

Coronavirus (COVID-19): Legal update for Canadian employers - Canada Emergency Wage Subsidy

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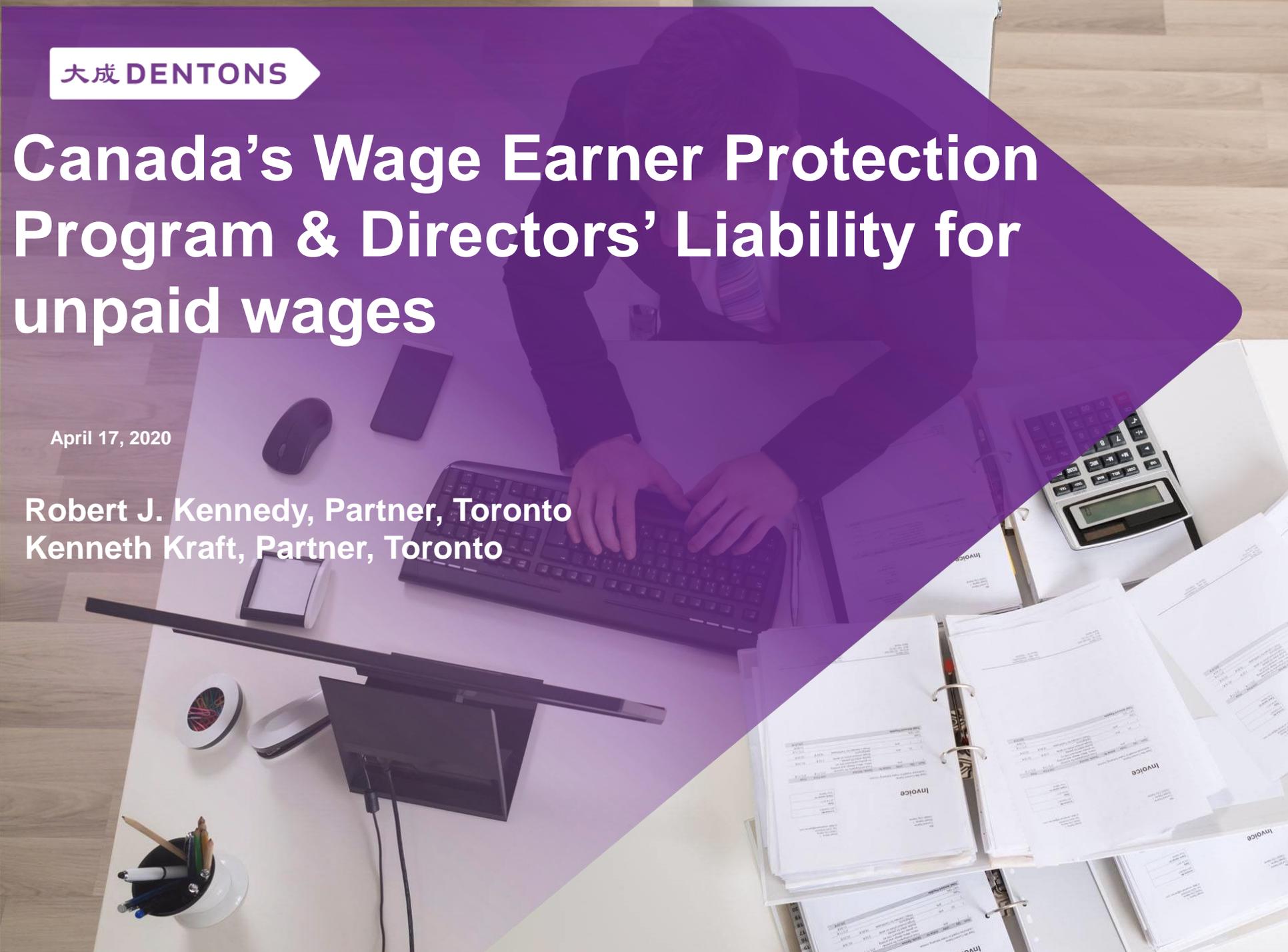
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Canada's Wage Earner Protection Program & Directors' Liability for unpaid wages

