

# The Canada Emergency Wage Subsidy: Helping Employers Keep Employees



*This blog post combines previous posts released on April 2 and 9, 2020, and contains additional details from Bill C-14, "A second Act respecting certain measures in response to COVID-19" ("Bill"), which received Royal assent on April 11, 2020.*

The following is a summary of the details released, to date, on the federal government's proposed Canada Emergency Wage Subsidy (the "Wage Subsidy").

## Who is an Eligible Employer?

- "Eligible entities" include employers that are taxable corporations, individuals (such as sole proprietors and trusts), non-profit organizations, registered charities, and partnerships (all of the members of which are partnerships or one of the aforementioned entities) who had an existing business number and payroll program account with the Canada Revenue Agency ("CRA") on March 15, 2020.
  - Public institutions are not eligible (e.g. municipalities and local governments, Crown corporations, public universities, colleges, schools and hospitals).
- To be eligible, an employer must suffer a drop in "qualifying revenues" of at least 15% in March, and 30% in April or May, 2020. The following are the periods in which employers can claim wage subsidies:

	<b>Decline in monthly revenue</b>	<b>Period can claim subsidy</b>
<b>Period 1</b>	March 2020 (15%)	March 15 – April 11
<b>Period 2</b>	April 2020 (30%)	April 12 – May 9
<b>Period 3</b>	May 2020 (30%)	May 10 – June 6

- To calculate revenue loss, employers have two options:
  - Compare their revenue of March, April, and May 2020 to that of the same month of 2019 ("Option 1"); or
  - Compare their revenue of March, April, and May 2020 to an average of their revenue earned in January and February 2020 ("Option 2").

Once an approach has been chosen, the employer has to follow the same approach for the entire duration of the program.

- For employers established after March 1, 2019, the reduction in qualifying revenue will be calculated using Option 2.
- Employers are allowed to measure qualifying revenues either on the basis of accrual accounting (as they are earned), or cash accounting (as they are received).

- “Qualifying revenue” is defined as the cash, receivables or other consideration arising in the course of the employer’s ordinary activities in Canada that is earned from arm’s length sources (e.g. from the sale of goods, the rendering of services or the use by others of the employer’s resources). Qualifying revenue excludes extraordinary items and amounts received (or receivable) under the 75% Wage Subsidy program and the 10% Temporary Wage Subsidy program.
  - For charities, qualifying revenue includes revenue from a related business, gifts, donations and other amounts received in the course of its ordinary activities. For non-profit organizations, qualifying revenue includes membership fees and other amounts received in the course of its ordinary activities. Both charities and non-profit organizations can elect to exclude government funding; however, this choice will apply to all qualifying periods.

### **What is the Amount of the Wage Subsidy?**

- Employers can use the [Canada Emergency Wage Subsidy](#) calculator to calculate the potential Wage Subsidy amount.
- The Wage Subsidy will subsidize “eligible remuneration” paid by an eligible employer to an “eligible employee” between March 15 and June 6, 2020 in an amount equal to the greater of:
  - 75% of the amount of eligible remuneration paid per week, up to a maximum benefit of \$847; or
  - the amount of eligible remuneration paid per week, 75% of the employee’s “pre-crisis weekly remuneration”, or a maximum benefit of \$847, whichever is least.
- If an eligible employee does not deal at arm’s length with the employer, the subsidy will be limited to the least of:
  - the amount of eligible remuneration paid per week;
  - 75% of the employee’s pre-crisis weekly remuneration; or
  - \$847.

However, the subsidy is not available to a new employee (hired after March 15, 2020) that does not deal at arm’s length with the employer.

- The weekly Wage Subsidy calculated above in respect of a particular eligible employee will be *decreased* by the following:
  - the 10% Temporary Wage Subsidy claimed by the employer in respect of that employee; and
  - any Employment Insurance (“EI”) benefits received by that employee under a work-sharing plan.

