9.10 Earned Wage Advances

9.10.1 What Are EWAs?

Earned wage advances (EWAs), often called earned wage access programs by industry, allow an employee to take an advance on wages that have been earned but are not yet due, ahead of the scheduled pay date. True EWA programs operate through an agreement with the employer or payroll provider, but there are also fake EWA programs that are direct-to-consumer and are not integrated with payroll.

True EWA programs. True EWA programs operate through an agreement with the employer and are integrated with the employer's time-and-attendance system. The system tracks the hours the employee actually worked. In advance of a scheduled pay date, the employee may obtain wage advances. In most models, the advance is provided from the EWA provider rather than the employer, but in at least one model, the EWA provider directs the employer to make the advance directly.

The employee generally repays the advance and any fee to the provider through a payroll deduction that the employer implements on the next scheduled pay date and then forwards to the provider. In some states (where regulatory issues prevent use of payroll deduction) or if payroll has already closed at the time of the advance, some providers will debit the employee's bank account.

Most EWA programs estimate taxes and other deductions to determine the amount of the consumer's next net pay. One model (the one where the employer pays the advance directly to the employee) is more tightly integrated with payroll and accounts for information about actual deductions, including any garnishments.

In some models, the EWA is a feature of a payroll card, debit card, or prepaid card, and the EWA provider offsets the advance from the incoming direct deposit. In yet another model, the EWA provider sets up an intermediary pass-through account that receives the direct deposit, which then offsets the advance and the fees and forwards the balance through the ACH system to the consumer's account (typically resulting in a delay in receipt of the paycheck).

The charges for EWAs vary greatly from program to program. Fees may be charged monthly, per pay period, or for each transaction. Some employers or payroll providers cover the costs and offer the service free to employees. EWA programs are also typically free when they are a feature of a payroll, debit, or prepaid card.

Most programs also charge expedite fees if the employee wants the

funds to be available immediately (i.e., sent through a real-time method) rather than waiting one or more business days for an ACH payment. Because EWAs are used by workers who do not want to wait for payday, it is not surprising that up to 90% of workers pay the expedite fees.[1] Expedite fees tend to be marked up far higher than the cost to program to send the funds instantly.[2] With fake direct-to-consumer EWAs, discussed below, the amount of the expedite fee may vary with the amount of the advance, increasing questions about whether these fees are disguised interest.[3]

Fake direct-to-consumer EWA programs. Fake direct-to-consumer EWAs are more problematic. Fake EWAs do not operate under a contract with the employer and have no connection to wages, the time-and-attendance system, or payroll, and thus are not properly called earned wage advances. Under these programs, a lender uses various methods to estimate the employee's work to date, such as by asking the employee to upload timesheets or installing a tracking app on the employee's smartphone to track the time spent at the work location. The lender advances funds to a designated bank account and debits the account on the day the paycheck is estimated to be deposited. This can result in overdraft or nonsufficient funds fees if the estimate of earnings or day of deposit are off, especially when the direct deposit is delayed due to a weekend or holiday.

Fake EWAs often rely on purportedly voluntary "tips" by the consumer in lieu of clear fees or interest. A default tip is normally included,[4] and the provider may use various methods to make it difficult not to tip or to induce the consumer into tipping.[5] Consumers may believe that their access to the program will be cut off if they do not pay a sufficient "tip." Attorneys should examine the circumstances closely to determine if the tips are truly voluntary. Even if they are, they are still likely to be considered finance charges under some state or federal laws.[6]

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1 Testimony of Lauren Saunders, Associate Director, National Consumer Law Center (on behalf of NCLC's low-income clients), Before the Task Force on Financial Technology, U.S. House Committee on Financial Services on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products 9 n.35 (Nov. 2, 2021), *available at* https://www.nclc.org.

2 Comments of NCLC et al. to the CFPB Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services 53–59 (May 2, 2022), *available at* https://www.nclc.org.

