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Canadian tax alert

COVID-19 – Bill C-9: Amendments to the Canada Emergency Wage Subsidy (CEWS) and the new Canada Emergency Rent Subsidy (CERS)

November 20, 2020

The CEWS program was first enacted on April 11, 2020 and focuses on providing financial assistance to Canadian businesses who have experienced a reduction in revenues during the global COVID-19 pandemic. Since the beginning of the pandemic and the enactment of the CEWS program, the government of Canada has been continuously revising and amending the related legislation.[1]

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[1] To learn more about the initial CEWS program and the July 27, 2020 amendments, please refer to our previous tax alerts dated April 13, 2020, July 29, 2020, and October 29, 2020.

The government's latest proposed changes are found in Bill C-9[2], *An Act to amend the Income Tax Act (Canada Emergency Rent Subsidy and Canada Emergency Wage Subsidy)* (Bill C-9), which was introduced on November 2, 2020 and adopted without amendments by the House of Commons on November 6, 2020 and received Royal Assent on November 19, 2020 following its review by the Senate.

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CANADA EMERGENCY WAGE SUBSIDY (CEWS)

Key changes to the CEWS program

The most significant proposed changes to the CEWS program outlined in Bill C-9 are as follows:

- extension of the CEWS program until **June 2021;**
- **modification of the application deadline** in respect of a qualifying period to the later of (i) January 31, 2021 and (ii) 180 days after the end of the qualifying period;
- **harmonization of the revenue decline test** for the base subsidy and the top-up subsidy beginning September 27, 2020;
- **maximum subsidy rate to remain at 65%** until December 19, 2020 (end of Period 10);
- elections under paragraphs **125.7(4)(c)** and **(d)** of the Income Tax Act (Act) can now be made for all qualifying periods;
- amendment to the conditions for the application of the **asset sales** rules under subsection 125.7(4.1) of the Act;
- amendment to the definition of "**eligible employee**" to specify that amounts paid to employees may still qualify even if those employees are not employed in Canada throughout the relevant qualifying period; and
- amendment to the definition of "**baseline remuneration**" to extend the baseline remuneration period to consider certain absences (such as maternity leaves).

This tax alert summarizes the proposed changes to the CEWS legislation and highlights areas where additional guidance has been provided.

Summary of modifications

Extension of the CEWS program until June 30, 2021

As previously communicated, Finance announced on October 6, 2020 that the CEWS program would be extended until June 30, 2021. This has now been legislated under Bill C-9 by amending the definition of "qualifying period" in subsection 125.7(1) of the Act to include an additional qualifying period from November 22, 2020 to December 19, 2020 (Period 10) and other prescribed periods that end no later than June 30, 2021.

As currently worded, we only have clarity as to the exact period dates through Period 10 (December 2020). Further details with regard to Period 11 and

[2] Bill C-9 largely codifies the changes announced in a backgrounder from the Department of Finance Canada (Finance) released on October 14, 2020 and some of these parameters have been discussed in our tax alert dated October 29, 2020.

onwards are expected to be released in amendments to the *Income Tax Regulations* (Regulations).

Modification to application deadlines

Given the extension of the CEWS program until June 30, 2021, the deadline for CEWS applications has been modified such that an eligible entity must make an application in respect of the qualifying period on or before the later of (i) January 31, 2021, and (ii) 180 days after the end of the qualifying period.

