

# Coronavirus (COVID-19): Legal update for Canadian employers – what you missed on your summer vacation

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# Meet our presenters

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# Update on the Canada Emergency Wage Subsidy

Gergely Hegedus (Senior Associate, Edmonton) and Stefanie Chimienti (Associate, Toronto)

# Background

- On **April 11, 2020**, **Bill C-14 - A second Act respecting certain measures in response to COVID-19**, received Royal Assent, which created the Canada Emergency Wage Subsidy (the “Subsidy”) by adding section 125.7 to the *Income Tax Act*.
- The Subsidy is designed to enable employers to keep employees on payroll, to enable employers to re-hire workers that were previously laid off, and to help employers hire new workers during the COVID-19 pandemic.
- The Subsidy was initially in place for a 24-week period from March 15 to August 29, 2020. However, on **July 27, 2020**, **Bill C-20 - An Act respecting further COVID-19 measures**, received royal assent which extended the Subsidy to November 21, 2020, and gave the Government the ability to extend the Subsidy to December 31, 2020, by regulation.

# Claims to date

**As of September 6, 2020**

<b>Applicants received:</b>	<b>1,036,450</b>
<b>Applications approved:</b>	<b>1,024,340</b>
• Under \$100K (thousand)	971,260
• 100K (thousand) to \$1M (million)	50,490
• (million) to \$5M (million)	2,320
• \$5M (million)	270
<b>Dollar value of subsidies paid</b>	<b>\$33.71 billion</b>

# Removal of the 30% revenue decline threshold

	Claim periods	Required reduction in revenue	Reference periods for comparison under the general year-over-year approach	Reference periods for comparison under the alternative approach
Period 5	July 5 to August 1, 2020	Greater than 0%	July 2020 over July 2019 <b>or</b> June 2020 over June 2019	July 2020 <b>or</b> June 2020 over average of January and February 2020
Period 6	August 2 to August 29, 2020	Greater than 0%	August 2020 over August 2019 <b>or</b> July 2020 over July 2019	August 2020 <b>or</b> July 2020 over average of January and February 2020
Period 7	August 30 to September 26, 2020	Greater than 0%	September 2020 over September 2019 <b>or</b> August 2020 over August 2019	September 2020 <b>or</b> August over average of January and February 2020
Period 8	September 27 to October 24, 2020	Greater than 0%	October 2020 over October 2019 <b>or</b> September 2020 over September 2019	October 2020 <b>or</b> September 2020 over average of January and February 2020
Period 9	October 25 to November 21, 2020	Greater than 0%	November 2020 over November 2019 <b>or</b> October 2020 over October 2019	November 2020 <b>or</b> October 2020 over average of January and February 2020

# Expanded employee eligibility

- Effective July 5, 2020, the eligibility criteria no longer excludes employees that are without remuneration in respect of 14 or more consecutive days in an eligibility period.
- This means that eligible employees under the CEWS will be defined as someone who is employed in Canada by an eligible entity.

# The two-part CEWS: base subsidy and top-up subsidy

- The CEWS program now consists of two parts as of July 5, 2020:
  - a **base portion of wage subsidy (base subsidy)** available to all eligible employers that are experiencing a decline in qualifying revenues, with the wage subsidy amount varying depending on the scale of qualifying revenue decline; and
  - a **top-up portion of wage subsidy (top-up subsidy)** of up to an additional 25% for those eligible employers that have been most adversely affected by the COVID-19 crisis.



# Calculating the base subsidy

## Calculation of the base portion of the wage subsidy for claim periods 5 to 9

	Period 5 (see note below)	Period 6 (see note below)	Period 7	Period 8	Period 9
Maximum weekly benefit per employee	\$677.40 (60% x \$1,129)	\$677.40 (60% x \$1,129)	\$564.50 (50% x \$1,129)	\$451.60 (40% x \$1,129)	\$225.80 (20% x \$1,129)
Revenue reduction (RR)	Base percentage	Base percentage	Base percentage	Base percentage	Base percentage
50% and over	60%	60%	50%	40%	20%
less than 50%	1.2 x RR (e.g., 1.2 x 20% RR = 24%)	1.2 x RR (e.g., 1.2 x 20% RR = 24%)	1.0 x RR (e.g., 1.0 x 20% RR = 20%)	0.8 x RR (e.g., 0.8 x 20% RR = 16%)	0.4 x RR (e.g., 0.4 x 20% RR = 8%)

