

# Managing Human Capital

Practical and Legal Considerations During the  
COVID-19 Crisis

April 22, 2020

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# Agenda

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- I. Opening Remarks: Marcus Cote
- II. Speaker Introduction
- III. The Federal Response and CERB: Devin McCarthy, Sussex Strategy Group
- IV. Employer Subsidies: Justin Mastrangelo, BDO Canada
- V. Legal Considerations: Andy Pushalik, Dentons
- VI. Q&A
- VII. Closing Remarks: Marcus Cote

## Speaker Introductions

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# The Federal Response and CERB

**Devin McCarthy**

Vice President, Sussex Strategy Group

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- Sussex is a multidisciplinary team of over 30 trusted advisors, sector experts, former government officials, political staff, digital media specialists, corporate communications professionals and journalists. Our expertise is to assist clients interact with governments, public sector agencies, regulators, and in engaging the public.
- Established in 1998, we have one of the largest – and the most effective – independent government relations and strategic communications firms in the country.
- We possess considerable experience, focus and success with all three levels of government across Canada. The Sussex team has extensive capabilities in wide variety of sectors, including energy and the environment, natural resources, infrastructure, land use development, financial services and Indigenous relations.
- We have senior associates and principals that have individually decades of experience in Canadian politics, amongst all major political parties, and are subject matter experts in specific areas of public policy.

- Phase 1: containment and suppression
  - Whole of government approach.
  - Focus on GoC business continuity and sourcing critical supplies (ventilators, N95 masks, hand sanitizer, etc).
  
- Phase 2: mitigate widespread economic fallout
  - Individuals: faster access to EI, increasing Canada Child Benefit, mortgage support, Emergency Support Benefit, Emergency Care Benefit, etc.
  - Businesses: wage subsidies, work-Sharing program, Business Credit Availability Program, deferred taxes.
  
- Phase 3: address sectoral impacts
  - Preference is to use broad tools, but there is a recognition that some sectors will be particularly hard hit (retail, hospitality, air travel, oil & gas, etc).
  
- Phase 4: recovery stimulus
  - Accelerating and expanding existing funding programs; developing new ideas; working directly with project proponents on tailored solutions.

- What it is: A taxable benefit that provides \$2,000 per four-week period for up to 16 weeks for workers who lose their income as a result of the Covid-19 pandemic.
  
- Applicability:
  - Workers who must stop working due to Covid-19 and do not have access to paid leave or other income support.
  - Workers who are sick, quarantined, or taking care of someone who is sick with Covid-19.
  - Working parents who must stay home without pay to care for children that are sick or need additional care because of school and daycare closures.
  - Workers who still have their employment but are not being paid because there is currently not sufficient work and their employer has asked them not to come to work.
  - Wage earners and self-employed individuals, including contract workers, who would not otherwise be eligible for Employment Insurance.

➤ Eligibility:

- Those residing in Canada, who are at least 15 years old;
- And who have stopped working because of Covid-19;
- And who had income of at least \$5,000 in 2019 or in the 12 months prior to the date of their application;
- Anyone who earns \$1,000+ in any four-week period is ineligible for the CERB that period.

➤ Effective Date: Applications opened on April 6, 2020.

➤ The CERB is taxable income but is not taxed at source. Taxes will be due upon filing 2020 taxes.

➤ As of April 19, the federal government has processed 8.4 million applications for the CERB and paid out a total of \$19.8 billion to Canadians in CERB payments.

➤ For more information, click [here](#).

# Employer Subsidies and Tax Considerations

**Justin Mastrangelo**

Partner, Canadian & Transaction Tax, BDO Canada



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### ➤ **\$25,000 Temporary Emergency Wage Subsidy (TEWS)**

- Permits eligible employers to reduce income tax remittances by 10% of the remuneration paid to employees
- Eligible employers include: Individuals, Eligible CCPC's\*, Partnerships\*, NPO, Charity
  - \*CCPC's with taxable capital under \$15M in the prior year
- Subsidy permits a maximum reduction of \$1,375 per employee and \$25,000 per employer