April 17, 2020

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Wage Earner Protection Program (“WEPP”) – Overview & Purpose

- The *Wage Earner Protection Program Act* (the “WEPPA”) came into force effective July 7, 2008, creating the Wage Earner Protection Program (the “WEPP”).
- The WEPP is a Government of Canada program that provides payment of eligible wages owing to individuals whose former employer has gone bankrupt or become subject to receivership.
- If there is no bankruptcy or receivership, the individual is not eligible for the WEPP.

Wage Earner Protection Program (“WEPP”) – Payment Amounts & Implications for the Employer

1. Maximum WEPP Payout Amount:

- For bankruptcies or receiverships on or after February 27, 2018, the WEPP payment (from the Federal Government) covers eligible wages up to an amount equal to 7 times the maximum weekly insurable earnings under the *Employment Insurance Act* (**\$7,296.17 for 2020**).

2. Implications for the Employer:

- After making a payment to an individual pursuant to the WEPP, the Federal Government takes that individual’s place as a creditor in the bankruptcy/receivership proceedings for the amount paid out to that former employee under the WEPP.
- In recovering the foregoing amount under the WEPP, the Federal Government can claim the employee’s super priority claim for unpaid wages under the BIA.
 - This **“Super Priority Claim”** allows unpaid wage claims (including vacation pay), up to **\$2,000 per employee**, to be paid out of the proceeds of the insolvent/bankrupt’s current assets, including inventory, accounts receivable and cash on hand, ahead of secured creditors.

Wage Earner Protection Program (“WEPP”) – Eligibility?

Eligibility Criteria:

- The individual’s employment has ended as a result of a bankruptcy or receivership;
- The individual is owed wages, vacation pay, termination pay or severance pay from the former employer; and
- Amounts owed were earned during the eligibility period (see next slide) or, in the case of termination pay or severance pay, the employment was terminated either during the eligibility period or prior to the discharge of the trustee/receiver.
- (If the individual continues to work for the employer after the date of bankruptcy or receivership, then they only become eligible for WEPP once their employment ends)

Who is NOT Eligible:

If, during the period for which eligible wages were owed (see next slide), the former employee:

- Was an officer or a director of the former employer;
- Had a controlling interest in the business of the former employer;
- Was a manager whose responsibilities included making binding financial decisions impacting the business of the former employer (including non-payment of wages); or
- Was not dealing at arm's length with any of these persons.

Wage Earner Protection Program (“WEPP”) – Eligible Wages

The following amounts are considered eligible wages under the WEPP:

1. **Wages** (salaries, commissions, compensation for services rendered, gratuities accounted for by the former employer, production bonuses and shift premiums) that were earned during the eligibility period;
2. **Disbursements of a travelling salesperson** properly incurred in and about the business of the former employer earned during the eligibility period; and
3. **Vacation pay** earned during the eligibility period;
4. **Termination pay and severance pay** for employment that ended either during the eligibility period or prior to the discharge of the trustee or receiver

Wage Earner Protection Program (“WEPP”) – Deadline to Apply

Applications under WEPP must be submitted to Service Canada within 56 days* of the latest of the following dates:

- the date of the bankruptcy/receivership;
- the date that the employment ended due to termination, resignation, retirement or expiry of term; or
- the date on which the trustee/receiver terminated the employment.