The resulting claim periods and respective filing deadlines are summarized as follows:

Qualifying period	**Period covered**	**Filing deadline**
Period 1	March 15, 2020 to April 11, 2020	January 31, 2021
Period 2	April 12, 2020 to May 9, 2020	January 31, 2021
Period 3	May 10, 2020 to June 6, 2020	January 31, 2021
Period 4	June 7, 2020 to July 4, 2020	January 31, 2021
Period 5	July 5, 2020 to August 1, 2020	January 31, 2021
Period 6	August 2, 2020 to August 29, 2020	February 25, 2021
Period 7	August 30, 2020 to September 26, 2020	March 25, 2021
Period 8	September 27, 2020 to October 24, 2020	April 22, 2021
Period 9	October 25, 2020 to November 21, 2020	May 20, 2021
Period 10	November 22, 2020 to December 19, 2020	June 17, 2021
Period 11 onwards	To be determined	180 days after the end of the qualifying period

Amending or revoking elections

Bill C-9 proposes to introduce subsection 125.7(10) in the Act to allow eligible entities to "amend or revoke an election made […] on or before the date that the application is due for the first qualifying period in respect of which the election is made."

It should be noted that the Canada Revenue Agency's ("CRA") interpretation provided during the webinar hosted by CPA Canada on October 26, 2020, was that an eligible entity can amend a previously filed application form to make an election previously not made. However, if an election was previously made, CRA's view was that the entity cannot revoke or otherwise amend such election by filing an amended application form. **The proposed addition of subsection 125.7(10) reverses this interpretation.**

Caution should be exercised when determining the deadline to amend or revoke an election. The amendment or revocation is due on or before the deadline of

when the claim application for the particular qualifying period that it impacts is due. For example, if an eligible entity wants to amend their previously filed claims to elect to use the cash method, this amendment would have to be made on or before January 31, 2021, which is the deadline for the first qualifying period in respect of which the election is made (being Period 1).

Availability of paragraph 125.7(4)(c) and (d) elections

Paragraphs 125.7(4)(c) and (d) of the Act currently reference paragraph (c) of the definition "qualifying entity" in subsection 125.7(1), which only refers to Period 1 through 4. Therefore, based on the currently enacted legislation, both of these elections did not appear to be available after Period 4. This has been clarified in Bill C-9 by proposing to remove the reference to paragraph (c) of the definition of "qualifying entity" in subsection 125.7(1). Accordingly, the 125.7(4)(c) and 125.7(4)(d) elections are proposed to be available to eligible employers for all qualifying periods.

With respect to applying the paragraph 125.7(4)(d) election (also known as the "look-through election") in Period 5 and onwards, it should be noted that based on CRA's interpretation, the election "may not be made by a multi-tiered structure or chain of entities that are not dealing with each other at arm's length"[3]. For more details on the application of this election, please refer to our previous tax alert dated October 29, 2020.

Amendment to the asset acquisition rules in paragraph 125.7(4.1)(b)

The asset acquisition rules in subsections 125.7(4.1) and (4.2) of the Act are intended to allow an eligible employer to adjust the qualifying revenue of the current and prior reference periods, where the eligible employer acquired assets that "constituted all or substantially all of the fair market value of the property of the seller used in the course of carrying on business". Absent this provision, an eligible employer's qualifying revenue for the current reference period compared to the prior reference period may be inflated if significant assets (or a "business") were acquired in the current period. The election must be made jointly between the acquirer and seller of the assets.

With respect to the meaning of "property [...] used in the course of carrying on business", CRA's recent interpretation has been to compare the transferred assets with all of the assets/property of the seller. For example, if the eligible employer acquires a division of the seller (i.e., what could constitute a business of the seller), it is CRA's view that the eligible employer must compare the fair market value (FMV) of such assets to the FMV of the property in all of the divisions of the seller's business[4]. CRA's interpretation did not appear to be consistent with the intent of the legislation and led to potentially unfair results where an eligible employer acquired the assets of one division/business, but which do not equal "all or substantially all" (generally at least 90%) of the seller's total assets.

[3] CRA Technical Interpretation 2020-0851731E5 – *CEWS – 125.7(4)(d) election – NAL chain* (September 28, 2020).
[4] Frequently asked questions – Canada emergency wage subsidy (CEWS), as published by the CRA (updated on August 11, 2020), question 8-3.

