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TAX NOTE

July 18, 2020

Government Proposes Significant CEWS Amendments

On July 17, 2020, the Minister of Finance proposed amendments to the CEWS legislation ("**Proposed Amendments**") that include an extension of the Canada Emergency Wage Subsidy to December 19, 2020, with details concerning the application of CEWS for qualifying periods from June 7, 2020 to November 21, 2020, as well as other amendments intended to correct technical issues identified by practitioners and other stakeholders. The proposed extension to the CEWS contains significant revisions that will impact both eligibility and the amount of benefits payable under the program. It also appears that some of the Proposed Amendments will supplant those in the previously-introduced Bill C-17, most importantly with respect to the extension of time.

Changes Affecting All Qualifying Periods

- Corporate Amalgamations. As previously announced by the Minister of Finance, the Proposed Amendments contain a rule that deems a corporation coming into existence on the amalgamation of two or more corporations to be the same corporation as the predecessor corporations.

- Adjustments to Qualifying Revenue for Asset Sales. A new rule for asset sales will permit the seller and the purchaser of all or substantially all of the assets of a business to jointly elect (or, if the seller has ceased to ceased to exist, allow the purchaser to unilaterally elect) for the seller's qualifying revenue reasonably attributable to the acquired assets for a prior reference period to be treated as the purchaser's qualifying revenue for that prior reference period. The seller's qualifying revenue would be reduced accordingly. These changes are intended to address issues with qualification for CEWS that arise when a business was acquired on an asset purchase and will be enacted with effect retroactive to April 11, 2020. Importantly, this measure is elective – there is no requirement to adjust qualifying revenue for assets sales or purchases, consistent with previously released CRA administrative positions.

- Baseline Remuneration. The baseline remuneration concept for non-arm's length employees will be amended to permit an employer to elect to use the period from March 1, 2019 to May 31, 2019 to calculate baseline remuneration for the original CEWS qualifying periods. For the CEWS qualifying period from June 7, 2020 to July 4, 2020, the employer may use either of these baseline remuneration periods or the period that begins on March 1, 2019 and ends on June 30, 2019. For all other CEWS qualifying periods, the employer will either use the January 1, 2020 to March 15, 2020 baseline remuneration period or will elect to use the period from July 1, 2019 to December 31, 2019 to calculate baseline remuneration.

- January/February Prior Reference Period. The rules permitting employers to use January and February 2020 as their prior reference period are also being clarified. The change is not substantive, but clarifies that employers that were not carrying on business on March 1, 2019

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must use January and February 2020 as their prior reference period for the qualifying periods ending on or before July 4, 2020. Any employers may otherwise elect to use January and February 2020 as their prior reference period, but they may elect separately for the qualifying periods ending on or before July 4, 2020 and the qualifying periods beginning after July 4, 2020.

- Definition of Eligible Entity. The eligible entity definition will be amended to clarify that trusts are eligible entities that can qualify for CEWS. The qualifying entity definition is also being amended to accommodate employers that did not have CRA payroll accounts because their payroll remittances were administered by a payroll service provider.

New Qualifying Periods, Current Reference Periods and Prior Reference Periods

The extension of CEWS necessitates the creation of the following additional qualifying periods and reference periods:

New Qualifying Period	Current Reference Period	Prior Reference Period
June 7-July 4, 2020	June 2020	June 2019
July 5-August 1, 2020	July 2020	July 2019
August 2-August 29, 2020	August 2020	August 2019
August 30-September 26, 2020	September 2020	September 2019
September 27-October 24, 2020	October 2020	October 2019
October 25-November 21, 2020	November 2020	November 2019

The Minister of Finance may also prescribe by regulation one additional qualifying period ending no later than December 31, 2020. If the Minister does prescribe an additional qualifying period, the current reference period and prior reference period in respect of that qualifying period will also be prescribed.

For the qualifying periods beginning after July 4, 2020, an employee need not have been without remuneration for 14 or more consecutive days in the qualifying period in order to be an eligible employee.

Revenue Test Changes

The most significant proposed amendment to the operation of CEWS concerns the calculation of benefits for qualifying periods beginning after July 4, 2020. The new benefit calculation will necessitate the enactment of four new concepts, being the “base percentage,” the “revenue reduction percentage,” the “top-up percentage” and the “top-up revenue reduction percentage”. The rationale for these new concepts is to increase the number of employers who are eligible for CEWS, while at the same time reducing the amount of the CEWS benefit available to employers that have not experienced very significant (i.e. 50% or greater) reductions in revenue and phasing out CEWS over the new qualifying periods.

In the qualifying periods ending August 1, 2020 and August 29, 2020, an employer with a revenue reduction percentage of at least 30% is entitled to a CEWS benefit for an employee that is not on leave with pay during that week equal to the greater of: (i) the CEWS benefit from prior qualifying periods (i.e. 75% of eligible remuneration, to a maximum of $847 per week); and (ii) the amount determined when the total of the employer’s base percentage and top-up percentage is multiplied by the least of three amounts, being the employee’s eligible remuneration, $1,129, or the employee’s baseline remuneration if the employer and employee do not deal at arm’s length. The formula in (ii) should produce a maximum weekly CEWS benefit of $960 per employee, with a maximum CEWS benefit of $677 per employee for employers that have not experienced a revenue decrease of at least 50%.