****If an application is submitted past the 56-day prescribed time frame, an explanation for the delay must be provided.***

Wage Earner Protection Program (“WEPP”) – The “Eligibility Period”

Wages earned (but not paid) are eligible for claims under WEPP if earned during the longer of the following two periods:

1. The six-month period before the bankruptcy or receivership:



2. If the employer has attempted a business restructuring as defined in the WEPPA, the eligibility period starts six months before the first restructuring event and ends on the date of the bankruptcy or receivership:



Personal Liability of Directors for Unpaid Wages, Termination, Severance and Vacation Pay – Corporate Law

Jurisdiction	Director Liability	Limitation Period to Bring a Claim Against a Specific Director
Canada Business Corporations Act (CBCA)	<ul style="list-style-type: none"> Directors liable for up to six months' unpaid wages (the foregoing wages must have become payable while the director was still in office) 	Within two years from when the director ceases to hold their office
Ontario Business Corporations Act (OBCA)	<ul style="list-style-type: none"> Directors liable for up to six months' unpaid wages and up to 12 months of accrued vacation pay (the foregoing amounts must have become payable while the director was still in office). 	Within two years from the cause of action being discovered
Quebec Business Corporations Act (QBCA)	<ul style="list-style-type: none"> Directors liable for up to six months' unpaid wages (the foregoing wages must have become payable while the director was still in office) 	1) the employee must sue the company within one year after the debt becomes due and an execution against the company must be returned unsatisfied in whole or in part, or 2) a winding-up order is made against the company or it becomes bankrupt within one year after the debt becomes due and an employee files a claim for the debt.

Note: Consult the applicable statute to understand what components (i.e. termination, severance, vacation pay etc.) roll into the definition of “unpaid wages” (as this varies by corporate statute).

Personal Liability of Directors for Unpaid Wages, Termination, Severance and Vacation Pay – Corporate Law

Jurisdiction	Director Liability	Limitation Period to Bring a Claim Against a Specific Director
Alberta Business Corporations Act (ABCA)	<ul style="list-style-type: none"> Directors liable for up to six months' unpaid wages (the foregoing wages must have become payable while the director was still in office). 	Within two years from when the director ceases to hold their office
British Columbia Business Corporations Act (BCBCA)	<ul style="list-style-type: none"> No liability for directors for unpaid employee wages under British Columbia corporate law. Directors ARE liable for unpaid employee wages under the British Columbia Employment Standards Act (see slide 10). 	N/A

Personal Liability of Directors for Unpaid Wages, Termination, Severance and Vacation Pay – Canada Labour Code and Provincial Employment Standards legislation

Jurisdiction	Director Liability	Limitation Period to Bring a Claim Against a Specific Director
Canada Labour Code (CLC)	<ul style="list-style-type: none"> • Directors are jointly and severally liable to employees for wages and other amounts up to a maximum of six months' wages. • Directors are only liable to the extent that employees became entitled to amounts while that director was still in office, and recovery of the amounts from the corporation is impossible or unlikely. 	<p>Proceedings in respect of an offence may be instituted at any time within but not later than three years after the time when the subject-matter of the proceedings arose</p>
Ontario Employment Standards Act, 2000 (OESA)	<ul style="list-style-type: none"> • Directors are jointly and severally liable to the employees of the corporation for the following: <ul style="list-style-type: none"> ➤ all debts not exceeding six months' wages that become payable while that director was still in office for services performed for the corporation; ➤ vacation pay accrued while that director was in office for not more than 12 months under the ESA (Ontario), its regulations or under any collective agreement; and ➤ interest on any outstanding wages for which the director(s) are liable. 	<p>Within two years of the contravention of the OESA</p>

Note: Consult the applicable statute to understand what components (i.e. termination, severance, vacation pay etc.) roll into the definition of “unpaid wages” (as this varies by statute).

Personal Liability of Directors for Unpaid Wages, Termination, Severance and Vacation Pay – Canada Labour Code and Provincial Employment Standards legislation

Jurisdiction	Director Liability	Limitation Period to Bring a Claim Against a Specific Director
Quebec Act respecting Labour Standards	<ul style="list-style-type: none"> Authorizes the Quebec Labour Standards Commission to order that a director is liable for unpaid wage amounts 	One year from when the employee should have been paid
Alberta Employment Standards Code (AESC)	<ul style="list-style-type: none"> Imposes joint and several liability on directors for unpaid wages up to a maximum of six months' wages. Directors are only liable for wages that become payable while that director was in office. 	Within two years from when the director ceases to hold their office
British Columbia Employment Standards Act (BCESA)	<ul style="list-style-type: none"> Imposes liability on directors for unpaid wages up to a maximum of two months' wages per employee Directors are only liable for wages that became payable while that director was in office. 	Within two years of the contravention of the BCESA

Can an individual take action simultaneously under both corporate law and employment standards legislation?