Effective April 11, 2020, Bill C-9 proposes to amend subsection 125.7(4.1) by including an "or" test, meaning that the eligible entity may either acquire:

(i) all or substantially all of the fair market value of the property of the seller used in the course of carrying on business, or
(ii) if the seller and the eligible entity deal with each other at arm's length, all or substantially all of the property of the seller that can reasonably be regarded as being necessary for the eligible entity to be capable of carrying on a business of the seller, or part of a business of the seller, as a business.

Accordingly, the proposed amendment to subsection 125.7(4.1) reverses CRA's current interpretation and aims to clarify the intent of these rules.

Increase to the base percentage

Bill C-9 proposes to increase the eligible entity's base percentage for Period 9 (October 25, 2020 to November 21, 2020). That is, if the eligible entity's "revenue reduction percentage"[5] is greater than or equal to 50% for Period 9, the base percentage is maximized at 40% (an increase from the current cap of 20%). If the eligible entity's revenue reduction percentage is less than 50%, a factor of 0.8 is multiplied by the revenue reduction percentage to determine its base rate percentage. This is an increase from the current factor of 0.4. For example, consider the following two scenarios:

- If an eligible entity's revenue reduction percentage is 40% in Period 9 (higher of Period 9 and Period 8), its base percentage would be 32% (being 40% x 0.8), resulting in a maximum base subsidy of $361/week/employee ($1,129 x 32%).
- If an eligible entity's revenue reduction percentage is 60% in Period 9 (higher of Period 9 and Period 8), its base percentage would be maximized at 40%, resulting in a maximum base subsidy of $452/week/employee ($1,129 x 40%). Furthermore, since the revenue decline exceeded 50%, the eligible entity should also qualify for the top-up subsidy in Period 9, as discussed below.

For Period 10 (November 22, 2020 to December 19, 2020), Bill C-9 confirms the same base rate percentage rules as Period 9 will apply.

For periods after Period 10 (i.e., beginning on December 20, 2020), the Regulations will be amended to specify the rate(s) to apply.

Amendment to the top-up revenue reduction percentage

Bill C-9 modifies the mechanics of the top-up revenue reduction percentage by harmonizing the revenue reduction test for both the base subsidy and the top-up subsidy beginning September 27, 2020 (Period 8).

Currently, the top-up subsidy rate for Periods 5 to 7 is calculated based on the average revenue decline of the three months preceding the applicable period,

[5] Revenue reduction percentage can be determined by comparing the current period revenues to the same month of the prior year, or to the average revenues of January and February 2020 (the "alternative method").

compared to the eligible employer's chosen prior reference period. This remains unchanged.

However, for Periods 8 to 10, to calculate the top-up revenue reduction percentage, the eligible employer can use the greater of:

(i) the three-month averaging approach, and
(ii) the revenue reduction percentage, being the revenue decline of the current period.

This "greater of test" effectively introduces a safe harbor mechanism, whereby an eligible employer that would have benefited from a larger top-up percentage under the existing legislation would continue to be able to access that benefit.

Beginning with Period 11, the top-up revenue reduction percentage is proposed to be equal to the revenue reduction percentage of the eligible entity for the qualifying period.

Additional considerations regarding the top-up subsidy

The top-up revenue reduction reference period comparisons are summarized in the following table:

<table>
<tr><th>Claim Period</th><th colspan="3">Option 1</th><th>Option 2</th></tr>
<tr><td>Periods 5 to 7</td><td colspan="3">Average monthly qualifying revenue of the immediately preceding 3 months compared to the average monthly qualifying revenue of the same months of 2019.</td><td>Average monthly qualifying revenue of the immediately preceding 3 months compared to the average monthly qualifying revenue of January and February 2020.</td></tr>
<tr><td rowspan="2">Periods 8 to 10</td><td colspan="4">Greater of:</td></tr>
<tr><td>Option 1: Average monthly qualifying revenue of the immediately preceding 3 months compared to the average monthly qualifying revenue of the same months of 2019;

OR

Option 2: Average monthly qualifying revenue of the immediately preceding 3 months compared to the average monthly qualifying revenue of January and February 2020.</td><td>AND</td><td>Option 1: Qualifying revenue for the current reference period compared to the qualifying revenue of the same month of 2019;

OR

Option 2: Qualifying revenue of the current reference period compared to the average monthly qualifying revenue of January and February 2020.</td></tr>
<tr><td>Period 11 and onwards</td><td colspan="3">Revenue reduction percentage[6]</td></tr>
</table>

Source: Deloitte.