3 *Id.*

4 *Id.*

5 *Id.*

6 *See* § 4.2.2, *supra* (whether voluntary payments are interest).

Under the Electronic Fund Transfer Act, a default setting is construed as a requirement that may violate the Act, such as defaulting the consumer into repaying by preauthorized electronic fund transfer. *See* National Consumer Law Center, Consumer

Issues with EWAs. Proponents of EWAs tout them as a less expensive alternative to traditional payday lending. However, EWAs foster the same cycles of chronic use as conventional payday loans.[7] A worker who cannot meet an expense out of the current paycheck and draws on next week's earnings is likely to face a hole in the next paycheck that drives yet another advance. As a result, most EWAs may merely be driven by the shortfall caused by the previous EWA rather than providing new liquidity. Workers who do not earn enough to meet regular expenses may perennially run behind budget. In addition, without regulation and APR caps, even the EWAs that are currently the most responsible could evolve to become more expensive and problematic.

EWA providers typically deny that an EWA transaction creates a "debt" (a component of the definition of "credit" under some federal and state laws[8]) because the agreement gives the provider the right to repayment only through the borrower's wages. If the wages are not sufficient to cover the advance and any charges for use of the program, the agreement typically limits the provider's right to collect against the debtor to specific limited circumstances, though some programs allow the provider to debit subsequent, unearned payrolls. However, the fact that a debt is to be repaid directly from the borrower's wages does not make it any less a debt. Moreover, the agreement may also require borrowers to represent and warrant that they have earned the net wages to which the EWA advance relates, that those wages are not subject to reduction in whole or in part by reason of a valid lien or garnishment, and that they have a reasonable expectation of receiving those net wages in their next paycheck. These clauses may give the EWA provider the ability to claim that breach of these "warranties" gives it the right to proceed directly against the debtor for the

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Banking and Payments Law § 5.9.5.1 (6th ed. 2018), *updated at* www.nclc.org/library; de la Torre v. CashCall, Inc., 56 F. Supp. 3d 1073, 1089 (N.D. Cal. 2014) (concluding that a violation of EFTA occurs "at the moment of conditioning—that is, the moment the creditor requires a consumer to authorize EFT as a condition of extending credit to the consumer"), *vacated on other grounds*, 2014 WL 7277377 (N.D. Cal. Dec. 22, 2014); Fed. Trade Comm'n v. Payday Fin., L.L.C., 989 F. Supp. 2d 799 (D.S.D. 2013) (lender violated compulsory use provision because loan was conditioned on agreement to repay by EFT despite right to cancel EFT payments even before first payment); Pinkett v. First Citizens Bank, 2010 WL 1910520 (N.D. Ill. May 10, 2010); W. Va. ex rel. McGraw v. CashCall, Inc. et al., No. 08-C-1964 (W.V. Cir. Ct. Sept. 10, 2012) (same), *available at* www.nclc.org/unreported; In re Integrity Advance, L.L.C., CFPB No. 2015-CFPB-0029 (Jan. 11, 2021), *available at* https://files.consumerfinance.gov. *See also* § 5.2.2.3, *supra* (discussing how consumers cannot be compelled by default to receive wages or benefits in particular accounts, even if they can opt out).

7 *See* NCLC, Early Wage Access: A Good Option for Workers or a Fintech Payday Loan? (Mar. 2020), *available at* http://www.nclc.org (citing data from Leslie Parrish, Aite, Employer-Based Loans and Early Pay: Disruption Reaching Scale 13–14 (April 2019)).

8 *See* § 9.10.4.4, *infra*.

amount due.

As discussed in § 9.10.4, *infra*, the application of state lending laws to EWA programs is relatively untested, but in many states EWAs should be considered loans. This is especially true of those that charge fees, are not integrated with payroll, or that debit bank accounts or future payrolls.