- The applicable labour laws and corporate statutes would need to both be consulted to understand if a claim against directors for unpaid wages could be filed under both legislative regimes (i.e. a complaint cannot be filed under the OESA if a civil proceeding was also commenced)

Update on the Canada Emergency Wage Subsidy

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April 17, 2020

Applying for the Subsidy

- Through Canada Revenue Agency's **My Business Account** portal (available “shortly”)
- Employers must have a business number to make remittances for source deductions registered with the Minister on **March 15, 2020**
- Applications must be submitted before **October 2020**.
- Employers should note that the Minister can publicly name any applicant

Attestation

The individual who has principal responsibility for the financial activities of the employer **must attest** that the application is complete and accurate in all material aspects.

How does an employer qualify?

- Drop in qualifying revenues of:
 - **at least 15%** in March (lowered from 30%), and
 - **at least 30%** in April or May.

Options for reference periods

Qualifying Period		
	Claiming period	Reference period for eligibility
Period 1	March 15 – April 11	15% decline when comparing either: <ul style="list-style-type: none">• March 2020 over March 2019• Or the average of January and February 2020
Period 2	April 12 – May 9	30% decline when comparing either: <ul style="list-style-type: none">• April 2020 over April 2019• Or the average of January and February 2020
Period 3	May 10 – June 6	30% decline when comparing either: <ul style="list-style-type: none">• May 2020 over May 2019• Or the average of January and February 2020

Deemed to qualify for following period

If an entity qualifies for the Subsidy for one qualifying period it is deemed to qualify for the Subsidy for the immediately following qualifying period.

i.e. if an entity qualifies for March 2020, it will automatically qualify for April 2020 (but note May 2020).

Using January and February 2020 as prior reference periods

Can use January and February 2020, if

- **(i)** on March 1, 2019, the eligible entity was not carrying on business or otherwise carrying on its ordinary activities, or
- **(ii)** the qualifying period is referred to in any of paragraphs (a) to (c) of the definition *qualifying period* and the eligible entity elects for all of those paragraphs; and

What is qualifying revenue?

Means the **inflow of cash, receivables or other consideration** arising in the course of the **ordinary activities of the eligible entity** ... in Canada in the particular period.

What is excluded from qualifying revenue

- extraordinary items;
- amounts derived from persons or partnerships not dealing at arm's length with the eligible entity; and
- the amount of the Subsidy received.

Qualifying revenues for charities

- **(i)** it includes revenue from a *related business*, gifts and other amounts received in the course of its ordinary activities, and
- **(ii)** may elect to exclude funding received from government sources in the determination of its qualifying revenue for all of its prior reference periods and current reference periods;

Certain tax exempt entities may qualify for the Subsidy

- agricultural organizations,
- boards of trade or chambers of commerce,
- non-profit corporations for scientific research and experimental development,
- labour organizations or societies or benevolent or fraternal benefit societies or orders, and
- non-profit organizations
other than public institutions

Qualifying revenues for certain tax exempt entities

- **(i)** it includes membership fees and other amounts received in the course of its ordinary activities, and
- **(ii)** may elect to exclude funding received from government sources in the determination of its qualifying revenue;

Special rules for calculating revenues for certain entities or groups of entities

- Group of eligible entities
- Affiliated group of eligible entities
- Joint venture
- Non-arm's length persons or partnerships

Group of eligible entities

If a group of eligible entities normally prepares consolidated financial statements, then each member of the group may determine its qualifying revenue separately if every member of the group determines its qualifying revenue on that basis.

Affiliated group of eligible entities

If the eligible entity is a member of an affiliated group of entities, then 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 if each member of the affiliated group of entities elects to do so.

Joint Venture

If all of the interests of an eligible entity are owed by participants in a joint venture and all of the or substantially all (i.e. 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.