[6] Since the qualifying Periods 1 to 10 fall within the calendar year 2020, all prior reference periods to determine the revenue reduction percentage refer to the months of year 2019. Beginning Period 11, current reference periods should be in year 2021, and therefore, the prior reference period may not refer to a month in year 2019. Proposed regulations are pending to implement the mechanics of computing the revenue reduction percentage for Period 11 onwards.

For employers using the alternative method (i.e., option 2 in the table above) to compute revenue declines, both the base subsidy and the top-up subsidy rates would be determined using the same approach (i.e., by comparing current period revenues to the average revenues of January and February 2020).

It should be noted that pursuant to the deeming rules in subsection 125.7(9), an employer can use the greater of the revenue reduction percentage in the current period or that of the preceding period. Currently, the revenue reduction percentage only applies for purposes of determining the base subsidy rate. Since Bill C-9 proposes the top-up reduction rate to be harmonized with the revenue reduction percentage, the deeming rules should also apply to the top-up subsidy rate, starting in Period 8.

Changes to weekly subsidy amount

As presented in our last tax alert dated October 29, 2020, below is a summary of the impact of the proposed changes on the maximum amount of subsidy available per employee per week. Special attention should be made to this table, as the actual amount of subsidy available to each eligible entity will vary by each entity's unique combination of revenue declines in the current reference period as well in the preceding three calendar months.

Max Subsidy per Employee per Week

Revenue Reference	March	April	May	June	July	August	September	October	November	December
Salary Start	15-Mar-20	12-Apr-20	10-May-20	7-Jun-20	5-Jul-20	2-Aug-20	30-Aug-20	27-Sep-20	25-Oct-20	22-Nov-20
Salary End	11-Apr-20	9-May-20	6-Jun-20	4-Jul-20	1-Aug-20	29-Aug-20	26-Sep-20	24-Oct-20	21-Nov-20	19-Dec-20
% Revenue Decline										
5%	$ -	$ -	$ -	$ -	$ 68	$ 68	$ 56	$ 45	$ 45	$ 45
10%	$ -	$ -	$ -	$ -	$ 135	$ 135	$ 113	$ 90	$ 90	$ 90
15%	$ 847	$ -	$ -	$ -	$ 203	$ 203	$ 169	$ 135	$ 135	$ 135
20%	$ 847	$ -	$ -	$ -	$ 271	$ 271	$ 226	$ 181	$ 181	$ 181
25%	$ 847	$ -	$ -	$ -	$ 339	$ 339	$ 282	$ 226	$ 226	$ 226
30%	$ 847	$ 847	$ 847	$ 847	$ 847	$ 847	$ 339	$ 271	$ 271	$ 271
35%	$ 847	$ 847	$ 847	$ 847	$ 847	$ 847	$ 395	$ 316	$ 316	$ 316
40%	$ 847	$ 847	$ 847	$ 847	$ 847	$ 847	$ 452	$ 361	$ 361	$ 361
45%	$ 847	$ 847	$ 847	$ 847	$ 847	$ 847	$ 508	$ 406	$ 406	$ 406
50%	$ 847	$ 847	$ 847	$ 847	$ 847	$ 847	$ 565	$ 452	$ 452	$ 452
55%	$ 847	$ 847	$ 847	$ 847	$ 847	$ 847	$ 635	$ 522	$ 522	$ 522
60%	$ 847	$ 847	$ 847	$ 847	$ 847	$ 847	$ 706	$ 593	$ 593	$ 593
65%	$ 847	$ 847	$ 847	$ 847	$ 889	$ 889	$ 776	$ 663	$ 663	$ 663
70% or more	$ 847	$ 847	$ 847	$ 847	$ 960	$ 960	$ 847	$ 734	$ 734	$ 734

Source: Deloitte

The above table assumes that the current month's decline and average preceding three-month's decline are identical.

