships.

This mechanism is mainly aimed at holding companies providing services to other entities in a related group and whose revenue should otherwise be excluded pursuant to the "non-arm's length source" criterion. A formula is provided for in the ITA, containing several presumptions in order to consider transactions with Canadian and foreign entities.

Deeming provision for subsequent reference period

Qualifying entities must file a new application for each qualifying period. The Canada Emergency Wage Subsidy will be paid monthly by cheque or direct deposit.

A deeming rule is provided for in the ITA. When an eligible entity meets the qualifying revenue criteria for a qualifying period, a provision found in subsection 127(9) of the ITA deems the eligible entity to have met the qualifying revenue criteria for the immediately following qualifying periods.

In other words, if for the qualifying period of March 15 to April 11, 2020, the entity has demonstrated and attested to a reduction of 30% of its revenue, the entity will be deemed to satisfy this condition for the next qualifying period of April 12 to May 9, 2020.

Eligible employees

Pursuant to subsection 127(1) of the ITA, an eligible employee is an individual who has been employed in Canada by an eligible entity during a qualifying period and who has not been without remuneration for a period of fourteen (14) or more consecutive days during this qualifying period.

Eligible remuneration

Eligible remuneration for the purposes of the CEWS includes wages, salaries and other remuneration[10]. In addition, professional fees, commissions and other amounts for services provided are eligible[11].

The following forms of remuneration are excluded:

- Retirement allowances;
- Amounts deemed to have been received by the eligible employee as a benefit under or because of a stock-option plan[12];
- Any amount received that can reasonably be expected to be paid or returned, directly or indirectly, in any manner whatever, to
  - the eligible entity,
  - a person or partnership not dealing at arm's length with the eligible entity, or
  - another person or partnership at the direction of the eligible entity; and
- Any amount paid in respect of a week in the qualifying period, if, as part of an arrangement involving the eligible employee and the eligible entity,
  - the amount is in excess of the eligible employee's baseline remuneration,
  - after the qualifying period, the eligible employee is reasonably expected to be paid a lower weekly amount than their baseline remuneration, and
  - one of the main purposes for the arrangement is to increase the amount of the CEWS.

As such, any arrangement to improperly benefit from the CEWS will be excluded from eligible remuneration.

For the purposes of the Canada Emergency Wage Subsidy, eligible remuneration is computed using the average weekly remuneration paid to an eligible employee between January 1 and March 15, 2020, inclusively (the “baseline remuneration”). An exclusion is provided for any period of seven (7) days during which the eligible employee has not received any remuneration.

There is no limit to the total amount of CEWS that an entity might claim. The CEWS applies to the first $58,700 of annual salary paid to each eligible employee, computed employee by employee.

Under subsection 125.7(2) of the ITA, the CEWS is equal to the greater of the following amounts:

100% of remuneration paid, up to the lesser of the following amounts:

75% of the average weekly remuneration that the employee received before March 15, 2020; and

75% of weekly remuneration paid, up to $847 per week.

Employees not dealing at arm’s length with the eligible entity

If an eligible employee is not dealing at arm’s length with the eligible entity and he or she has not received eligible remuneration before March 15, 2020, he or she will not be eligible for the CEWS. Only 75% of the remuneration paid before March 15, 2020 will be eligible. This is aimed at preventing persons not dealing at arm’s length from increasing their salaries after March 15, 2020 to increase the amount of the CEWS they would be eligible to received.

Example of a CEWS application

Baseline weekly remuneration **between** January 1 and March 15, 2020 = $60,000

Average remuneration **after** March 15, 2020 = $60,000

% of remuneration paid		**% before March 15**	Greater of:
			(A) up to the lesser of (C) and $847
(A) 100%	**(B) 75%**	**(C) 75%**	
			(B) up to $847
Week applied for : 03/13-03/21			
$1,153.85	$865.38	$865.38	$847
Week applied for : 03/22-03/28			
$1,153.85	$865.38	$865.38	$847
Week applied for : 03/29-04/04			
$1,153.85	$865.38	$865.38	$847
Week applied for : 04/05-04/11			
$1,153.85	$865.38	$865.38	$847
Total CEWS for the eligible employee			**$3,388**

The CEWS is equal to 73.40 % of remuneration paid. The net cost for the eligible entity is 26.60% (+ payroll contributions except if the employee is on leave without pay).

