EARNED WAGE ACCESS PROGRAMS

Division of Financial Institutions

February 2024

Earned wage access programs ("EWA"), otherwise known as On-Demand Pay, real-time pay or early wage access, have increasingly gained popularity in recent years. EWA is a payroll program where employees are able to access their pay when they want, rather than on a traditional schedule determined by the employer. The growth of EWAs has been fostered by the overall FinTech and Faster Payments revolution taking place as well as the gig economy. The use of EWA become widespread due to workers' arising needs and expenses during the COVID-19 pandemic, and due to current inflationary pressures.

What is EWA?

EWA programs allow employees to access wages they already earned prior to payday. This allows employees to access their earned pay prior to the traditional payday using a cell phone app to meet unexpected expenses without having to pay late fees, overdraft fees or even take out short term loans.

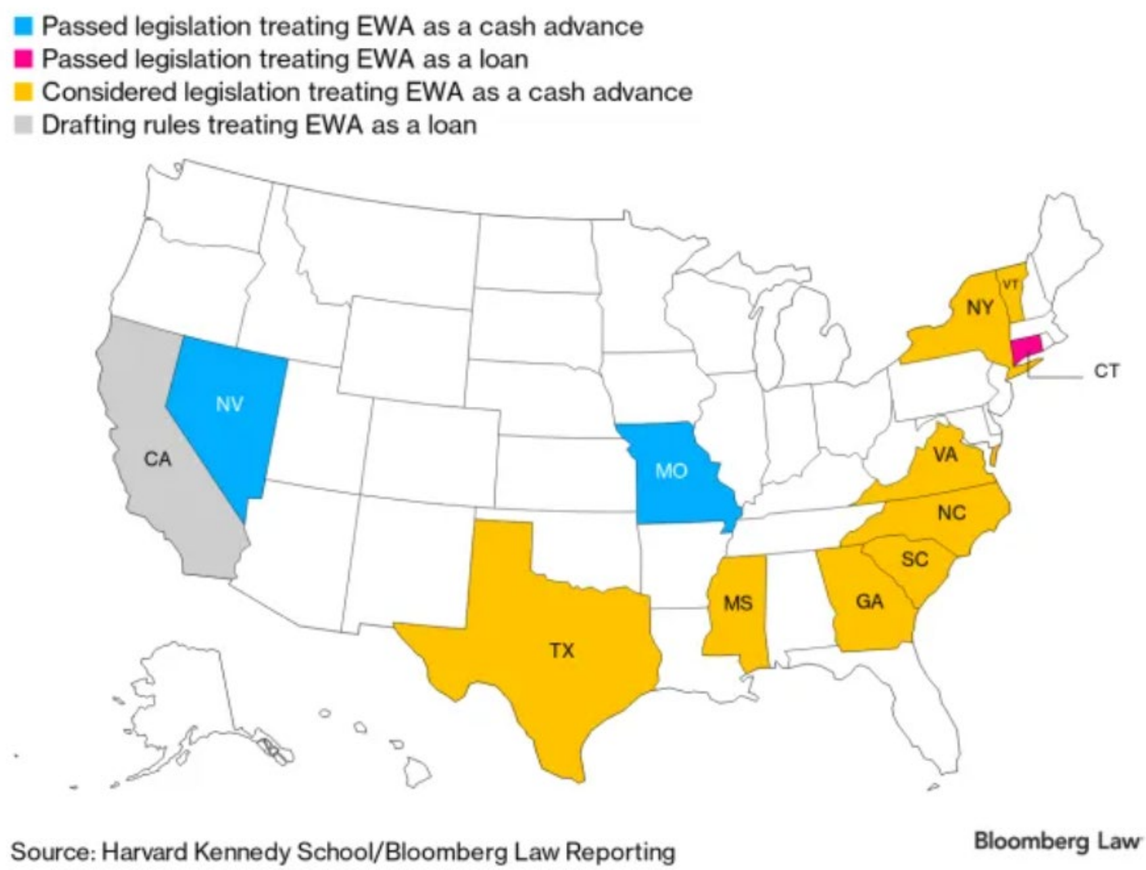
There are two types of EWA; employer-direct and direct-to-consumer. Generally the employer-direct EWA partners directly with EWA companies. Those employers often cover any costs employees incur to obtain access to their money or for costs associated with expedited payment to their bank accounts. Finally, at payday, EWA also poses concerns or questions for employers, including when the actual date of payment occurs for employment tax withholding, garnishments, child support, depositing, and for reporting purposes. In an employer-direct EWA, employers need to assure that any deductions do not drop the employee's effective rate below the state minimum wage while also being cognizant to comply with state wage assignment statutes. EWA may be considered a loan from the employer.

