

April 15, 2020

CANADA EMERGENCY WAGE SUBSIDY (“CEWS”) – THE NEW 75% SUBSIDY

We’ve all been waiting for the final details of the Governments 75% wage subsidy. On Sunday the legislation was passed as Bill C-14, COVID-19 Emergency Response Act, No. 2.

The content of the Bill is relatively short and put together quickly by the Department of Finance to assist businesses through the present pandemic. The Bill includes some clarification on the brief details announced by the Government previously. However, like many new tax provisions, interpretation and clarification will be needed in certain business situations.

As a disincentive to businesses submitting “incorrect” claims, there are significant penalties included in the Bill including a 50% penalty based on the amount claimed plus interest i.e. refund 150% of the amount claimed plus interest. In addition, there could be penalties of up to 200% of the claim plus jail in extreme circumstances. There is also a clause stating that the Minister can make public the name of any person who applies for the subsidy – the “name and shame” clause.

A reminder that the 10% wage subsidy still applies and can be claimed alongside the 75% subsidy. However, any claim for the 10% subsidy will reduce the 75% subsidy. As the 10% is available now and the 75% will hopefully be available in the next 4/5 weeks, we suggest that the 10% is claimed now where applicable and follow up with the 75% subsidy claim if you qualify and when available.

The following is an outline of the details included in the Bill. We advise that you should not rely on this outline as a legal interpretation of its contents. If in doubt you should contact us and hopefully we can assist in clarifying the legislation.

Bill outline

As a simple start:

A “qualifying entity” can claim up to \$847 per week for “eligible remuneration” paid to an “eligible employee” during a “qualifying period” where the business has met the “qualifying revenue” test. The Bill contains many new “definitions” that we all need to get used to. We have summarized the basics of the Bill below. However, in many situations we will need to review the exact details of the details and definition contained in the Bill to ensure valid claims are submitted.

Basics of the bill

- A “qualifying entity” or “eligible entity” (See note 1 full definition) in general terms is a taxable corporation, individual, registered charity, exempt person or partnership that had a CRA payroll remittance number as of March 15, 2020.
- Claims are made for specific periods as follows:

Eligible periods			
	Claiming period	Required reduction in revenue	Reference period for eligibility
Period 1	March 15 to April 11	15%	March 2020 over: - March 2019 or - Average of January and February 2020
Period 2	April 12 to May 9	30%	Eligible for period 1 or April 2020 over: - April 2019 or - Average of January and February 2020
Period 3	May 10 to June 6	30%	Eligible for Period 2 or May 2020 over: - May 2019 or - Average January and February 2020

REVENUE

- Qualifying revenue generally means revenue computed under the employer’s normal accounting practices and more specifically excludes certain extraordinary items, amounts derived from persons or partnerships not dealing at arms length and any amounts received under the 10% subsidy.
- As an alternative, and by making an election that must cover all three claim periods, revenue can be based on cash receipts for each of the reference periods
- The relevant month in 2020 may be compared to the average qualifying revenue in January/February 2020 if an election is made. Once made, the election applies for all periods.
- Determining “revenue” on a monthly basis may not be easy for many businesses either because of an unsophisticated accounting system or a sophisticated business with inherent difficulties in determining revenue.
- If a group of eligible entities normally prepares consolidated financial statements, each member of the group may determine its qualifying revenue separately, provided every member of the group determines its qualifying revenue on that basis;
- If an eligible entity and each member of an affiliated group of eligible entities of which the eligible entity is a member jointly elect, the qualifying revenue of the group determined on a consolidated basis in accordance with relevant accounting principles is to be used for each member of the group. Affiliated persons is defined in subsection 251.1(1) of the Income Tax Act. It’s a long definition and reproduced in note 2 below.
- If all of the interests in an eligible entity are owned by participants in a joint venture and all or substantially all (generally 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 (determined as if the joint venture were an eligible entity) instead of its qualifying revenues

- If all or substantially all of an eligible entity's qualifying revenue for a qualifying period is from one or more particular persons or partnerships with which it does not deal at arm's length and each particular person or partnership jointly elects with the eligible entity there is a formula that effectively calculates qualifying revenue. For the entity that receives revenue from a non arms length entity the formula is based on the percentage of its revenue from the non arms length entities multiplied by 100% minus the payor company's % decline in revenue.
- **In addition to the penalties mentioned above, there are additional anti-abuse penalties of 25% including denial of the claim if the employer "enters into a transaction or participates in an event (or a series of transactions or events) or takes an action (or fails to take an action) that has the effect of reducing the qualifying revenues..... of the eligible entity for the current reference period" - this is an incomplete extract from the Bill.**

