Important Changes to the CEWS announced: will you now be eligible, and what should you consider?

July 22, 2020

Author

Jessica Parent

Partner, Lawyer

The Canada Emergency Wage Subsidy (the "**CEWS**") is a key component of the Government of Canada's COVID-19 economic response plan. The purpose of the CEWS, adopted on April 11, 2020, is to help Canadians keep their jobs during the crisis and help companies maintain an employment relationship with their employees in order to recover more quickly when the economy returns to normal.

On July 13, 2020, when the Canada Revenue Agency had already approved 667,400 applications, the Prime Minister of Canada confirmed that the CEWS will be extended until December 2020. A few days later, on July 17, the Minister of Finance of Canada announced that the CEWS will be extended until December 19, 2020. He also announced major changes to the structure of the CEWS, which, for the time being, should apply until November 21, 2020. Details are expected to follow for the eligibility period from November 22 to December 19, 2020.

Summary of changes

As the draft legislative proposal has not yet been adopted, the proposed changes may be modified.

Duration of the CEWS

Pursuant to the legislative proposal, the CEWS would now be available until November 21, 2020, and CEWS applications may be accepted until February 2021.

Eligibility

The concept of eligible entity remains the same, except that trusts would now be eligible for the CEWS.

The changes to the CEWS are intended to make the eligibility criteria more flexible to enable more employers to benefit from the subsidy.

Businesses that do not meet the 30% drop in revenue test would now be eligible to the CEWS. The base rate of the CEWS would now vary depending on the revenue decline's level, and its application would be extended to employers with a revenue decline of less than 30%. However, despite being more flexible, the criteria would be more complex than those applicable to initial eligibility periods.

CEWS's "base" and "top-up" subsidy

The amount of the CEWS for each employee would now vary according to the employer's drop in revenue, expressed as a percentage. The CEWS would consist of two parts: a "base" subsidy and a "top-up" subsidy.

During an eligibility period, the CEWS amount would be calculated by adding the base and top-up percentages, as defined in Appendix A below.

Base subsidy:

1. The **maximum base CEWS rate** would be gradually reduced **from 60%** in eligibility periods 5[1] and 6 **to 20%** for the last period (Period 9).
2. The maximum base CEWS rate would be available for eligible entities that have experienced a revenue drop of more than 50%. It would then be gradually reduced by the percentage of the eligible entity's revenue decline from the maximum base rate for the relevant eligibility period to zero.

For example, for a revenue drop of 50% or more, the maximum CEWS amount would now be 60% for Periods 5 and 6, to be reduced to 50% for Period 7.

Top-up subsidy:

1. A maximum **top-up subsidy of 25%** would be offered in certain cases to provide additional support to companies particularly affected by the crisis.
2. The top-up subsidy would be available to eligible entities that have experienced a revenue drop of more than 50% for a given eligibility period. To be eligible for the maximum top-up subsidy, a revenue drop of 70% or more must be registered for the three months preceding the relevant period.

A **transitional rule** is provided for Periods 5 and 6 to allow eligible employers to elect the most advantageous subsidy, that is, the CEWS rate of 75% under the initial structure with a threshold of 30% or one of 60% (+ potentially 25%) under the new structure.

In addition, the special rule providing for **automatic eligibility** forthe subsequent period would also be modified. Thus, an entity that qualified for Period 3 would automatically qualify for Period 4.

However, for subsequent periods, the revenue reduction percentage from the previous qualifying period could be applied if the revenue reduction percentage for the current qualifying period is lower. For example, if an eligible entity had a 45% revenue reduction for Period 6 but its revenue reduction for Period 7 fell to 25%, the entity could benefit from the Period 6 percentage, that is, 45%.

The base and top-up CEWS would apply to the remuneration of **active employees**. A separate CEWS rate structure would apply to furloughed employees. For furloughed employees, for Periods 5 and 6, the CEWS calculation would remain the same as it is now, but would be adjusted for Periods

7 to 9 to harmonize with income support through the Canada Emergency Response Benefit ("**CERB**") and/or Employment Insurance.

Calculating the CEWS

In order to calculate the CEWS, the proposed legislation introduces three new definitions that are further described in Appendix A below. These definitions are used to calculate the base and top-up subsidies.