### ➤ **Canada Emergency Wage Subsidy (CEWS)**

- 75% wage subsidy for eligible employees paid to eligible employers for 12 weeks, retroactive to March 15th, 2020
- Subsidy available to eligible employers that see a drop of at least 15% of their qualifying revenue in March 2020 and 30% for the following months (eligible periods\*)
- Eligible employers include individuals, taxable corporations, partnerships, NPO's and charities

### ➤ Eligible Employees

- Eligible employees include individuals employed in Canada and in an eligible period
- Available to all employees other than those who have been without remuneration for 14 or more consecutive days in the eligible period (CERB)
- Any subsidy received from the 10% wage subsidy will reduce the amount available under the CEWS
- Any benefits received by an employee through regular EI or the Work Sharing program will reduce the amount the employer is eligible to receive under the CEWS
- Eligible remuneration includes salary, wages, commissions but does not include a retiring allowance, severance pay or stock option benefits

## ➤ Arm's Length Employees

- Subsidy is the greater of:
  - 75% of the amount of remuneration paid, up to a maximum benefit of \$847 per week; and the lessor of ->
  - The amount of remuneration paid, up to a maximum benefit of \$847 per week; or
  - 75% of the employees pre-crisis weekly remuneration (Avg. of Jan 1 – March 15th, 2020)

## ➤ Non-Arm's Length Employees

- Non-arm's length employees are eligible provided they were employed prior to March 15th, 2020
- Maximum benefit is the lessor of \$847 per week and 75% of the employee's pre-crisis weekly remuneration
  - Eligible remuneration may include salary, wages and other remuneration like taxable benefits. These are amounts for which employers would generally be required to withhold or deduct remittances
- For all eligible employees, additional subsidy for CPP, EI, QPP and Quebec Parental Insurance plan paid in respect of eligible employees on leave with pay and not working at all

Remuneration	Salary	Reduced Salary
Actual wages paid	\$1,200	\$847
75% of Actual	\$900	\$675
Maximum Subsidy	\$847	\$847
Pre-Crisis Avg	\$1,200	\$1,200
75% of Pre-Crisis	\$900	\$900

### ➤ Calculating Qualifying Revenues

- An employer's revenue for this purpose is its revenue in Canada earned from arm's length sources. Revenue is calculated using the employer's normal accounting method, and excludes revenues from extraordinary items and amounts on account of capital
  - *Specifically, qualifying revenue is defined as the inflow of cash, receivables or other consideration arising in the course of the ordinary activities of the eligible entity – generally from the sale of goods, the rendering of services and the use by others of resources of the eligible entities in Canada*
- Employer's are allowed to calculate revenue under the accrual method or the cash method, but not a combination of both. You must continue to use the same method for the duration of the program
- Special rules are available for the computation of revenue to take into account certain non-arm's length transactions. For example, in a situation where an employer sells all of its output to a related company that in turn earns arm's length revenue
- Affiliated groups are able to compute revenue on a consolidated basis
- For NPO's, the calculation includes most forms of revenue, excluding revenue from non-arm's length persons and these organizations are allowed to choose whether or not to include revenue from government sources as part of the calculation

## ➤ Eligible Periods

- Two approaches – you must choose one when you apply and remain consistent throughout each period:
  1. Compare the average revenue earned in January and February 2020 vs March, April and May 2020
  2. Compare revenue earned in March, April and May 2019 vs March, April and May 2020

	Claiming period	Required reduction in revenue	Reference period for eligibility
<b>Period 1</b>	March 15 to April 11	15%	March 2020 over: <ul style="list-style-type: none"> <li>• March 2019 or</li> <li>• Average of January and February 2020</li> </ul>
<b>Period 2</b>	April 12 to May 9	30%	Eligible for Period 1 <b>OR</b> April 2020 over: <ul style="list-style-type: none"> <li>• April 2019 or</li> <li>• Average of January and February 2020</li> </ul>
<b>Period 3</b>	May 10 to June 6	30%	Eligible for Period 2 <b>OR</b> May 2020 over: <ul style="list-style-type: none"> <li>• May 2019 or</li> <li>• Average of January and February 2020</li> </ul>