- The eligible employee must be on payroll and paid during the period between March 15, 2020 and June 6, 2020 in order for the employer to be eligible for the Wage Subsidy. If the eligible employee is on leave with pay (i.e. on payroll but not working) the weekly Wage Subsidy amount will be *increased* for the employer's EI premiums and the employer's contributions to the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan (i.e. eligible employers that qualify for the Wage Subsidy will receive a 100% refund for these employer-paid contributions).
  - An employee is considered on leave with pay if that employee is remunerated by the employer for that week but does not perform any work for the employer in that week.
  - Employees who have been laid off or furloughed can become "eligible employees" retroactively, provided employers rehire them and their retroactive pay and status meet the eligibility criteria noted above for the particular claim period. Employees must be rehired and retroactively paid before they can be included in the employer's calculation for the Wage Subsidy.
- "Eligible remuneration" is defined as salary, wages, fees, commissions, and other employment benefits (including taxable benefits). Exceptions to "eligible remuneration" (i.e. amounts that will not be subsidized under the Wage Subsidy program) include:
  - retiring allowances (i.e. severance pay);
  - benefits arising from employee stock option plans;
  - amounts received by employees that can reasonably be expected to be paid back to the employer, a person not dealing at arm's length with the employer, or another person at the direction of the employer; and
  - remuneration in excess of an employee's "pre-crisis weekly remuneration" if it is reasonably expected that after the qualifying period, the employee's remuneration will be lower than their pre-crisis weekly remuneration and one of the main purposes for the excess is to increase the employer's Wage Subsidy amount (these last two exceptions are anti-avoidance rules to combat abuse of the Wage Subsidy).
- "Eligible employee" is defined as an individual who is employed in Canada who has not been without remuneration for more than 14 consecutive days from March 15 to April 11, April 12 to May 9, and from May 10 to June 6, 2020.
- "Pre-crisis weekly remuneration" is defined as the average weekly eligible remuneration paid to the eligible employee by the employer between January 1, 2020 and March 15, 2020, excluding any period of seven or more consecutive days for which the employee was not remunerated.
- There is no limit on the total Wage Subsidy amount that an eligible employer can claim.

## How do Employers Apply?

- Employers will be able to apply for the Wage Subsidy beginning April 27, 2020 through the CRA's [My Business Account](#) portal as well as through a web-based application.
- Before applying, employers must calculate the estimated Wage Subsidy for their businesses.
- The payments will come through the CRA; employers should make sure their business details and direct deposit information for their payroll accounts (RP) are up to date to facilitate timely payment from the CRA.
- In order to qualify for the Wage Subsidy, an employer must file an application in the appropriate form before October 2020. Further, an individual who has principal responsibility for the financial activities of the employer (e.g. the CFO) must attest that the application is complete and accurate.

## Rules for Corporate Groups, Joint Ventures, and Non-Arms' Length Entities

- If a group of eligible entities (such as taxable corporations), normally prepares consolidated financial statements, each member of the group may determine its qualifying revenue on a standalone basis, provided each member determines its qualifying revenue on that basis. Alternatively, each member of an affiliated group of eligible entities may use the consolidated revenue of the group (determined in accordance with relevant accounting principles) as its qualifying revenue, provided each member agrees to determine its revenue on that basis.
- If all of the interests in an employer are owned by participants in a joint venture, and all or substantially all of the revenue for a qualifying period is in respect of the joint venture (the CRA generally accepts 90% or more as "substantially all"), then the employer may use the qualifying revenues of the joint venture instead of its own qualifying revenues.
- Where all or substantially all of an employer's qualifying revenues (including revenues from non-arm's length sources) are from one or more particular non-arm's length persons, and each particular non-arm's length person jointly elects with the employer, the employer's qualifying revenues for March, April or May 2020 (referred to in the Bill as a "current reference period") will be determined by applying the following formula to each particular non-arm's length person and then the aggregated results will be compared to the employer's revenues in the prior reference period (deemed by the Bill to be \$100):

	Employer's qualifying revenues for March, April, or May 2020 attributable to the particular non-arm's length person	x	Particular non-arm's length person's qualifying revenues for March, April, or May 2020 (include revenues outside Canada)
\$100	x		
Employer's qualifying revenues for March, April, or May 2020 attributable to <u>all</u> particular non-arm's length persons		x	Particular non-arm's length person's qualifying revenues for the prior reference period (i.e. March, April, or May 2019 or January to February 2020) (include revenues outside Canada)