The direct-to-employees EWAs operate independently of employers. Direct-to-consumer services may have an extra level of integration with the employer's payroll system or more typically link directly to the employee's checking account. The direct-to-consumer EWAs receive repayment of the advance pay or early pay directly from the employee's checking account, not from the employer. Employees can still access their earned wages before payday, but the process may involve higher fees and less seamless interactions. There could be situations where, on the day of the employer's normal payday, the employee fails to have sufficient funds to cover the EWA's debit against the employee's bank account which may cause an overdraft fee.

The big advantage for consumers is that it provides employees an alternative to high-cost forms of credit and may help employees meet their financial needs in the middle of a pay period. The EWA accounts are easy to set up for employees: (1) download the app and link a bank account (debit cards only); (2) request part of your pay; (3) agree to the potential fees; and (4) obtain the remainder of your paycheck on payday (the advance is deducted from the paycheck).

State responses

States are deciding whether EWA is a loan (borrow money from an EWA which needs to be repaid) or cash advance. The type of EWA provider may determine whether this product is a loan or cash advance in states. To date (February 2023) only a few states have passed laws or are considering whether to regulate EWAs for consumer protection.



2023 Nevada – American Legislative Exchange Council model law – cash advance

2023 Missouri – American Legislative Exchange Council model law – cash advance

2023 Montana Attorney General issued an opinion that some EWA products are not loans if the EWA provider does not engage in debt collection activities, there's no payment of mandatory interest, fee, or tip, and when limited the amount to the employee's accrued income.

2023 Connecticut – considered a loan.

2023 California – considered a loan.

Federal response

The Consumer Financial Protection Bureau (CFPB) created a sandbox project to look at this product. The Advisory Opinion in 2020[1] stated that EWA was not credit within the scope of Reg Z, depending on its specific fee structure. Then in 2022, CFPB announced it was rescinding the Advisory Opinion of 2020[2].

TILA and Reg Z

The Truth in Lending Act (TILA) requires creditors to provide disclosures and follow procedures when extending consumer credit. For TILA, a "creditor" is a person "who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments. Credit is the right to defer payment of debt or to incur debt and defer payment.

Does it fit the landscape of Reg Z?

According to the CFPB, EWAs may not be considered "credit" if they meet these criteria:

---

[1] https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf

[2] https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-special-regulatory-treatment-for-payactiv/

1. EWA offered by employers.
2. EWA does not exceed the accrued cash value of wages the employee has earned (no debt) based on info provided by the employer.
3. The employee makes no payment, voluntary or otherwise, for access to the EWA program. No tips, a prepaid card (if used) must be free of charge to employee.
4. EWA provider recovers the amount advanced by the employer.
5. There is no contract or recourse with employees in the event of a failed deduction.
6. The EWA provider provides disclosures
7. The EWA provider does not directly or indirectly access credit reports of employees.

There is an open question, yet to be resolved if the Equal Credit Opportunity Act (ECOA) applies to this product. We look to the definitions of ECOA to determine whether ECOA applies. ECOA applies to "creditors" or "a person who in the ordinary course of business, regularly participates in a credit decision, including setting the terms of credit."[3] "Credit" is defined "the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor."[4]

Key points to consider regarding EWA programs:

1. Employer-direct EWAs

[3] 12 C.F.R. § 1002.2(l).
[4] 12 C.F.R. § 1002.2(j).

a. Employees can use their employer-direct EWA app to request their earned pay.

b. Generally employer direct EWAs will not have fees or will have low fees for transactions.

c. Some third party payroll companies can assist employers in setting up the EWA.

d. Some employers may use a stored value card to deposit payment of wages if employees do not have bank accounts.

2. Direct-to-consumer EWAs

   a. Employees may be charged a withdrawal fee.

   b. There may be limits to the amount employees can withdraw.

   c. Employees generally are required to link their bank account to the EWA app to enable direct deposit or withdraw of earned wages. This enables the EWA to obtain reimbursement for the advance pay.

   d. EWA programs have different fee models. Employees should be aware of any potential fees such as membership fees or per-transaction fees, as these can amount to unanticipated costs when frequently accessing part of their earned wages.

   e. EWA apps can have various restrictions, such as a limit on how many times employees can request their pay in one pay cycle or some apps have a waiting period which can delay access to pay after a request is made.

f. Use of EWA apps require personal information to be shared with third parties. Employees should know that such financial data might be sensitive when releasing information related to wages and there is the privacy risk of security issues online.

CONCLUSION

The popularity of EWAs is causing states to determine if these products should be regulated and how they should be regulated to protect consumers. Currently only a few states have enacted laws in this area.

The advantages to EWA is offering wage or hourly workers an option to get earned wages before the normal payday. EWAs are considered an alternative to payday lending.

The fintech industry has advanced the use of the EWA apps. The mobile wallets, digital accounts and faster payments technology ostensibly gives consumers more control of their financial lives. Consumers are not waiting to find out if their funds have cleared the banks or the payment system. Faster is better to consumers who may get caught in unintended credit situations.

The ability to cover unexpected expenses for consumers is a huge driver for the adoption by consumers. However, a cautious approach to the adoption of the EWAs should be considered before consumers are hurt with unintended actions.