Canada Emergency Wage Subsidy Update — Potential Repayment of CEWS Related to Executive Pay

The 2021 Budget extended the Canada Emergency Wage Subsidy (“CEWS”) to September 25, 2021 (with the possibility of a further extension to November 20, 2021). It also introduced a repayment requirement, if 2021 aggregate executive pay is higher than it was in 2019.

Bill C-30, which implemented these measures, was approved June 29, 2021.

Overview

Public companies (including controlled affiliates) will be required to repay CEWS received after June 5, 2021, if the aggregate compensation paid to Named Executive Officers (NEOs) during calendar 2021 exceeds the aggregate compensation paid to NEOs during calendar 2019. The amount required to be repaid is described below.

The rules respond to concerns that corporations are using CEWS to fund executive compensation. The Budget confirms that CEWS is designed to support employers whose revenue declined during the COVID-19 pandemic, to allow them to keep their employees on the payroll. The Budget goes further to suggest that increases to executive pay during this period demonstrate that a company has adequate financial resources to support employees, without CEWS.

Repayment Requirement

If a company triggers the CEWS repayment requirement, the amount required to be repaid is <u>the lesser of</u>:

- The total of all CEWS amounts received after June 5, 2021; and
- The amount by which the corporation’s aggregate NEO compensation for 2021 exceeds the aggregate NEO compensation for 2019.[1]

If the corporation has a non-calendar fiscal year, the aggregate compensation for a calendar year will be prorated based on the number of days of the fiscal period in the calendar year.

Practical Considerations

Aside from normal course pay increases or stronger bonus payouts, there are a number of ways the repayment requirement could be inadvertently triggered, which are not dealt with in the legislation:

- Senior executive turnover replacing 2019 senior executives with more experienced and higher paid executives, or with one-time hiring, promotion or termination payments;

[1] NEOs’ compensation is the total amount reported in the Statement of Executive Compensation pursuant to NI 51-102. If the corporation is not required to make disclosure under NI 51-102, the amount is based on similar disclosure under the laws of another jurisdiction (but limited to the top 5 highest paid), or the amount that would be required to be reported using the methodology in the Statement of Executive Compensation, as applicable.

- Increases to the number of reported NEOs (e.g., more than 5 to be reported in 2021 due to executive transitions);
- Retention awards made to selected NEOs during 2021;
- Changes in pension values, which reflect actuarial and interest rate changes, rather than increased compensation; and
- Corporations involved in transactional M&A activity resulting in significant changes to the NEOs or their compensation.

Meridian Comment: The great majority of companies used CEWS for its intended purpose—to retain employees on their payroll during a very difficult business period. For these companies, there was often an offset between the amount received from CEWS and payroll costs that were higher due to employee retention.

As business begins to return to more normal levels, companies will need to carefully weigh the need for and benefits of receiving CEWS against the rather blunt potential repayment obligations, particularly if they have had significant executive turnover or other business changes that affect their summary compensation table disclosure. Companies taking CEWS should model potential outcomes to assess the financial and other risks.

There is reputational risk associated with being required to repay CEWS due to increased executive compensation; however, there are *also* potential brand and engagement risks with laying off employees, rather than accepting CEWS.

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