# Calculating the top-up subsidy

3-month average revenue drop	Top-up CEWS rate	Top-up calculation = 1.25 x (3 month revenue drop - 50%)
70% and over	25%	$1.25 \times (70\% - 50\%) = 25\%$
65%	18.75%	$1.25 \times (65\% - 50\%) = 18.75\%$
60%	12.5%	$1.25 \times (60\% - 50\%) = 12.5\%$
55%	6.25%	$1.25 \times (55\% - 50\%) = 6.25\%$
50% and under	0.0%	$1.25 \times (50\% - 50\%) = 0.0\%$

# Top-up subsidy reference periods

Qualifying Period		General Approach		Alternative Approach
5	July 5, 2020 to August 1, 2020	April to June 2020 over April to June 2019	or	April to June 2020 average over January and February 2020 average*
6	August 2, 2020 to August 29, 2020	May to July 2020 over May to July 2019	or	May to July 2020 average over January and February 2020 average*
7	August 30, 2020 to September 26, 2020	June to August 2020 over June to August 2019	or	June to August 2020 average over January and February 2020 average*
8	September 27, 2020 to October 24, 2020	July to September 2020 over July to September 2019	or	July to September 2020 average over January and February 2020 average*
9	October 25, 2020 to November 21, 2020	August to October 2020 over August to October 2019	or	August to October 2020 average over January and February 2020 average*

\* The calculation would equal the average monthly revenue over the 3 months of the reference period divided by the average revenue for the months of January and February 2020.

# Combined base and top-up subsidy

## Combined base portion (BP) and top-up portion of the wage subsidy percentages for claim periods 5 to 9

	Period 5 (see note below)	Period 6 (see note below)	Period 7	Period 8	Period 9
Maximum weekly benefit per employee	\$959.65 (85%x \$1,129)	\$959.65 (85%x \$1,129)	\$846.75 (75%x \$1,129)	\$733.85 (65%x \$1,129)	\$508.05 (45%x \$1,129)
Revenue reduction (RR) in the current 1-month reference period					
•50% and over	85% (60% BP + 25% top-up)	85% (60% BP + 25% top-up)	75% (50% BP + 25% top-up)	65% (40% BP + 25% top-up)	45% (20% BP + 25% top-up)
•less than 50%	1.2 x RR + 25% (e.g., 1.2 x 20% RR + 25% top-up = 49%)	1.2 x RR + 25% (e.g., 1.2 x 20% RR + 25% top-up = 49%)	1.0 x RR + 25% (e.g., 1.0 x 20% RR + 25% top-up = 45%)	0.8 x RR + 25% (e.g., 0.8 x 20% RR + 25% top-up = 41%)	0.4 x RR + 25% (e.g., 0.8 x 20% RR + 25% top-up = 33%)

# Baseline remuneration

- Baseline remuneration means the average weekly eligible remuneration paid to an eligible employee by an eligible employer during the period that **begins on January 1, 2020, and ends on March 15, 2020**. Any period of seven or more consecutive days for which the employee was not remunerated is excluded from the calculation. However, the eligible employer may [elect](#) for each claim period in respect of an employee, a different period to calculate the average weekly eligible remuneration, as described in the table below:

## Eligible remuneration periods for claim periods 1 to 4

Claim period(s)	If the eligible employer elects for an employee for each claim period, then average weekly eligible remuneration paid during the period that begins on:
1 to 3	March 1, 2019 and ends on May 31, 2019
4	March 1, 2019 and ends on May 31, 2019 <b>or</b> March 1, 2019 and ends on June 30, 2019
5 to 9	July 1, 2019 and ends on December 31, 2019

# Safe harbour rule

- For claim periods 5 and 6, if an eligible employer has a revenue reduction of 30% or more, then the employer would be entitled to a wage subsidy not lower than the amount calculated under the rules in place for periods 1 to 4 in respect of an eligible employee who is not on leave with pay for that week.
- This means that in claim periods 5 and 6, an eligible employer with a revenue decline of 30% or more, would receive a wage subsidy rate of at **least 75%**.

# CEWS for furloughed employees

- A separate CEWS rate structure now applies to furloughed employees (employees on leave with pay).
- This means that beginning in claim period 7 (Aug 30 to Sept 26), CEWS support for employees on leave with pay will be adjusted to align with the benefits provided through the Canada Emergency Response Benefit (CERB) and/or Employment Insurance (EI).