- For example, assume the employer's qualifying revenues for April 2020 are \$200,000 and \$190,000 of its revenues (more than 90%) is attributable to two non-arm's length particular persons (\$90,000 from ACo and \$100,000 from BCo). ACo's qualifying revenues for April 2020 and April 2019 (its prior reference period) is \$300,000 and \$500,000, respectively. BCo's qualifying revenues for the same periods are \$600,000 and \$800,000, respectively. Using the formula above, the employer's qualifying revenues for April 2020 would be \$68 (i.e. [(\$100 x \$90,000/\$190,000 x \$300,000/\$500,000) + (\$100 x \$100,000/\$190,000 x \$600,000/\$800,000)]. In this example, the employer would be a qualifying entity for the Wage Subsidy since its qualifying revenues of \$68 for April 2020 represent more than a 30% reduction from its qualifying revenues for the prior reference period of April 2020 (deemed to be \$100).

### Additional Issues to Consider

- Although not legislated, the government has stated that employers are expected to "at least make best efforts" to top up salaries to pre-crisis levels.
  - At this time, it is not clear what is required to meet the "best efforts requirement."
  - Note that if an employer unilaterally decreases an employee's pay by, for example, 25%, this is likely a constructive dismissal. However, in these circumstances we expect many employees would consent to that reduction in pay in order to keep their job.
  - The legislation grants the Minister of Finance the power to publicize the names of all employers who applied for the Wage Subsidy Program. As such, there is a risk of reputational damage for employers who fail to pay the remaining 25% of salaries when they have the ability to do so.
- The funds received by an employer from the Wage Subsidy will count as "income" for tax purposes.
- Those employers that do not qualify for the Wage Subsidy may continue to qualify for the previously announced 10% Temporary Wage Subsidy on remuneration paid from March 18 to before June 20, up to a maximum subsidy of \$1,375 per employee and

\$25,000 per employer, provided the employer meets the eligibility requirements for the 10% Temporary Wage Subsidy.

- Eligible employers must keep records documenting the reduction in revenue for a particular period. However, there is nothing in the legislation that suggests the employer needs to prove that the revenue reduction was related to COVID-19.

### **Limitations and penalties imposed for anti-avoidance**

- If an employee is employed during the same week by two or more employers that do not deal with each other at arm's length, the total amount of the Wage Subsidy for that employee is limited to the amount that would be available if the employee was paid by only one employer.
- If an employer attempts to manipulate revenue in order to qualify for the Wage Subsidy (i.e. the employer enters into a transaction that reduces its qualifying revenues for March, April, or May, 2020 and one of the main purposes of the transaction is to cause the employer to qualify for the Wage Subsidy), then the employer will be required to repay any Wage Subsidy amounts received plus a penalty of 25% of the amount claimed ("25% Penalty"). An employer is not considered to have manipulated revenue by choosing one method of computing qualifying revenues over another.
- If an employer claims the Wage Subsidy and knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of a false statement or omission in a return, form, certificate, statement or answer filed or made in respect of a taxation year, the employer is liable for a penalty of 50% of the Wage Subsidy claimed in excess of the amount of the Wage Subsidy the employer was actually entitled to ("50% Penalty"). The 50% Penalty is in addition to the 25% Penalty.
- If an employer obtains the Wage Subsidy to which the employer is not entitled, or obtains or claims a Wage Subsidy amount greater than that to which they are entitled by making, participating in, assenting to or acquiescing in the making of a false or deceptive statement, the employer is guilty of an offence. Depending upon the circumstances, prosecutors may choose to proceed by way of either a summary or indictable offence. Penalties are as follows:
  - Summary Conviction: Fine between 50% to 200% of the Wage Subsidy claimed that exceeds the amount of the Wage Subsidy entitled to ("Fine"), or Fine plus imprisonment of up to two years; or
  - Indictment: Fine of 100% to 200% of the Wage Subsidy claimed that exceeds the amount of the Wage Subsidy entitled to plus imprisonment of up to five years.
- These penalties are in addition to the 25% Penalty and the 50% Penalty.