



March 30, 2020

The Honourable William Francis Morneau, Minister of Finance
Department of Finance Canada
90 Elgin Street
Ottawa, ON K1A 0G5

c/o Andrew Donelle, Director, Deferred Income Plans
Lori Merrigan, Senior Tax Policy Officer

Dear Mr. Donelle and Ms. Merrigan:

Re: Requested Changes to Employee Benefit related Legislation and Policy due to COVID-19 Crisis
Re: Health and Welfare Trusts (HWTs) and Employee Life and Health Trusts (ELHTs)

We are writing on behalf of the Multi-Employer Benefit Plan Council of Canada (MEBCO) to request immediate changes be implemented to the *Income Tax Act* (the "ITA") and benefit related legislation and policy to facilitate measures being implemented and considered by HWTs and ELHTs across the country to mitigate the financial impact of the COVID-19 crisis on plan members and their families.

As you know, MEBCO is a non-profit corporation representing the interests of Canadian multi-employer pension and benefit plans. Attached is additional background information regarding MEBCO and the millions of workers and families represented by its members from across the country.

MEBCO is encouraged by and applauds the extraordinary efforts of the Federal Government to address this crisis in the *COVID-19 Emergency Response Act* ("CERA"), including the relief measures targeted at income interruption caused to these members as a result of COVID related workplace disruption and the impact on the health and welfare of workers and their families. To the extent that these benefit plans have reserves or can allocate contributions to provide additional support in the form of income replacement, enhanced member assistance and health and wellness benefits, to mitigate the catastrophic economic and health impact of the crisis, the Federal Government should implement the legislative and administrative changes necessary to support these private sector efforts.

We set out below the tax and other measures which MEBCO recommends should be adopted immediately.

Income Tax Act and Canada Revenue Agency Policy

MEBCO believes that all benefits that may be added to HWT and ELHT plans in response to COVID-19, including income maintenance, supplementary unemployment, health and wellness and member assistance, should be treated as benefits under a Private Health Services Plan ("PHSP") and be payable on a tax exempt basis as eligible PHSP benefits. These benefits are directly tied to a medical and hospital care emergency and reasonably fit within the parameters of PHSPs.

To the extent that any income replacement benefits not directly tied to sickness or accident are not currently eligible HWT or ELHT benefits, the ITA or Canada Revenue Agency (CRA) policy should be amended to expressly permit these plans to provide COVID-19 related income replacement benefits in addition to any existing sickness or accident benefits currently provided.

To the extent that HWTs and ELHTs may extend supplementary unemployment benefits to top-up unemployment benefits under the *Employment Insurance Act* (EI Act) ("EI benefit payments"), they should be deemed to be registered supplemental unemployment benefit plans ("SUB plans") without the requirement to establish separate trust funds or plans or the need to register the plans with Services Canada and the CRA.

In addition, benefits provided through employee/member assistance plans or health and wellness plans should be deemed to be eligible HWT or ELHT benefits provided on a tax exempt basis, notwithstanding that they may not normally qualify for the medical expense tax credit, in accordance with the CRA's PHSP policy. Our clients expect a significant increase in the demand for mental health services and supports as a result of this crisis, and HWTs and ELHTs have established relationships with service providers that can efficiently and cost effectively deliver much needed mental health and wellness related supports.

To the extent that any of these benefits cannot be provided on a tax exempt basis, relief from immediate dilution of the economic impact of these benefits should be provided by exempting these benefit payments from tax withholding and any other statutory deductions, including Canada Pension Plan and Employment Insurance contributions.

Healthcare Spending Accounts

Many HWTs and ELHTs provide healthcare spending accounts ("HSAs") which members use to purchase eligible healthcare benefits. Many members will have accumulated significant credits in these HSAs, which they may not be able to use during the year or the 12 month period rollover period permitted by CRA policy because many practitioners and other medical services are not operating during the pandemic.

HWTs and ELHTs should be permitted to grant tax exempt refunds to these members of unused HSA credits at their request for a limited period time. The tax treatment would be consistent with the treatment they would have received if the HSA credits were used to purchase eligible PHSP benefits and therefore, this measure is effectively tax neutral.

In addition, the CRA should relax or extend the rollover period currently permitted for HSAs so that members can continue to use their accumulated HSA credits to obtain eligible medical services when practitioners and service providers resume operation.

Employment Insurance related Measures

HWTs and ELHTs cannot and will not implement these emergency benefit measures without some modification to the impact on employment insurance and other benefit entitlements.

Specifically, under the *Employment Insurance Act Regulations* (the "EI Regulations") any payments that may be allocated to a benefit period may cause a reduction or "claw back" of the claimant's Employment Insurance (EI) entitlements (sections 35 and 36 of the EI Regulations). This may alternatively result in a delay of the claimant's EI commencement period and a reduction of EI benefits if they are unemployed for a period of 52 weeks or less.

