

MEMORANDUM

DATE: April 22, 2020

TO: Board of Trustees of the IBEW Local 353 Supplementary Unemployment Benefits Plan

FROM: Koskie Minsky, LLP

FILE NO: 200240

SUBJECT: Providing Top-Ups to the Canada Emergency Relief Benefit

This memo provides an update on the possibility of Supplemental Unemployment Benefit Plans ("SUB Plans") providing top-ups for Canada Emergency Response Benefit (CERB) payments.

While such payments are currently prohibited, we expect this may be addressed by the Minister of Employment and Social Development in the coming days or weeks.

Background

SUB Plans are employee benefit plans that provide top-up payments to supplement unemployment insurance benefits in certain circumstances. They may be registered with Employment and Social Development Canada (ESDC) under the *Employment Insurance Act*, SC 1996, c 23 (EI Act)¹ and/or the Canada Revenue Agency (CRA) under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA).

Bill C-13 introduced the *Canada Emergency Response Benefit Act* (CERBA), under which the CERB is provided.² The federal government has announced that for the period of March 15, 2020 to October 3, 2020, CERB payments will be provided to those who would otherwise qualify of unemployment insurance benefits under the EI Act. Understandably, many SUB Plan administrators wish to know whether it is permissible to provide top-up payments for CERB payments at this time.

Potential Risks

At the moment, there are risks associated with providing top-ups to CERB payments from a SUB Plan.

Registered SUB Plans are only permitted to provide top-up payments to employees who are receiving unemployment benefits under the EI Act or have applied and had their benefits denied

¹ Registration with the ESDC is conducted through Service Canada.

² See Appendix A.

for very specific reasons.³ If payments are made from a SUB Plan for purposes other than topping up EI benefits, then the SUB Plan's registration with the ESDC and/or the CRA could be at risk.

In addition, although CERBA does not appear to include a claw back mechanism, the legislation provides the Minister of Employment and Social Development wide scope to deem certain types of income as disqualifying a claimant from eligibility for the CERB.⁴ Benefits paid from a group wage loss plan such as a SUB Plan could be deemed as disqualifying.

Current Status

We have been actively involved in conversations with the federal government about permitting SUB Plans to offer top-up payments in respect of CERB payments, during this time of crisis. While we cannot provide any guarantees with respect to this matter, we do expect the ESDC to make an announcement to this effect soon.

In the meantime, we have been advised by ESDC that Service Canada employees have been directed to collect email addresses from SUB Plan administrators inquiring about CERB top-ups so that Service Canada is able to follow up once they are given a clear directive. We recommend that an e-mail be sent to Service Canada to advise that the Trustees wish to provide a CERB top-up from the Local 353 SUB Plan.

³ *Employment Insurance Regulations*, SOR/96-332 (EI Regulations), s 37(2)(c);

⁴ See section 6(3)(b) (Appendix A).

Appendix A

Short title

1 This Act may be cited as the *Canada Emergency Response Benefit Act*.

Definitions

2 The following definitions apply in this Act.

COVID-19 means the coronavirus disease 2019. (*COVID-19*)

Minister means the Minister of Employment and Social Development. (*ministre*)

week means the period of seven consecutive days beginning on and including Sunday. (*semaine*)

worker means a person who is at least 15 years of age, who is resident in Canada and who, for 2019 or in the 12-month period preceding the day on which they make an application under section 5, has a total income of at least \$5,000 — or, if another amount is fixed by regulation, of at least that amount — from the following sources:

- (a) employment;
- (b) self-employment;
- (c) benefits paid to the person under any of subsections 22(1), 23(1), 152.04(1) and 152.05(1) of the *Employment Insurance Act*; and
- (d) allowances, money or other benefits paid to the person under a provincial plan because of pregnancy or in respect of the care by the person of one or more of their new-born children or one or more children placed with them for the purpose of adoption. (*travailleur*)

Regulations — definition of worker

3 With the consent of the Minister of Finance, the Minister may, by regulation, fix an amount for the purposes of the definition *worker* in section 2.

Payment

4 The Minister must make an income support payment to a worker who makes an application under section 5 and who is eligible for the payment.

Application

5 (1) A worker may, in the form and manner established by the Minister, apply for an income support payment for any four-week period falling within the period beginning on March 15, 2020 and ending on October 3, 2020.

Limitation

(2) No worker is permitted to file an application after December 2, 2020.

Information

(3) An applicant must provide the Minister with any information that the Minister may require in respect of the application.

Eligibility

6 (1) A worker is eligible for an income support payment if

- (a) the worker, whether employed or self-employed, ceases working for reasons related to COVID-19 for at least 14 consecutive days within the four-week period in respect of which they apply for the payment; and
- (b) they do not receive, in respect of the consecutive days on which they have ceased working,

- (i) subject to the regulations, income from employment or self-employment,
- (ii) *benefits*, as defined in subsection 2(1) of the *Employment Insurance Act*,
- (iii) allowances, money or other benefits paid to the worker under a provincial plan because of pregnancy or in respect of the care by the worker of one or more of their new-born children or one or more children placed with them for the purpose of adoption, or
- (iv) any other income that is prescribed by regulation.