9.10.2 Application of Wage and Hour Laws to EWAs

Almost every state[9] has wage and hour laws by which employers must abide. These laws govern when wages must be paid, what deductions can be made from them, when taxes must be deducted and transmitted, and how statements of earnings and leave must be provided to employees. If a deduction reduces the employee's wages below the minimum wage, the employer may be liable.[10]

A state's wage and hour laws may also prohibit employers from discounting wages. These statutes should apply whenever a fee is deducted from an employee's wages, whether because of a wage advance or otherwise. Some of these statutes make their application to wage advances explicit,[11] or explicitly restrict the amount of any discount for wages paid early.[12]

For example, Arkansas prohibits employers from discounting wages by more than an interest rate of 10% per year when the wages are paid earlier than the employee's regular payday.[13] Interest at 10% for a couple of days on a worker's paycheck would be just pennies. A federal court held that an Arkansas employer violated this statute by charging workers a $10 fee for a $75 salary advance.[14] It ruled that the agreement was void and that the worker was entitled to recover the amount of the advance and the $10 fee.

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9 Alabama appears to be an exception. *See* https://labor.alabama.gov/Wage_and_Hour_Info.pdf ("Alabama does not have any state laws governing wage and hour issues. Therefore, employers must follow federal guidelines set forth by the U.S. Wage and Hour Division, a division of the U.S. Department of Labor").

10 *See, e.g.*, Torreblanca v. Naas Foods, Inc., 1980 WL 2100, at *5 (N.D. Ind. Feb. 25, 2980) (employer's illegal reduction of migrant workers' paychecks to repay its cost of transporting them from Texas to its Indiana cannery is violation of federal minimum wage laws).

11 *See* Conn. Gen. Stat. § 31-74 ("No employer of labor or any person acting for him shall make a discount or deduction from the wages of any person employed by him, when the wages of the employee or any part thereof are paid at an earlier time than that at which such wages would regularly have been paid. Any person violating any provision of this section shall be fined not more than one hundred dollars.").

12 Ark. Code Ann. § 11-4-402(a).

13 Ark. Code Ann. § 11-4-402(a).

14 Browne v. P.A.M. Transport, Inc., 434 F. Supp. 3d 712 (W.D. Ark. 2020).

The statute makes no distinction between wages that were earned at the time of the advance and those that were not yet earned.

Some state labor departments have offered regulatory opinions or guidances on EWA programs, and the companies that offer earned wage access programs usually structure their transactions in ways that they think will avoid these laws. Nonetheless, it is always a good idea to check the requirements of the state in which the early wage access was provided.

9.10.3 Application of Wage Assignment Laws to EWAs

EWA providers are very likely to rely on a wage assignment. If the provider disburses the funds to the consumer, it will in all likelihood require the consumer to assign at least a portion of the consumer's unpaid wages to it to repay the advance. The agreement may phrase the assignment in obscure language and deny being a wage assignment, but the agreement should be examined closely to determine if the effect is a wage assignment.[15]

The FTC's Credit Practices Rule prohibits lenders from accepting an assignment of wages from a debtor in connection with an extension of credit.[16] However, it exempts wage assignments that apply only to wages already earned at the time of the assignment.[17] Because of this exemption, the Credit Practices Rule would not apply to an early wage access program whether or not EWAs are considered extensions of credit.

However, many state non-bank lending laws include provisions that govern and restrict assignment of wages, and these laws may be broader than the FTC rule. For example, a Florida wage assignment statute, part of its Consumer Finance Act, encompasses assignments of wages whether earned or unearned.[18] Typically these statutes flatly prohibit wage assignments (sometimes with an exception for payroll deduction plans that are revocable by the worker), or provide that any wage assignment is void or unenfoceable.[19] These restrictions are included in the summaries of state

15 *See* § 3.9, *supra* (substance controls over form).

16 16 C.F.R. § 444.2(a)(3). *See* National Consumer Law Center, Federal Deception Law § 2.3 (4th ed. 2022), *updated at* www.nclc.org/library (detailed discussion of the Credit Practices Rule).

17 16 C.F.R. § 444.2(3)(iii).