When considering the above table, it should also be noted that an entity's actual subsidy for a particular period may be calculated using the current period's revenue decline or the immediately preceding period's revenue decline, whichever is higher.

Amendment to the definition of "eligible employee"

In our last tax alert dated October 29, 2020 we reiterated CRA's view that an employee is considered to be "employed in Canada" if they fulfil their duties of

employment within Canada[7]. Therefore, a non-resident employee can be an eligible employee if they reside outside of Canada, but physically perform their duties of employment within Canada. On the other hand, in CRA's view, employees of a Canadian entity fulfilling their services outside of Canada may not be eligible employees.

The amendment in Bill C-9 to the definition of "eligible employee" in subsection 125.7(1) provides further clarity by adding specific language as to an employee's location. The new proposed definition provides that an eligible employee includes an "individual employed by the eligible entity primarily in Canada throughout the qualifying period (or the portion of the qualifying period through which the individual was employed by the eligible entity)." Generally, the use of the term "primarily" suggests 50%; i.e., employees must physically perform their duties in Canada for more than 50% of the time throughout the qualifying period (or for the portion of such time that they were employed by the eligible entity).

The new definition of "eligible employee" is proposed to come into effect on the day on which Bill C-9 receives Royal Assent. That is, the proposed definition does not come into force retroactively.

Amendment to the definition of "baseline remuneration"

Effective April 11, 2020, the draft legislation proposes to extend the start of the baseline remuneration period for eligible employees that were on leave for any reasons outlined in subsection 12(3) of the Employment Insurance Act or section 2 of the Act respecting parental insurance (CQLR, c. A-29.011), throughout the period that begins on July 1, 2019 and ends on March 15, 2020.

For instance, if an eligible employee was on leave due to a pregnancy, a birth or an adoption, or certain prescribed illnesses, the baseline remuneration period will begin 90 days prior to the date on which that individual commenced their leave, provided the leave began in the period between July 1, 2019 and March 15, 2020. This modification further allows eligible employers to access maximum subsidy amounts for individuals that would otherwise not have a baseline remuneration in the previously identified baseline remuneration periods.

Note that the notion of baseline remuneration would only be relevant for Periods 1 through 6 for eligible employees. As of Period 7, baseline remuneration only remained relevant for employees on leave with pay and non-arm's length employees. Meanwhile, again as of Period 7 (or 5 and 6 if not accessing the safe harbour rules), active employees would have their subsidies calculated based solely on eligible remuneration paid with respect to the given week in a qualifying period.

CANADA EMERGENCY RENT SUBSIDY (CERS)

As mentioned above, the Government of Canada tabled Bill C-9 on November 2, 2020 (which received Royal Assent on November 19, 2020) and released details about the new Canada Emergency Rent Subsidy (CERS), which replaces the Canada Emergency Commercial Rent Assistance (CECRA) program.

[7] Frequently asked questions – Canada emergency wage subsidy (CEWS), as published by the CRA (updated on October 6, 2020), question 13-1.

The CERS offers more extensive rent and mortgage support than was previously offered under the CECRA program. Unlike the CECRA, the CERS will be available directly to renters. The owner of a qualifying property will also be entitled to the CERS where, on the one hand, the property will not be used primarily to earn rental income or, on the other, where the owner will use it primarily to earn rental income directly or indirectly from a person or partnership not dealing at arm's length with them and that person or partnership will not use the property primarily to earn rental income. In each situation, the property must be used in the normal course of business of the tenant or owner, as the case may be.