Under the *COVID-19 Emergency Response Act*, the Minister of Employment and Social Development is granted powers to make interim orders to adapt or exempt provisions of the EI Act for the purposes of mitigating the economic effects of COVID-19, subject to the consent of the Minister of Finance.

We believe that there are at least 2 current provisions in the EI Regulations which can be relied on to temporarily suspend reductions and claw back of EI benefits pursuant to the interim order power as follows:

Relief grants (s. 35(7)(c))

Section 35(7) of the EI Regulations exempts certain income from the definition of "earnings" that would otherwise be captured under s. 35(2), including "relief grants in cash or kind" at 35(7)(c). It is possible that some of the COVID-19 benefits that may be provided by HWTs and ELHTs are eligible under this provision, but this is not clear. In any case, the type of financial assistance being contemplated by HWTs and ELHTs in the context of a pandemic, fall within the scope and intent of the relief grant provision and should therefore be viewed as not constituting "earnings" for the purpose of s. 35.

In furtherance of this approach, it will serve to consider how the concept of a "relief grant" has been interpreted in the context of unemployment insurance benefits. The Federal Court of Appeal (FCA) has interpreted the term in *Canada (Attorney General) v. Fillion*.

In *Fillion*, the issue arose after the shutdown of a mine. The union for the laid off claimants negotiated payments intended to compensate the claimants for the decrease in the value of their properties given the closure of the mine. The FCA held that these housing subsidies did constitute relief grants.

The Court provided a broad definition, as follows:

The phrase "relief grant", therefore, suggests financial assistance that is given to alleviate hardship. Hardship certainly includes, but is not confined to, circumstances of personal destitution, emergency, or disaster. Hardship may also comprise the broader circumstances of financial or other adversity, not necessarily amounting to destitution, emergency, or disaster.

Supplemental Unemployment Benefit Plans


Pursuant to s. 37 of the EI Regulations, the proposed COVID-19 income replacement benefits would not constitute earnings if they were provided under a SUB Plan.

Allowing HWTs and ELHTs to temporarily provide SUB benefits and deeming these SUB Plans to be registered immediately for purposes of the ITA and the EI Act would avoid EI reductions and claw backs that might otherwise occur under the ss. 35 and 36 of the EI Regulations.

We appreciate that these measures do not fall within the scope of the Ministry of Finance, but urge you to work with the Minister Employment and Social Development to implement the necessary interim orders and adopt temporary administrative policies to accommodate these objectives.

We appreciate your urgent consideration of these matters. We will make ourselves available to answer any questions or assist with the details of any legislative regulatory proposals at your convenience.

Yours truly,



Robert Blakely
President
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About MEBCO

MEBCO was established in 1992 to represent the interests of multi-employer benefit plans (MEPs) in Canada. MEBCO advocates on behalf of all stakeholders involved with MEPs, including union and employer trustees, independent and professional trustees, professional third party administrators, non-profit or “in house” plan administrators and professionals including actuaries, benefit consultants, lawyers, investment managers, and chartered professional accountants. MEBCO’s Board of Directors is composed of volunteer representatives of these groups, and is responsible for identifying, addressing, and advocating with respect to all issues impacting multi-employer plans in Canada.

Background on Multi-Employer Plans

Multi-employer plans are essential to over one million workers and their families in industries including construction, food service, retail, hotel and restaurant, graphic arts, garment manufacturing, security, textiles, transportation and entertainment. MEPs are a response to the difficulties of delivering quality health care services, disability and other income replacement benefits and life insurance to workers and their families in industries typified by small employers and mobile work forces. These plans ensure that seamless benefit coverage is provided to workers and their families as they move from one contributing employer to the next. This seamless coverage is especially important in mobile and/or seasonal industries where it is often expected that workers will be employed by multiple employers in a single year and/or may experience significant periods of non-employment or disability. In these industries, it is not uncommon for a worker to be employed by one employer for a matter of days or weeks before moving on to a different project with a different employer. A centralized MEP ensures these workers have access to necessary benefit coverage regardless of the sometimes intermittent nature of these work relationships.

In addition to providing seamless benefit coverage, MEPs are economically efficient in the sense of providing economies of scale by bringing together large numbers of smaller employers who receive financial savings in respect to administration and the purchasing of benefits. In other words, the pooling of collectively bargained contributions in these industries is beneficial both to workers and smaller employers who may wish to extend benefit coverage to their workers.

MEPs are generally administered by an independent board of trustees, comprised of an equal number of trustees appointed by the participating union or unions and employer bargaining associations. As with any trust, the MEP trustees owe a fiduciary obligation to act in the best interest of the trust beneficiaries, not the sponsoring employers or unions. The trustees do not determine the contribution rates, which are negotiated between the employers and the unions as part of the collective bargaining process. The contribution rates are typically based on hours worked.

MEPs deliver health and welfare benefits and services that are supplementary to publically funded health care and social security programs through privately funded vehicles. Without MEPs, millions of Canadians would not have access to these supplementary benefits, the cost of which would otherwise be unaffordable and may ultimately be borne by public programs.