18 Fla. Stat. § 516.17 ("No assignment of, or order for the payment of, any salary, wages, commissions, or other compensation for services, earned or to be earned, given to secure any such loans shall be valid.").

19 *See* Fla. Stat. § 516.17 ("No assignment of, or order for the payment of, any salary, wages, commissions, or other compensation for services, earned or to be earned, given to secure any such loans shall be valid."); Kan. Stat. Ann. § 16a-3-305(a) ("A creditor may not take an assignment of earnings of the consumer for payment or as security for payment of a debt arising out of a consumer credit transaction"; assignment is

non-bank installment loan laws in Appendix D, *infra, .*

In addition, many states have free-standing wage assignment laws that apply whether or not a transaction is a loan. These laws may specify the procedures that must be followed in order for a wage assignment to be valid. They may also restrict the amount or duration of a wage assignment. These laws are likely to be held to be remedial legislation "designed to protect working people and assist them in the collection of compensation wrongly withheld."[20]

A federal court held that an employee's agreement that his employer could reduce his paycheck to repay a wage advance and a "service fee" for the advance was a wage assignment under Indiana's definition: "any direction given by an employee to an employer to make a deduction from the wages to be earned by said employee."[21] A ruling like this is significant

unenforceable by the assignee of the earnings and is revocable by the consumer); Md. Code Ann., Com. Law § 12-311(c)(2) ("(b) A lender may not take as security for a loan any … (2) Assignment or order for payment of wages"); Md. Code Ann., Com. Law 12-1023(2)(i) ("An agreement, note, or other evidence of a loan may not contain: (i) An assignment or order for the payment of wages, whether earned or to be earned, or of any chose in action covering lost wages"); Mich Comp. Laws § 493.17 (prohibiting wage assignments); Mo. Rev. Stat. § 408.560 (wage assignment in credit transaction is void and unenforceable). Nev. Rev. Stat. § 675.340 (wage assignment is invalid); Ohio Rev. Code Ann. § 1321.32 (assignment ofwages invalid; exceptions for family support and revocable payroll deduction plans); Okla. Stat. tit. 14A, § 3-403 (assignment of wages invalid as security for debt arising out of consumer loan; exception for and revocable payroll deduction plans); Or. Rev. Stat. § 725.355(2) ("No licensee shall take an assignment of earnings as payment of or as security for payment of a loan. An assignment in violation of this subsection is unenforceable by the assignee and revocable by the assignor. Nothing in this subsection is intended to prevent an employee from authorizing deductions from the earnings of the employee if the authorization is revocable."); 19 R.I. Gen. Laws § 19-14.2-5(5) ("No loan document shall contain … [a]ny assignment of or order for the payment of any salary, wages, commission, or other compensation for services, or any part of these, earned or to be earned"); S.C. Code Ann. § 37-3-403 ("A lender may not take an assignment of earnings of the debtor for payment or as security for payment of a debt arising out of a consumer loan" other than revocable payroll deduction; any assignment is unenforceable and revocable); Tex. Fin. Code Ann. § 342.503 (West) ("A lender may not take as security for a loan made under this chapter an assignment of wages"); W. Va. Code § 46A-4-109 ("no regulated consumer lender shall take any assignment of or order for payment of any earnings to secure any loan made by any regulated consumer lender under this article"; any assignment is void); Wyo. Stat. Ann. § 40-14-334 (lender may not take assignment of earnings as security for payment of debt arising out of consumer loan, but may take assignment of commissions or accounts receivable). *See* Decision Point, Inc. v. Reece & Nichols Realtors, Inc., 144 P.3d 706 (Kan. 2006) (real estate agent's assignment of their commissions in return for cash advance is unenforceable; this provision must be applied broadly to comport with legislative intent).

