

COVID-19 RESPONSE UPDATE FOR THE CEWS AND THE CERB PROGRAMS

FURTHER CHANGES TO THE COVID-19 ECONOMIC RESPONSE PLAN

In recent days we have once again seen meaningful changes to two of the principal federal support programs available to Canadian businesses and individuals. These programs are intended to help businesses and individuals through these unprecedented

“We must be there for each other as we spare no effort to safeguard our collective future”

- *Prime Minister Justin Trudeau*

times by supporting and subsidizing income for workers in Canada who have seen their income and employment adversely impacted by the COVID-19 pandemic.

As we have mentioned previously, these programs announced by the Department of Finance continue to

evolve in response to the needs of Canadians during the pandemic. We remain committed to ensuring you have up-to-date information about the eligibility criteria for the programs, how they will operate and, ultimately how you will be able to access these programs.

As we now have legislation that we can review and refer to regarding the Canada Emergency Wage Subsidy (**CEWS**) program, we are able to speak definitively (for now) on the details around this program. In addition, we are aware of changes to the Canada Emergency Response Benefit (**CERB**) program that opens up the eligibility for the \$2,000 per month benefit to a much broader section of the population. Here are the changes as we understand them:

CHANGES TO THE CEWS Locking Down the Details

Bill C-14, which received Royal Assent on April 11, 2020, adds new section 125.7 to the Income Tax Act, Canada (**the Act**). The introduction of this section also references various other provisions in the Act by way of reference to section 125.7. As we have mentioned previously, the CEWS will provide a subsidy to an “eligible entity” in respect of an “eligible employee” equal to 75% of their “baseline remuneration” to a maximum of \$847 per week for a “qualifying period” provided there is a decline in revenue for the qualifying period when compared to the “reference period”.

Simple...right??

As you can see, this new legislation introduces several new defined terms that are critical in understanding how this program operates, who is eligible to apply and who is eligible to receive the CEWS payments.

Here is a summary of the new defined terms:

Baseline remuneration – simply put, this is the average weekly amount paid to an employee for the January 1 through March 15, 2020 period, excluding any period of 7 or more **consecutive** days that the

employee wasn't paid. This is the amount that is used to determine the weekly benefit that will be received by the employee.

Current Reference Period - this is the definition that ties the reference calculation to the eligible periods, being March, April and May of 2020. As we see throughout the bill, flexibility for potential extension of the program exists by adding a reference to a "prescribed" period which means that the government is able to "prescribe" additional months by way of a Regulation change.

Eligible Employee – an employee of the eligible entity employed in Canada. Anyone who does not receive pay from the company for 14 consecutive days in the "qualifying period" (see below) is excluded from this definition.

Eligible Entity - this new definition describes which corporations may receive the CEWS. The definition captures ALL entities with the exception of corporations exempt from Part I tax or public institutions. Because of this definition, charities, NPO's, individuals who pay eligible employees and partnerships are all considered to be eligible. There is also a provision to allow government to "prescribe" additional entities by Regulation.

Eligible Remuneration - this definition captures salary, wages, commissions and other payment but **excludes** retiring allowances, stock option benefits and any amount paid but is expected to be *repaid*. This definition also **excludes** amounts paid that could potentially manipulate the CEWS benefit received or would result in the employee receiving a lower wage after the calculation is made.

Prior Reference Period - this is a key definition as it defines the period that is used to compare the current period for the decline in revenue. This definition provides that the prior reference period is **either** the same month in the prior year (March 2019 vs March 2020) **or** is the January and February period if the business was not in existence on March 1st, 2019, **or** the business elects to use this 2020 period. It is important to note that once you close a prior reference period, you

must use the same reference period for each month of application for the CEWS.

Qualifying Entity - this definition sets out the specific criteria for an eligible entity to qualify for the program. Simply put, the entity has to have applied before October 2020, must have identified someone with "principal responsibility for the financial activities" of the entity and this person must "attest" that the entity meets the prior year or average January-February revenue decline.

Qualifying Revenue – this definition sets out what must be considered when calculating the decline in revenue for either the prior year or average Jan-Feb method. Of note, this revenue is essentially all ordinarily calculated sources of income **earned in Canada**. This means that income earned from sources outside of Canada would be excluded from the calculation. This definition also excludes "extraordinary items", amounts received from non-arm's-length persons and partnerships and any amounts received under the 10% wage subsidy.

Specified Percentage - this adds clarity around the required revenue decline to be eligible for the CEWS benefit. The definition sets out the 15% decline from the prior reference period for the March qualifying period and 30% thereafter. Again, the legislation provides additional flexibility by adding that the specified percentage may be a prescribed amount, which suggests the ability to alter the amount by Regulation.