Non-arm's length persons or partnership

If all or substantially all (i.e. 90% or more) of an eligible entity's qualifying revenue for a qualifying period is from one or more particular persons or partnerships with which the eligible entity does not deal at arm's length, then the eligible entity can calculate its qualifying revenues in reference to the qualifying revenues of those non-arm's length persons or partnerships.

Subsidy is government assistance

- Considered government assistance and included in the employer's taxable income.
- Reduce the amount of remuneration expenses eligible for other federal tax credits (film tax credits or SRED) calculated on the same remuneration.
- Deemed to be received immediately before the end of the qualifying period.

Non-arm's length entities

If an employee is employed by two or more qualifying entities that do not deal with each other at arm's length, then amount of the Subsidy shall not exceed the amount that would arise if the employee was paid by one of the qualifying entities.

Temporary Wage Subsidy of 10%

For employers that are eligible for both the Subsidy and the 10 per cent wage subsidy for a period, any benefit from the 10 per cent wage subsidy will reduce the amount available to be claimed under the Subsidy in that same period.

Refund for employer contributions for EI, CPP and QPP

- Employers will be entitled to a refund of 100% of the employer-paid contributions to EI, the CPP, the QPP, and the Québec Parental Insurance Plan for employees who are on leave with pay and are also eligible for the Subsidy
- **Leave with pay:** employee is remunerated but does not perform any work for the employer in that week.
- Not be available for eligible employees on leave with pay for only a portion of a week.
- This refund is **not** subject to the weekly maximum benefit of \$847
- Employers required to continue to collect and remit employer and employee contributions for CPP and EI as usual and then may will apply for a refund for their contributions at the same time that they apply for the Subsidy.

Work-Sharing Program

For employers and employees that are participating in a Work-Sharing program, EI benefits received by employees through the Work-Sharing program will reduce the benefit that their employer is entitled to receive under the Subsidy.

Penalties

Penalty of 25% of Subsidy

- An employer that enters into transaction or participates in an event (or series of transactions or events) or takes an action (or fails to take an action) for the main purpose of reducing its qualifying revenues to receive the Subsidy, then the employer is liable to a penalty of 25% of the amount of the Subsidy.