20 Mullins v. Venable, 297 S.E.2d 866, 869 (W. Va. 1982).

21 Blakley v. Celadon Group, Inc., 2017 WL 2403189, at *4 (S.D. Ind. June 2, 2017) (applying definition found at Ind. Code § 22-2-6-2(b)).

not only because it means that the state wage assignment law applies, but also because, as discussed in § 9.10.4.2, *infra*, many state lending laws provide that an advance made in exchange for a wage assignment is a loan. The court also held that it was a question of fact whether the wage assignment violated Indiana's wage assignment law by extending for more than thirty days.[22] However, in a later decision, the court held that the worker did not have a private cause of action for this violation, so the court did not reach the question of whether the employer had in fact violated the law.[23]

West Virginia has also applied its wage assignment laws to wage advances made by employers. *Fairmont Tool v. Davis*[24] involved an employer that had withheld amounts from employees' pay to repay advances it had made for the purchase of uniforms, work boots, and tools. The state supreme court held that the employer was liable to the employees for treble the amount withheld, because the employer had not obtained signed wage assignments that met the procedural requirements of the state wage assignment law. The court interpreted the statutory definition of "wage assignment" to encompass any amount that an employer withholds from the employee's wages that does not meet the statutory definition of an authorized deduction (amounts required by law to be withheld, labor union dues, premiums for employer-provided insurance, and the like). A dissent argued that the court should have followed an earlier decision that held that an authorization for the employer to deduct amounts from the worker's pay was a wage assignment only when the employer was acting as a creditor,[25] but even under that theory this employer might have been a creditor, as the employees owed it a debt for having given them advances in order to purchase various items.

An interpretive opinion issued by the California Department of Financial Protection and Innovation gives another example of the application of these laws to wage advances:

> [I]n *Lande v. Jurisich*, [59 Cal. App. 2d 613 (1943], a court considered whether an agreement that placed a "lien upon wages" was subject to a Labor Code provision covering an "assignment of, or order for, wages or salary." The court acknowledged that a lien upon wages is not an assignment, because one may enforce an assignment immediately and can only enforce a lien in court, but said there was "little difference… on the future condition of the worker and his family" between the two collection mechanisms. The court stated that in enacting the Labor Code provision "the Legislature obviously sought to reach every form of instrument which would result in the impounding of a wage

22 *Id.* at *5 (applying Ind. Code § 22-2-7-2).

23 Blakley v. Celedon Group, Inc., 2017 WL 3478954 (S.D. Ind. Aug. 14, 2017).

24 868 S.E.2d 737 (W. Va. 2021).

25 Rotruck v. Smith, 2016 WL 547190 (W. Va. Feb. 10, 2016).

> earner's wages before he received them." In this context, the court concluded that the lien upon wages was subject to the Labor Code provision because the provision applied to "orders" for wages, and a lien upon wages could ultimately result in an order from the court. The court reached this determination notwithstanding that the contract provided for a "lien" upon wages and not an "order" for wages.[26]

The agency concluded that this provision brought "any contract that effectively operates as a sale or assignment of a recipient's unpaid wages, whether or not that sale or assignment is bona fide," into the lending law's scope.[27]

These decisions show the potentially broad scope of state wage assignment laws. They may apply both when an employer withholds wages and passes them onto an EWA provider and when an employer withholds wages to repay itself for a debt that the worker owes to the employer. Withholding a fee in addition to the advance is particularly likely to bring the arrangement within the scope of a wage assignment statute, because it is unlikely that the fee is an authorized deduction.

EWA providers may seek to evade these laws by inserting clauses in their contracts saying that the transaction is not an assignment of wages. However, it is black letter law that courts will look behind the form of the transaction to determine its true nature.[28]

9.10.4 Application of State Lending Laws to EWAs

9.10.4.1 Introduction

Every state has at least one statute or constitutional provision that regulates non-bank loans. In a given state, there may be several lending laws that may apply to an EWA transaction. First, most states have a statute—often termed a small loan act or installment loan law—that applies to non-bank lenders.[29] In almost all of the states, this law caps the interest and fees that lenders may charge. Most of these small loan laws apply to loans no matter how small the amount lent, but a few apply only to loans over a certain amount. Some may also carve out certain short-term loans, or loans that are repayable in just one or only a few installments. Many of these laws also authorize non-bank lenders to extend open-end credit,

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26 Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 4 (Feb. 11, 2022), *available at* https://dfpi.ca.gov (page citations to *Lande* omitted).