EMPLOYEES

- Wages paid to employees who are without pay for 14 or more consecutive days in the qualifying period will not qualify; likely those employees will have received the \$2000 emergency benefit ("CERB")
- Eligible remuneration includes salary, wages, commissions but does not include retiring allowances, certain benefits, any amounts that can reasonably be expected to be paid or returned to the employer, amounts paid in excess of the employees "baseline remuneration" or in other words "inflated wages"
- New hires are eligible for the subsidy
- Pre-existing employees working at any time between January 1 and March 15 - the subsidy amount is the least of a. 100% of the eligible remuneration paid, b. 75% of baseline remuneration or c. \$847. Baseline remuneration is equal to that person's average weekly eligible remuneration during that period but excluding any period of 7 or more consecutive days for which the employee was not paid.
- Non-arms length employees - the same provisions apply as for pre-existing employees. This prevents non-arms length employees from inflating their salaries or adding on family members to payroll to access the subsidy.
- For any employees on paid leave, the employer can claim an additional subsidy equal to 100% of the employer portion of CPP and EI. This amount is not limited to \$847 per week.

OTHER DETAILS

- The subsidy is taxable to the entity recipient
- An employee employed by two non-arms length employers - the total amounts of subsidy cannot exceed \$847 per week
- If the percentage reduction in revenue as calculated for a particular monthly period is either 14% or 29% no subsidy is available.
- It may be worthwhile deferring any claim for the subsidy until calculations are available for all periods. At that time, it can be determined which calculation method produces the maximum claim. Claims can be submitted until September 30, 2020
- There is no maximum claim per entity
- Claims under the 10% subsidy are deducted from any claims for the 75% subsidy

- **Claims will be made through the CRA My Business Account. Employers should ensure they are registered for access and also ensure that they are registered for direct deposit to ensure speedy access to funds.**

Note 1: Eligible entity means

- a) a corporation, other than a corporation that is exempt from tax under this Part or is a public institution;
- b) an individual;
- c) a registered charity, other than a public institution;
- d) a person that is exempt from tax under this Part because of paragraph 149(1)(e), (j), (k) or (l), other than a public institution;
- e) a partnership, all of the members of which are described in this paragraph or any of paragraphs (a) to (d); or
- f) a prescribed organization.

Note 2: Definition of Affiliated persons ITS 251.1(1)

251.1 (1) For the purposes of this Act, affiliated persons, or persons affiliated with each other, are

- a) an individual and a spouse or common-law partner of the individual;
- b) a corporation and:
 - i. a person by whom the corporation is controlled,
 - ii. each member of an affiliated group of persons by which the corporation is controlled, and
 - iii. a spouse or common-law partner of a person described in subparagraph (i) or (ii);
- c) two corporations, if:
 - i. each corporation is controlled by a person, and the person by whom one corporation is controlled is affiliated with the person by whom the other corporation is controlled,
 - ii. one corporation is controlled by a person, the other corporation is controlled by a group of persons, and each member of that group is affiliated with that person, or
 - iii. each corporation is controlled by a group of persons, and each member of each group is affiliated with at least one member of the other group;
- d) a corporation and a partnership, if the corporation is controlled by a particular group of persons each member of which is affiliated with at least one member of a majority-interest group of partners of the partnership, and each member of that majority-interest group is affiliated with at least one member of the particular group;
- e) a partnership and a majority-interest partner of the partnership;
- f) two partnerships, if
 - i. the same person is a majority-interest partner of both partnerships,
 - ii. a majority-interest partner of one partnership is affiliated with each member of a majority-interest group of partners of the other partnership, or
 - iii. each member of a majority-interest group of partners of each partnership is affiliated with at least one member of a majority-interest group of partners of the other partnership;
- g) a person and a trust, if the person
 - i. is a majority-interest beneficiary of the trust, or
 - ii. would, if this subsection were read without reference to this paragraph, be affiliated with a majority-interest beneficiary of the trust; and
- h) (h) two trusts, if a contributor to one of the trusts is affiliated with a contributor to the other trust and
 - i. a majority-interest beneficiary of one of the trusts is affiliated with a majority-interest beneficiary of the other trust,
 - ii. a majority-interest beneficiary of one of the trusts is affiliated with each member of a majority-interest group of beneficiaries of the other trust, or
 - iii. each member of a majority-interest group of beneficiaries of each of the trusts is affiliated with at least one member of a majority-interest group of beneficiaries of the other trust.