## Other technical changes: payroll service providers

- Eligible employers who did not have their own payroll program account with the CRA on or before March 15, 2020, but on March 15, 2020 employed one or more individuals and allowed a third party with a business number to make payroll remittances on their behalf, through the third party's account may now qualify for the subsidy.
- However, the eligible employers will need to [register for their own payroll program account](#). Eligible employers may also need to register for their own business number if they did not previously have one.



## Other technical changes: second level review

- If an employer disagrees with the decision made by the CRA, the employer may request a **second level review** of the CEWS application.
- The request for a second level review must be submitted within 30 days of CRA's original decision. Employers can submit their request online by logging into My Business Account and selecting "**Register a formal dispute.**"
- Once a Notice of Assessment or Notice of Determination, as applicable, has been issued for the employer's income tax return for the taxation year in which the claim period ends, formal recourse rights (notice of objection, and appeal to the Tax Court of Canada), will still be available if the employer disagrees with the second level review decision.

## Other technical changes: amalgamations

- A new corporation formed on an amalgamation of two or more predecessor corporations, or where one corporation is wound up into another on a tax-deferred basis, may be eligible for the wage subsidy provided all other required conditions have been satisfied.
- This change is retroactive to April 11, 2020, which means that it would apply to the first claim period starting March 15, 2020 and subsequent claim periods.
- However, the wage subsidy will be denied if it is reasonable to consider that **one of the main purposes** for the amalgamation (or the wind-up) was to qualify for the wage subsidy or to increase the amount of the wage subsidy.

## Other technical changes: non-cash taxable benefits

- Non-cash taxable benefits are not remuneration eligible for the wage subsidy. Only eligible remuneration paid to an eligible employee qualifies for purposes of computing the wage subsidy.
- Although the value of a stand-by charge is a taxable benefit derived because of employment, the value of such benefit is not eligible remuneration paid to an eligible employee for purposes of computing the wage subsidy.

## Other technical changes: non-taxable employee benefits

- Non-taxable benefits, such as employer contributions to a registered pension plan or a private health services plan, are not eligible remuneration paid to an eligible employee.
- Eligible remuneration of an eligible employee means amounts paid to an employee as salary, wages, and other remuneration for which an eligible employer would generally be required to make payroll deductions to be remitted to the CRA.

# End of the CERB and Transition to EI

Larysa Workewych, Associate, Toronto

# Final expansion of the CERB

- August 20, 2020, the Federal Government announced that the CERB would be extended by an additional 4 weeks, for a total maximum of **28 weeks**
- Final CERB pay period ends on September 26, 2020
- Eligible workers have until December 2, 2020 to make a claim in relation to the CERB

# “Simplified” employment insurance program

- Number of hours required to qualify for EI lowered to 120 hours
- One-time insurable credits available for one year:
  - Credit of 300 insurable hours for regular benefit claims
  - Credit of 480 insurable hours for special benefit claims
- New claimants will receive maximum benefits rate of \$400 per week (or \$240 for extended parental benefits)
- Regular benefits will be accessible for a minimum duration of **26 weeks**
- Minimum unemployment rate of 13.1% will be used

# New transitional benefits

- Proposed transition benefits available September 27, 2020

Benefit	Amount	Duration	Purpose
Canada Recovery Benefit	\$400/week	Up to 26 weeks	For workers who are not eligible for EI but are unable to work due to COVID-19
Canada Recovery Sickness Benefit	\$500/week	Up to 2 weeks	For workers who are unable to work because they are sick or must self-isolate due to COVID-19
Canada Recovery Caregiving Benefit	\$500/week (per household)	Up to 26 weeks	For individuals who are impacted by the closure of schools and other daycare and day program facilities



# Family Status Accommodation during COVID-19

Mark Hart, Alternative Dispute Resolution at Sanson & Hart ADR Corporation

# Employee entitlement

1. When is an employee entitled to leave under the ESA due to COVID-19 and its impact on family members?
2. When is an employee entitled to be accommodated under the Ontario Human Rights Code because of family status due to COVID-19?