Base percentage (if revenue decline < 50 %)	Base percentage (if revenue decline = 50 %)	Top-up percentage (if revenue decline > 50 %)
CEWS Period 5: July 5 to August 1st, 2020 **CEWS Period 6: Period 6 : August 2 to August 29, 2020**		
1.2 x % decline	60 %	1.25 x (% of revenue decline on preceding three-month average – 50 %) Max 25 %
CEWS Period 7: August 30 to September 26, 2020		
1 x % decline	50 %	1.25 x (% of revenue decline on preceding three-month average – 50 %) Max 25 %
CEWS Period 8: 27 septembre au 24 octobre 2020		
0.8 x % decline	40 %	1.25 x (% of revenue decline on preceding three-month average – 50 %) Max 25 %
CEWS Period 9: October 25 to November 21, 2020		
0.4 x % decline	20 %	1.25 x (% of revenue decline on preceding three-month average – 50 %) Max 25 %

CEWS amount

The maximum weekly amount per employee would be increased from $847 to a maximum percentage of **85%** (maximum base and top-up subsidies) of the lesser of the weekly remuneration paid and $1,129, for a maximum of $960 per week, per employee. This percentage would be reduced according to an eligible employer's revenue decline.

The concept of eligible remuneration would remain the same, but the concept of basic remuneration would no longer apply as of Period 5, except in the case of employees that do not deal at arm's length with the employer.

Other significant changes to the CEWS

A variety of other changes were announced, including:

- An **appeal process** based on the existing Notice of Determination procedure to make it possible to appeal to the Tax Court of Canada. For example, an employer denied the CEWS in whole or in part could avail itself of the objection and appeal process under the *Income Tax Act* to challenge the CRA decision in this regard. On June 17, 2020, as part of the economic response plan, the CRA announced that it would begin post-payment audits of CEWS claims as early as September 2020.
- Employers whose employees are **paid through a payroll service provider** would now be able to claim CEWS for the salaries of their eligible employees;
- For reference periods beginning July 5, employees who have not received remuneration for **14 consecutive days** would still be granted eligible status;
- New optional reference periods have been added to each qualifying period to account for the particularities of **seasonal businesses**;
- **Corporations formed on an amalgamation** would be deemed to be the same corporation and a continuation of

each of the corporations existing immediately before the amalgamation;
Trusts would now be eligible entities;
Continuity rules would be introduced to make it possible for employers who have **purchased all or substantially all the assets of a business** to calculate their drop in revenues for the purposes of CEWS.

Labour and employment law considerations

As in the previous version of CEWS, an employer would not be required to pay employees the pre-crisis remuneration they were receiving in order to be eligible to the CEWS[2].

However, it is important to remember that a substantial change in an employee's working conditions, especially one lasting for an extended period of time, may give rise to allegations of constructive dismissal. An analysis of the employment contract of employees affected by a change in their working hours, remuneration, position or duties is recommended, as well as obtaining legal advice.

Considering the elimination of the requirement that an employee should not be "without remuneration from the eligible employer in respect of a period of 14 or more consecutive days in the claim period," employers will now have more flexibility in terms of call-back dates and employee schedules.

Caution is still advised when calling employees back to work. While employer eligibility for CEWS is no longer dependent on the "14-day rule," employees may still be required to reimburse the CERB benefits received, depending on their income level during the applicable eligibility period. Currently, an employee must reimburse the CERB in the following cases:

1st1 CERB eligibility period

An employee will be required to reimburse the sum of $2,000 if they have earned or will earn, **for at least 14 consecutive days during that period**, , more than $1,000 (before deductions) in employment or self-employment income.

Other CERB eligibility periods

An employee will be required to reimburse the sum of $2,000 if they have earned or will earn more than $1,000 (before deductions) in employment or self-employment income during this period.

Finally, despite CEWS's rules being more flexible, some employers will have to consider permanently laying off part of their workforce. Legal advice should be obtained in order to assess an employer's obligations under the employment contracts' terms and applicable law. Particular considerations also apply to notice and severance pay for an employer benefiting from the CEWS, as the amounts paid generally cannot be subsidized through the CEWS.

Lavery's tax and labour law teams are available to answer all your questions regarding the application of the CEWS and to support in the case of audits by tax authorities.

APPENDIX A

"**Revenue reduction percentage**" means the percentage of revenue reduction for the qualifying period relative to revenue for the reference period used to determine eligibility.

For qualifying periods beginning July 5, 2020, employers would now have the option of calculating their revenue reduction percentage by electing the greater of:

The revenue reduction obtained by comparing the current month with the same month in 2019; and
The revenue reduction obtained by comparing the previous month with the same month in 2019.

Otherwise, an eligible employer would have the possibility of electing to calculate the revenue reduction percentage by comparing either:

The current month and the average of January and February 2020; or
The previous month and the average of January and February 2020.

Employers would be able to decide which calculation method they wish to use for the qualifying period beginning July 5, regardless of the election they made for qualifying periods prior to that date. The method chosen for the eligibility period beginning July 5 would become mandatory for all subsequent qualifying periods.