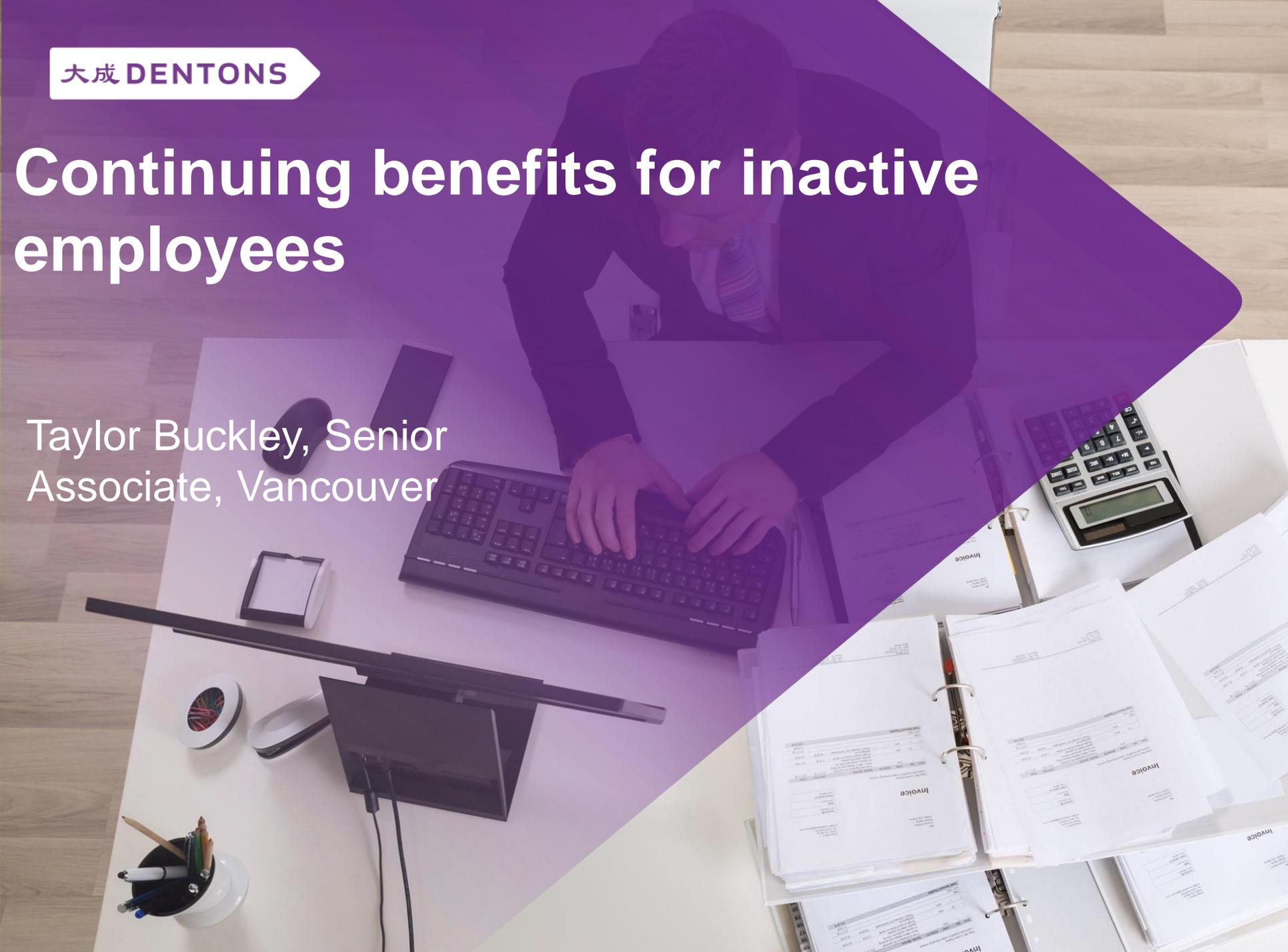
Gross negligence penalties of 50%

- Every person who knowingly, or under the circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of a false statement or omission in an application for the Subsidy is liable to a penalty of up to 50% of the amount of the Subsidy to which the employer was not entitled.

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Continuing benefits for inactive employees

Taylor Buckley, Senior Associate, Vancouver



Continuing benefits for inactive employees

Overview

- Can you continue benefits?
- Required benefit continuation
- Managing benefit contributions

Continuing benefits for inactive employees

Can you continue benefits?

- Nothing at law prevents benefit continuation for laid-off or inactive employees
- Insurance policies may have restrictions on inactive participation or participation thresholds
- Groups of employees cannot be differentiated in a discriminatory way
- In some jurisdictions, continuing benefits can extend the temporary layoff period
 - e.g., ON, AB, Federal

Continuing benefits for inactive employees

When do you have to continue benefits?

- Some jurisdictions require benefit continuation during statutory leaves
 - Employment standards legislation
 - Workers' compensation legislation
- Not all statutory leaves are covered and not all benefits are covered
 - The new COVID-19-related leaves are generally covered
- Employers are required to continue benefits that are 100% employer-funded as well as employee-funded benefits if the employee continues their contributions
 - In Ontario, the employee must indicate in writing that they do not intend to continue their contributions

Continuing benefits for inactive employees

Managing employee contributions

- Issue: Inactive employees do not have pay to deduct contributions from
- Employment standards regulators generally require employers to make an effort to confirm whether the employee intends to continue contributing
- LTD benefits - the tax treatment of LTD benefits is determined by who is responsible for paying the premiums; employee-paid LTD benefits are taxable in the hands of the employee
 - CRA guidance is that if a wage replacement plan requires employees to pay 100% of the premiums, any contributions they do not pay must be included in income to maintain the tax status of the benefits

Thank you



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