# Differences between these obligations

- Leave under the ESA is unpaid
- whereas accommodation under the Code may require you to pay the employee
  
- Accommodation under the Code only applies in the context of needs arising from marital or parent-child relationships
- Whereas leave under the ESA is available to a far broader set of family relationships

# Infectious Disease Emergency Leave (IDEL) under the ESA

- An employee is entitled to IDEL when they can't work because they are providing care or support to a family member because of COVID-19, including, but not limited to, school or day care closures (s. 50.1(1.1)(b)(v))
- There is a long list of family relationships that applies, includes siblings, in-laws, aunts / uncles, nieces / nephews, grandparents and “a person who considers the employee to be like a family member” (s. 50.1(8))
- This kind of leave recently has been extended until up to January 2, 2021 (O.Reg. 228/20)
- You can require the employee to provide evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, that the employee is entitled to the leave, but you can't require the employee to provide a medical note (s. 50.1(4.1))

# Issues

- What if the school or daycare is open, but the employee doesn't feel safe sending their child there due to COVID-19 and wants to take an ESA leave and not come in to work? This obviously would not be due to a “school or day care closure”, but would it be regarded as providing care and support to their child “because of COVID-19”?

# Family Status Accommodation under the Ontario Human Rights Code

- There currently are three different legal tests that apply in different jurisdictions in Canada to determine whether an employee is entitled to family status accommodation
- In B.C., the employee is required to show a change in a term or condition of employment imposed by an employer that results in a serious interference with a substantial parental or other family duty or obligation of the employee: see *Campbell River*, 2004 BCCA 260; *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 (application for leave to appeal to SCC dismissed 2019 CanLII 73206)

# Family Status Accommodation under the Ontario Human Rights Code cont'd

In the federal jurisdiction, there is a four-part test:

1. The child needs to be under the employee's care and supervision
2. The childcare obligation at issue needs to engage the employee's legal responsibility for that child, as opposed to being a matter of personal choice
3. The employee needs to have made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, but no such alternative solution was reasonably accessible
4. The impugned workplace rule needed to interfere with the fulfillment of the childcare obligation in a manner that is more than trivial or insubstantial

See Johnstone, 2014 FCA 110

# Family Status Accommodation under the Ontario Human Rights Code cont'd

- The *Johnstone* decision has been criticized because
  - the requirement for the employee's "legal responsibilities" to have been engaged imposes too high a burden on claimants, especially in relation to their obligations in terms of elder care
  - the test effectively requires the employee to self-accommodate as part of the *prima facie* test for discrimination, thereby reversing the legal onus on the employer to prove an inability to accommodate without undue hardship



# Family Status Accommodation under the Ontario Human Rights Code cont'd

- In Ontario, at least in one HRTO decision, a different test was established
  - Applying a contextual assessment as to whether the negative impact of the impugned work requirement results in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work
  - While the employee does not have to prove an inability to self-accommodate as an essential element of proving discrimination, nonetheless this contextual assessment can include consideration of what other supports are available to the employee

See *Misetich*, 2016 HRTO 1229

It's still not clear whether the Johnstone or Misetich test applies in Ontario: see *Peternel v. Custom Granite & Marble Ltd.*, 2019 ONSC 5064

# Family Status Accommodation under the Ontario Human Rights Code cont'd

- How does this apply in the context of COVID-19?
  - If the nature of the employee's work makes it impossible for it to be performed from home, such as for front-line workers, then you may need to accommodate a family status related leave but you wouldn't be required to pay the employee
  - However, if the employee is able to perform useful and productive work from home, then they would need to be paid: se *Vanegas v. Liverton Hotels International Inc.*, 2011 HRTO 715 at para. 139
  - A second variable is the identity of the family member at issue, and particularly whether the person is a child, a spouse or a parent
  - This makes a big difference under the Johnstone test, where it is uncertain what level of care required by a parent would be covered, given the apparent requirement for the need to engage the employee's legal responsibilities
    - but see *Canada (Attorney General) v. Bodnar*, 2017 FCA 171 if there is "a practical and moral need to provide urgently needed care for a disabled parent or to take them to medical appointments"

# Family Status Accommodation under the Ontario Human Rights Code cont'd

- If an employee needs to stay home to care for a child because the school or day care is closed and if the employee can perform useful and productive work from home, then I would suggest that on any test, the employee would need to be accommodated and paid
- If an employee says they can't come in to work because they need to care for a parent, it gets much more complicated
  - Does the parent have COVID-19?
  - Does the parent live with the employee?
  - What care requirements are there?
  - How was this managed pre-COVID-19?

# Family Status Accommodation under the Ontario Human Rights Code cont'd

- Back to the issue raised in the context of ESA leave – what if the school or day care is open but the employee does not want to come in to work because they don't want to send their children there due to COVID-19?
  - Under Missetich, I think this would qualify as a real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship
  - Under Johnstone, it is unclear whether the childcare obligation at issue would engage the employee's legal responsibility for the child, as opposed to being a matter of personal choice

# Thank you

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