Exclusion

(2) An employed worker does not cease work for the purpose of paragraph (1)(a) if they quit their employment voluntarily.

Regulations

(3) The Minister may, by regulation,

- (a) exclude a class of income from the application of subparagraph (1)(b)(i); and
- (b) prescribe any other income for the purposes of subparagraph (1)(b)(iv).

Amount of payment

7 (1) The amount of an income support payment for a week is the amount fixed by regulation for that week.

Regulations

(2) With the consent of the Minister of Finance, the Minister may, by regulation, fix the amount of an income support payment for a week specified in the regulation.

Distinguishing — classes

(3) Regulations made under subsection (2) may distinguish among different classes of workers.

Maximum number of weeks

8 (1) The maximum number of weeks for which income support payments may be made to a worker is 16 weeks or, if another number of weeks is fixed by regulation, that number of weeks.

Regulations

(2) With the consent of the Minister of Finance, the Minister may, by regulation, fix a number of weeks for the purpose of subsection (1).

Social Insurance Number

9 The Minister is authorized to collect and use, for the purposes of the administration and enforcement of this Act, the Social Insurance Number of a person who makes an application under this Act.

Provision of information and documents

10 The Minister may, for any purpose related to verifying compliance or preventing non-compliance with this Act, by notice served personally or by confirmed delivery service, require that any person provide any information or document within the reasonable time that is stated in the notice.

Payments cannot be charged, etc.

11 An income support payment

- (a) is not subject to the operation of any law relating to bankruptcy or insolvency;
- (b) cannot be assigned, charged, attached or given as security;
- (c) cannot be retained by way of deduction, set-off or compensation under any Act of Parliament other than this Act; and
- (d) is not garnishable moneys for the purposes of the *Family Orders and Agreements Enforcement Assistance Act*.

Return of erroneous payment or overpayment

12 (1) If the Minister determines that a person has received an income support payment to which the person is not entitled, or an amount in excess of the amount of such a payment to which the person is entitled, the person must repay the amount of the payment or the excess amount, as the case may be, as soon as is feasible.

Recovery as debt due to Her Majesty

(2) The amount of the erroneous payment or overpayment, as determined by the Minister, constitutes a debt due to Her Majesty in right of Canada, as of the day on which it was paid, that may be recovered by the Minister.

Certificate of default

(3) The amount of any debt referred to in subsection (2) may be certified by the Minister, and registration of the certificate in the Federal Court has the same effect as a judgment of that Court for the amount specified in the certificate and all related registration costs.

Limitation or prescription period

13 (1) Subject to subsections (2) to (7), no action or proceedings are to be taken to recover money owing under this Act after the expiry of the six-year limitation or prescription period that begins on the day on which the money becomes due and payable.

Deduction, set-off or compensation

(2) Money owing by a person under this Act may be recovered at any time by way of deduction from, set-off against or compensation against any sum of money, including an income support payment under this Act, that may be due or payable by Her Majesty in right of Canada to the person, other than an amount payable under section 122.61 of the *Income Tax Act*.

Acknowledgment of liability

(3) If a person's liability for money owing under this Act is acknowledged in accordance with subsection (5), the time during which the limitation or prescription period has run before the acknowledgment does not count in the calculation of that period.

Acknowledgment after expiry of limitation or prescription period

(4) If a person's liability for money owing under this Act is acknowledged in accordance with subsection (5) after the expiry of the limitation or prescription period, an action or proceedings to recover the money may, subject to subsections (3) and (6), be brought within six years after the date of the acknowledgment.

Types of acknowledgment

(5) An acknowledgment of liability means

- (a)** a promise to pay the money owing, made by the person or their agent, mandatary or other representative;
- (b)** an acknowledgment of the money owing, made by the person or their agent, mandatary or other representative, whether or not a promise to pay can be implied from it and whether or not it contains a refusal to pay;
- (c)** a part payment by the person or their agent, mandatary or other representative of any money owing; or
- (d)** an acknowledgment of the money owing, made in the course of proceedings under the *Bankruptcy and Insolvency Act* or any other legislation dealing with the payment of debts by the person, their agent, mandatary or other representative or the trustee or administrator.

Limitation or prescription period suspended

(6) The running of a limitation or prescription period in respect of money owing under this Act is suspended during any period in which it is prohibited to commence or continue an action or other proceedings against the person to recover money owing under this Act.

Enforcement proceedings

(7) This section does not apply in respect of an action or proceedings relating to the execution, renewal or enforcement of a judgment.

No interest payable

14 No interest is payable on any amount owing to Her Majesty in right of Canada under this Act as a result of an erroneous payment or overpayment.

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