The reference periods for the purposes of calculating the revenue reduction percentage of an eligible employer would thus be as follows:

Reference period (revenue reduction percentage)	**Optional reference period (revenue reduction percentage)**
Qualifying period 5: July 5 to August 1, 2020	
July 2020 compared to July 2019 **or** June 2020 compared to June 2019	July **or** June 2020 compared to the average of January and February 2020
Qualifying period 6: August 2 to August 29, 2020	
August 2020 compared to August 2019 **or** July 2020 compared to July 2019	August **or** June 2020 compared to the average of January and February 2020
Qualifying period 7 : August 30 to September 26, 2020	
September 2020 compared to September 2019 **or** août 2020 comparé à août 2019	September **or** August 2020 compared to the average of January and February 2020
Qualifying period 8: September 27 to October 24, 2020	
October 2020 compared to October 2019 **or** September 2020 compared to September 2019	October **or** September 2020 compared to the average of January and February 2020
Qualifying period 9: October 25 to November 21, 2020	
November 2020 compared to November 2019 **or** October 2020 compared to October 2019	November **or** October 2020 compared to the average of January and February 2020

"**Top-up percentage**" is the percentage equal to the **lesser of**:

- 25%;
- 1.25 multiplied by the result of the following subtraction:
  - The average monthly revenue for the last three calendar months divided by the average decrease in revenue compared to their respective reference period;
  - minus 50%

The qualifying periods and their corresponding reference periods for the purpose of calculating the top-up percentage are set out in the table below:

Qualifying period	**Reference period (top-up percentage)**
July 5 to August 1, 2020 (Period 5)	Average of April to June 2020 compared to the average of April to June 2019 **or** January and February 2020
August 2 to August 29, 2020 (Period 6)	Average of May to July 2020 compared to the average of May to July 2019 **or** January and February 2020
August 30 to September 26, 2020 (Period 7)	Average of June to August 2020 compared to the average of June to August 2019 **or** January and February 2020
September 27 to October 24, 2020 (Period 8)	Average of July to September 2020 compared to the average of July to September 2019 **or** January and February 2020
October 25 to November 21, 2020 (Period 9)	Average of August to October 2020 compared to the average of August to October 2019 **or** January and February 2020

"**Base percentage**" means the percentage calculated based on the base percentage defined above and the qualifying period, as set out in the table below:

Reference period (base percentage)	Base percentage if the revenue reduction percentage exceeds 50%	Base percentage if the revenue reduction percentage does not exceed 50%
Qualifying period 4: June 7 to July 4, 2020		
June 2020 compared to June 2019 **or** the average of January and February 2020	N/A	N/A
Qualifying period 5: July 5 to August 1, 2020		
July 2020 compared to July 2019 **or** the average of January and February 2020	60 %	1.2 x revenue reduction percentage
Qualifying period 6: August 2 to August 29, 2020		
August 2020 compared to August 2019 **or** the average of January and February 2020	60 %	1.2 x revenue reduction percentage
Qualifying period 7: August 30 to September 26, 2020		
September 2020 compared to September 2019 **or** the average of January and February 2020	50 %	1 x revenue reduction percentage
Qualifying period 8: September 27 to October 24, 2020		
October 2020 compared to October 2019 **or** the average of January and February 2020	40 %	0.8 x revenue reduction percentage
Qualifying period 9: October 25 to November 21, 2020		
November 2020 compared to November 2019 **or** the average of January and February 2020	20 %	0.4 x revenue reduction percentage

As set out in the table above, the base percentage rate, and therefore the total amount of CEWS paid relative to an employee's salary, would gradually decrease over the qualifying periods. The maximum CEWS for an employee's salary for a given week in the last qualifying period beginning October 25, 2020, would be $508.

New CEWS calculation

For qualifying periods beginning August 30, the amount of the CEWS that may be claimed for each employee would be calculated as follows:

- If the employee deals at arm's length with the employer and is not on paid leave in a particular week:
    - The percentage obtained by adding the base percentage and the top-up percentage for the qualifying period multiplied by the **lesser** of:
        - The remuneration paid in respect of that week; and
        - $1,129.00.
- If the employee does not deal at arm's length with the employer and is not on paid leave for a particular week:
    - The **lesser** of:
        - The eligible amount of remuneration paid in respect of that week;
        - An amount prescribed by regulation; and
        - $0 if both the revenue reduction percentage and the top-up percentage are 0%.

---

1. Eligibility periods: March 15, 2020, to April 11, 2020 (Period 1), April 12, 2020, to May 9, 2020 (Period 2), May 10, 2020, to June 6, 2020 (Period 3), June 7, 2020, to July 4, 2020 (Period 4), July 5, 2020, to August1, 2020 (Period 5), August 2, 2020, to August 29, 2020 (Period 6), August 30, 2020, to September 26, 2020 (Period 7), September 27, 2020, to October 24, 2020 (Period 8), and October 25, 2020, to November 21, 2020 (Period 9).
2. It should be noted that the government strongly encouraged businesses to supplement employee remuneration to bring it back to pre-crisis levels wherever possible.