Reduction in wages after March 15

If the baseline remuneration of the eligible employee was $60,000 prior to March 15, 2020 but, by agreement, the salary after March 15, 2020 is reduced to $40,000, the CEWS would then be $769, 23.

In this example, the CEWS is equal to 100% of the remuneration paid after March 15, 2020 with a net cost to the eligible entity of $0.

% of remuneration paid		**% before March 15**	Greater of:
(A) 100%	**(B) 75%**	**(C) 75%**	(A) up to the lesser of (C) and $847 (B) up to $847
Week applied for: 03/13-03/21			
$769.23	$576.92	$865.38	$769.23
Week applied for: 03/22-03/28			
$769.23	$576.92	$865.38	$769.23
Week applied for: 03/29-04/04			
$769.23	$576.92	$854.38	$769.23
Week applied for: 04/05-04/11			
$769.23	$576.92	$854.38	$769.23
Total CEWS for the eligible employee			**$3,076,92**

New Employee

Should the eligible entity hire a new employee for a salary of $40,000 per year, the CEWS received in respect of this employee would be equal to $576.92 (75% of remuneration paid).

Payroll contributions reimbursed under certain circumstances

Certain employer-paid contributions can be reimbursed. This reimbursement would apply to the entirety of employer-paid contributions in respect of eligible employees, for each week during which these employees are on leave with pay and for which the entity qualifies for the CEWS regarding these employees.

These contributions include:
Employment Insurance;
The Canada Pension Plan;
The Québec Pension Plan; and
The Québec Parental Insurance Plan.

Eligible entities should continue to withhold and remit both employee and employer contributions as usual. They will then be able to claim a reimbursement at the same time as the CEWS.

The Government of Canada has announced that entities benefiting from the CEWS will have to demonstrate having “done their best” to pay the remaining 25% of wages not covered by the CEWS to their employees. This criterion will be evaluated with flexibility in order to take into account the financial struggles of businesses. As of now, nothing with respect to this 25% is mentioned in the ITA.

The CEWS will be deemed as taxable income for the entities benefiting from the program. Employees benefiting from the CEWS will be taxed at the source.

How to apply

An online portal will be launched between two (2) to five (5) weeks from now, for eligible entities to file a claim for the CEWS. Qualifying entities will be able to apply for the CEWS through the Canada Revenue Agency's My Business Account portal.

The Minister of Finance will be able to communicate the name of any person or partnership that applies for the CEWS.

More information should be released shortly.

Anti-avoidance and penalties

Specific anti-avoidance rules are provided for by the legislation. Also, in case of ineligibility, an employer must reimburse the amounts received. In case of abuse of the program, a penalty of up to 25% of amounts received could be imposed (up to 225% when computing all penalties that could be applied under the ITA), with the possibility of a prison sentence of up to 5 years.

Eligible employees and interaction of the CEWS with the Canada Emergency Response Benefit

The Government of Canada is considering putting in place a process allowing employees rehired by their employers during the same qualifying period to cancel their application for the Canada Emergency Response Benefit and to reimburse any amounts received pursuant to this program.

Lavery’s team is available to answer any question you may have regarding the announced emergency measures as well as any related aspects.

The information and commentaries contained in the present document do not constitute a legal opinion. Their sole purpose is to allow readers, who bear all responsibility, to use them for their own ends.

The information and commentaries contained in this document are limited to the measures announced or made public by the Government of Québec and the Government of Canada on or before April 13, 2020.

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1. R.S.C. (1985), c. 1 (5th Suppl.)
2. As defined in paragraph 149(1)(e) of the ITA
3. As defined in paragraph 149(1)(j) of the ITA
4. As defined in paragraph 149(1)(k) of the ITA
5. As defined in paragraph 149(1)(l) of the ITA
6. As defined by paragraphs 149(1)(a) to 149(1)(d.6) of the ITA
7. Under section 153 of the ITA
8. Source: https://www.canada.ca/en/department-finance/news/2020/04/the-canada-emergency-wage-subsidy.html [to date as of April 13, 2020]
9. Definition of “Qualifying revenue” in section 125.7 of the ITA
10. Under paragraph 153(1)a) of the ITA
11. Under paragraph 153(1)g) of the ITA
12. Under paragraphs 7(1)(a) to (d.1) of the ITA