The rules governing this new subsidy will be harmonized with those of the Canada Emergency Wage Subsidy (CEWS). As a result, as of September 27, 2020, eligible entities that qualify under the CEWS program will also qualify for the CERS for the same qualifying periods as those provided under the CEWS program, subject to specific rules applicable to the CERS.

The CERS applies with respect to a written agreement entered into prior to October 9, 2020, i.e. the date of the CERS program initial announcement, or to the continuation of such agreement.

In summary, qualifying eligible entities will be entitled to a rent subsidy of up to a maximum of 65% of qualifying expenses. The subsidy percentage will vary and will be based on the revenue decline of the qualifying entity, as calculated for CEWS purposes. Among other things, where the revenue decline is equal to or greater than 70%, the rent subsidy percentage will be 65%. The table below illustrate the rate structure.

Revenue decline percentage	**Rent subsidy percentage***
70%	65%
65%	58,75%
60%	52,50%
55%	46,25%
50%	40%
45%	36%
40%	32%
35%	28%
30%	24%
25%	20%
20%	16%
15%	12%
10%	8%
5%	4%

Source: Deloitte

** These rent subsidy percentages apply from September 27, 2020 with respect to the same qualifying periods as the CEWS.*

In addition, qualifying eligible entities that will be affected by a public health order will be entitled to receive an additional 25% of rent subsidy, bringing the maximum rent subsidy percentage which such entity may receive to 90%.

A public health order means a decree or decision made under the laws of Canada or a province, or pursuant to the authority granted by such laws. This

order must require an entity to cease some or all of the activities at a specific location for at least one week in response to the COVID-19 pandemic, and it is reasonable to conclude that the ceased activities, in the appropriate pre-pandemic prior reference period, were responsible for at least approximately 25% its revenues at that location.

The scope of such decree or decision is limited based on factors such as defined geographical boundaries, type of business or other activity, or risks associated with a particular location; for example, the order for the closure of movie theatres, bars and restaurants' dining rooms.

A qualifying renter dealing at arm's length with the property owner will benefit from a subsidy for each qualifying period that will be equal to the rent subsidy percentage multiplied by the lesser of $75,000 and the total of all amounts paid to the owner under an agreement for that period.

As such, the qualifying rent expenses are basically what was provided for under the CECRA program. That is the rent for the use, or right to use, of the qualifying property including, among others, gross rent, rent based on a percentage of sales, profit or similar criterion, and amounts payable to the property owner or a third party under a net lease for certain charges such as common areas expenses or property taxes, but excluding amounts such as sales taxes or fees payable for special services. It is important to note that the law, in its current version, only considers paid expenses as qualifying expenses. We have been informed that the Senate, in its review of the Bill, has requested that expenses payable also be considered as qualifying expenses. Since no changes were made to Bill C-9 prior to final approval, changes may be announced in the coming weeks to take into account the Senate's comments.

Where the owner will not use the property to earn rental income or will rent it to a renter not dealing at arm's length, the owner will be entitled to the CERS, as previously noted. In this instance, for each qualifying period, the rent subsidy percentage will be multiplied by the lesser of $75,000 and the total of the interest paid on a loan secured by a mortgage (if applicable), amounts paid for insurance as well as property taxes and similar taxes in respect of the property.

For the purposes of eligible rent expense calculations for a renter or an owner for a given qualifying period, as the case may be, these expenses could be prorated based on the number of days during the qualifying period and the number of days covered by those expenses.

However, the CERS to which a renter or owner will be entitled for a qualifying period, as the case may be, will be limited to $300,000, which limit will be applicable taking into account any CERS amounts received by eligible entities affiliated with the renter or property owner.

This $300,000 limit will not apply, however, in respect of the additional 25% rent subsidy that may be available to a qualifying eligible entity that would be affected by a public health order.

This new support will be available until June 2021.

How can Deloitte help?

If you have questions, please contact your Deloitte representative or any of the individuals noted in this alert.

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