THE CHANGES

We have addressed many of the proposed changes in our previous Newsletter (see April 8TH, 2020 Update) but there are a few surprises contained in the legislation. As we have always said...."the devil is always in the details". Of note:

- 1. Computation of Jan-Feb Average Qualifying Revenue** – the computation of the average January and February qualifying revenue for the purpose of establishing a baseline for new companies or companies who choose to use this method takes into consideration days that the entity is not carrying on business during those two months.

2. **Automatic Qualification – Subsequent Period** - if the entity meets the decline in revenue test for a period, the deeming provision in subsection 125.7(9) basically says that the entity automatically meets the test for the following claim period. For example, if the entity meets the 15% decline in revenue test for March, it is automatically deemed to meet the test for April. When making application for May, the entity must perform and attest to a new calculation to determine if the 30% decline in revenue test has been met.
3. **Amounts on Account of Capital** – surprisingly, the legislation did not specifically contain any language that would remove “amounts received on account of capital” from the definition of “qualifying revenue”. This is concerning because of the vagueness of the defined term which suggests that revenue includes any “inflow of cash, receivables or other consideration ...[from] ordinary activities”. As some of my colleagues have pointed out, the sale of capital property certainly adds to cash inflows or receivables but would likely be outside the definition of ordinary activities.
4. **Complex Corporate Groups** - All members of an affiliated group (affiliation generally means common control by a person or spouse) may jointly elect to use the same consolidated qualifying revenue for the revenue decline test. Where an employer entity receives substantially all (typically means 90% or more) of its revenue from non-arm’s length persons, a joint election may be made to calculate the employer’s decline in revenue based on the non-arm’s length person’s decline in revenue. A complicated formula is involved.

Alternatively, a group that normally prepares consolidated financial statements may choose to determine qualifying revenue separately for each member, but every member of that group must do the same.
5. **Non-Arm’s-Length Employees** – persons who are related to the controlling shareholder(s) by

blood marriage or adoption are considered **not** to be acting at arm’s length with the corporation. This would also include the controlling shareholders themselves. The legislation contains rules that limit the availability of the CEWS to controlling shareholders and/or those persons related to them.

The rules have been designed to prevent businesses from adding family members to access the CEWS for them or from artificially inflating their wages to increase the amount of the benefit received.

Suffice it to say, if you (as a controlling shareholder or someone related to a controlling shareholder) have not received employment income in 2020 prior to March 15th, the CEWS benefit will not be available in respect of this person. Also, any temporary increase in remuneration after March 15th will not have an impact on the amount of the benefit received.

6. **Other Adjustments** – The legislation also provides for a number of adjustments to the CEWS benefit that may be received as follows:
 - Reduction of the CEWS benefit for amounts received under the 10% wage subsidy plan for the same claim period;
 - Reduction of the CEWS benefit received for any EI work-sharing benefit received by employees for the claim period;
 - Refund of CPP and EI for employees who are receiving the CEWS but are considered to be “on leave with pay”.
7. **Anti-Avoidance Rules** – the new legislation codifies the rules previously discussed in our April 8th update. There is a provision that will allow the government the ability to “name and shame” bad actors in addition to the financial penalties previously discussed.

The CEWS benefit is considered to be “government assistance” received by the corporation and will be taxable for the fiscal year(s) in which it is received .

CHANGES TO THE CERB

Availability for Those Earning “Some” Income

To continue the theme of legislation by Press Release and News Conference, Prime Minister Justin Trudeau announced today that eligibility for the CERB would be substantially expanded. Today’s announcement changes the eligibility rules to include the following:

- Individuals will be able to earn up to \$1,000 per month and still be considered eligible to receive the CERB benefit of \$2,000 per month;
- Seasonal workers who may have exhausted their regular EI benefits and cannot return to their regular seasonal employment because of COVID-19 can now qualify for the CERB;
- Employees who have recently exhausted their regular EI benefits (since January 1, 2020) and are unable to find employment because of COVID-19 are now eligible for the CERB.

As these changes have not been captured in the legislation introduced under Bill C-13, please consider them to be subject to change.

For additional information on supports & benefits for individuals and families, please click on the following link for a comprehensive summary compiled by Jennifer Robson, Associate Professor of Political Management, Carleton University.

https://drive.google.com/file/d/1lOJn7XS6ETtkbLRodYk681M_2dxkkQsc/view

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**In these trying and challenging times we can help you navigate the
programs and benefits available to keep you moving forward. Do not
hesitate to contact us for assistance.**