In the qualifying periods ending September 26, 2020, October 24, 2020 and November 21, 2020, an employer is entitled to a CEWS benefit for an employee that is not on leave with pay during that week equal to the amount determined when the total of the employer's base percentage and top-up percentage is multiplied by the least of the employee's eligible remuneration, $1,129, or the employee's baseline remuneration if the employer and employee do not deal at arm's length. This should produce a maximum weekly CEWS benefit of $847 per employee in the September 26, 2020 period, $734 per employee in the October 24, 2020 period and $508 per employee in the November 21, 2020 period. Employers that have not experienced a revenue decrease of at least 50% should be entitled to a maximum per-employee CEWS benefit of $565, $452 and $226, respectively, for those same qualifying periods.

If an employee is on leave with pay in the qualifying periods ending August 1, 2020 and August 29, 2020 and the employer has experienced a revenue decrease of any amount, the employer is entitled to a CEWS benefit computed using the rules for qualifying periods ending before July 5, 2020. If the employee remains on leave with pay in the successive qualifying periods, the employer is entitled to a CEWS benefit equal to the employee's eligible remuneration, but only if the employer has experienced a decrease in revenues, the employee deals at arm's length or does not deal at arm's length but has a baseline remuneration greater than nil, and no regulations are promulgated that would prescribe a lesser benefit.

For qualifying periods beginning after July 4, 2020, the employer should only receive a CEWS benefit in respect of employer-side CPP contributions and EI premiums paid in relation to an employee if the employer has experienced a decrease in revenues and the employee is on leave with pay.

New Concepts Relevant to Revenue Test

The revenue reduction percentage concept is straightforward. It is effectively the difference, expressed as a percentage, between the employer's qualifying revenues for its current reference period and the employer's qualifying revenues for its prior reference period.

An employer's base percentage for a qualifying period beginning after July 4, 2020 is one of two amounts, depending on whether the employer's revenue reduction percentage is or is not equal to or greater than 50%:

Qualifying Period	Revenue Reduction ≥ 50%	Revenue Reduction < 50%
July 5-August 1, 2020	60%	1.2 * revenue reduction percentage
August 2-August 29, 2020	60%	1.2 * revenue reduction percentage
August 30-September 26, 2020	50%	1 * revenue reduction percentage
September 27-October 24, 2020	40%	0.8 * revenue reduction percentage
October 25-November 21, 2020	20%	0.4 * revenue reduction percentage

It is, however, open to the Minister of Finance to prescribe different percentages and different factors if the Minister of Finance is so inclined.

An employer's top-up revenue reduction percentage for a qualifying period is the difference, expressed as a percentage, between the employer's average qualifying revenue for: (i) the three months ending prior to the current reference period; and (ii) either the average of January and February 2020 or the average of the three months ending prior to the prior reference period, depending on whether the employer has elected to use January and February 2020 as its prior reference period in respect of the qualifying period.

An employer's top-up revenue percentage is equal to the lesser of 25% and 1.25 times the amount by which the employer's top-up revenue percentage exceeds 50%.

Qualifying Revenue Deeming Rule

The currently enacted CEWS legislation contains a rule that deems an employer to meet the qualifying revenue test in respect of a qualifying period if it met the qualifying revenue test in respect of the immediately preceding qualifying period. This deeming rule is now being amended so that it only applies to deem employers to meet the qualifying revenue test in respect of qualifying periods ending on or before July 4, 2020. For qualifying periods beginning after July 4, 2020, this deeming rule will now deem an employer's revenue reduction percentage to be the same as its revenue reduction percentage in its immediately preceding qualifying period if the revenue reduction percentage in respect of that qualifying period is less than its revenue reduction percentage from the preceding qualifying period. This amended deeming rule is less generous than the existing deeming rule, since it does not deem a similar reduction to the employer's top-up revenue reduction for the qualifying period.

Notices of Determination

The Minister of National Revenue will now be authorized to issue notices of determination in respect of a deemed overpayment arising in a qualifying period or that no deemed overpayment has arisen in the qualifying period. The notice of determination should permit an employer to object to the CRA's determination of its CEWS benefit entitlement without having to wait until it receives a notice of assessment in respect of its taxation year that includes the qualifying period.

Conclusion

The Proposed Amendments add considerable complexity to the CEWS regime. The Department of Finance's desire to phase out benefits as the economy recovers while still protecting the most vulnerable businesses is understandable, but the proposed amendments are sufficiently complex that they will likely contain many traps for the unwary. The efficacy of the revised CEWS regime will likely depend in large part on the CRA adopting reasonable administrative positions in respect of the new qualifying periods.

Felesky Flynn LLP is pleased to be of assistance to you or your clients in determining their CEWS eligibility and the quantum of the available benefits. Please do not hesitate to contact any of our lawyers should you require assistance with these or any other tax matters.