### ➤ **I have a complex structure with a payroll company and many non arm's length transactions**

- Consider the ability to jointly elect to consider the qualifying revenue on a consolidated basis if the group is affiliated
- If all or substantially all (90% or more) of the revenue from payroll company is from non-arm's length sources, there is an alternative election that can be made to calculate revenue from payroll company effectively using a weighted average of the qualifying revenue it charges amongst its group of companies

### ➤ **What should I do now?**

- Make sure you have compared your qualifying revenue for March – September 2019 and compare this to the average revenue of January and February 2020. Remember that once you qualify for one period, you automatically qualify for the following period
- Consider the cash vs accrual method in each instance
- Consider timing of when to bring back employees if they are laid off. Be careful of the 14 day remuneration clause in each period in order to be considered an eligible employee
- Prepare a 6 month cash flow
- Make sure you have registered for your My Business Account

# Legal Considerations

**Andy Pushalik**

Partner, Group Leader Employment and Labour, Dentons

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- Salary/Wage Reductions / Deferrals
- Temporary Layoffs

### ➤ **Constructive Dismissal**

- Employer cannot unilaterally make a fundamental or substantial change to the terms and conditions of an employee's employment
- If employee establishes constructive dismissal, damages for constructive dismissal = damages for termination of employment without cause
- Examples of changes that can lead to a constructive dismissal claim:
  - Demotion
  - Changing or reassigning job duties / responsibilities
  - Reducing or changing hours of work
  - Substantially reducing salary / wages
  - Imposing a layoff
- Absent an atmosphere of “hostility, embarrassment or humiliation”, an employee's duty to mitigate requires an employee to accept continued employment with the employee's current employer

### ➤ **Salary/Wage Reductions / Deferrals**

- No bright line test as to when a change in an employee's remuneration will result in a constructive dismissal
- Generally speaking, where there is a reduction of 15% or more to an employee's total compensation there will be a material risk that such change would constitute a constructive dismissal
- Communication is key

### ➤ Temporary Layoffs (Ontario)

- Maximum Length:
  - Up to 13 weeks in any period of 20 consecutive weeks
  - Up to 35 weeks in any period of 52 consecutive weeks **IF** the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan
- No advance notice required
- Not required to provide a reason for the layoff
- Not required to provide a specified recall date
- Employees continue to accrue vacation time while on layoff
- Employer must provide ROE
- A layoff is NOT a termination

### ➤ **Recall to work (Ontario):**

- If recalled and employee returns to work, employment continues
- If recalled and employee fails to return to work on recall date, employee is deemed to have resigned
- If employer does not recall employee before the end of the maximum temporary layoff period, employees are deemed to have been dismissed
  - Notice of termination date is the date the employee received notice of the temporary layoff

- Temporary layoffs may constitute a constructive dismissal if not expressly permitted by contract or referenced in company policy or implied by past practice



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## How to apply for the Canada Emergency Wage Subsidy (CEWS)

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- Beginning at 6:00 AM EST on Monday April 27, applications will be open for the CEWS
  - Most business may apply using their My Business Account
  - If you represent a business, you may apply using Represent a Client
  - Alternatively, you may apply using a separate online application form (also available April 27<sup>th</sup>)
  
- Guidance on how to register for the My Business Account can be found on the CRA's website
  
- CRA has provided a Wage Subsidy Calculator on their website <https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy/cews-calculate-subsidy-amount.html>
  
- Applications will not be processed on a first come, first serve basis, but will be batched and processed during an automatic verification process that will take place on May 4<sup>th</sup>
  
- Businesses whose applications are processed on May 4<sup>th</sup> can expect to receive their cheques via direct deposit on May 6<sup>th</sup> or May 7<sup>th</sup>

## Tax considerations for difficult and uncertain times

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- Estate Thaw / Re-Freeze / Family Trust
  - Previous freeze value: \$75,000,000
    - Estate Tax: \$20,000,000
  - Thaw / re-freeze value: \$50,000,000
    - Estate Tax: \$13,400,000
    - **Estate Tax Savings: \$ 6,600,000**
- CDA Planning
- Capital Gains Strips
- Loss Utilization and Realization
- Prescribed Rate Loan Income Splitting Planning



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