27 *Id.*

28 *See* § 3.9, *supra*.

29 *See* Ch. 10, *supra* (analysis of state installment loan laws); Appx. D, *infra* (summaries of state installment loan laws).

sometimes without a cap on the APR or on all fees.[30] Some EWA programs may operate like a line of credit that would be treated as open-end credit under the relevant state law.

Typically the statute also requires these lenders, if their charges exceed the low general or "legal" usury rate,[31] to be licensed by a state agency, make periodic reports to the state, and comply with procedural protections such as a written contract. In some states, a non-bank installment lender has the option of operating under any of several statutory schemes.

Many states also have payday loan laws that may apply to certain types of EWA transactions. These laws, discussed in § 9.3, *supra*, usually are limited to short-term or single payment loans below a certain amount. EWAs are all single payment loans, and the amounts are likely to be under the payday loan cap, so are likely to meet these criteria.[32] The payday loan law may apply only to lenders that take a postdated check or ACH authorization in connection with the loan, but some EWA providers do so.[33]

Even if no other lending law applies in a state, an EWA may be subject to a general usury law or a law setting the legal interest rate.[34] These laws often carve out any transaction that is regulated by another statute.

EWA providers prefer not to have to comply with these statutes, and argue that the wage advances they provide are not loans. They make two basic arguments.

First, they argue that EWAs are simply a payment of wages. But if that is the case, then state laws prohibiting the payment of wages at a discount or limiting the amount of the discount when wages are paid in advance apply.[35] EWA providers cannot have it both ways: either they are wages or they are loans.

Second, often EWA providers claim that lending laws do not apply based on the assertion that the loan is non-recourse. They point to a contract provision that, if the advance cannot be collected from the

30 *See* § 10.9, Appx. E, *infra*.

31 *See* § 1.3.2, *supra*; Appx. B, *infra* (listing general usury and legal interest laws).

32 *See* § 9.10.4.6, *infra*.

33 *See* § 9.10.1, *supra*.

34 *See, e.g.*, Dibello v. Alpha Centurion Security, Inc., 2015 WL 1344642 (E.D. Pa. Mar. 23, 2015) (denying employer's motion for summary judgment on claim that it violated state's general usury law, 41 Pa. Stat. § 201, by making wage advances and then deducting a 20% "administrative fee" on the advance from the next paycheck, so may be liable under RICO for collection of unlawful debt; noting that evidence of many transactions may show that employer was in business of lending money). *See generally* § 9.10.4.7, Appx. B, *infra* (citing state general usury and legal interest rate laws).

35 *See* § 9.10.2, *supra*.

consumer's paycheck, the company will not sue or try to collect directly from the consumer. They may claim that, therefore, the advance does not create a "debt," and that a transaction that does not create a debt is not a loan.[36] They may assert that, even if it is a loan, it is a non-recourse loan, and such a loan does not fall within the state's credit laws.[37] Another common argument is that these transactions cannot be loans because they merely enable consumers to access their own money.[38] These issues are discussed in the next subsections.

In evaluating the application of state lending laws to EWAs, it is critical to keep in mind the rule that substance controls over form in usury cases.[39] This is black letter law in almost every state, and many decisions have applied it to find that transactions structured as sales or assignments of an asset are in fact loans.[40] This rule is particularly relevant in the EWA context. When a transaction operates just like a loan, and uses a payment mechanism such as bank account debits or payroll deductions that is used by other loans and that typically increases the lender's assurance of repayment, courts should recognize the transaction as a thinly-disguised loan. Many states also take the position that usury laws—especially the special usury statutes that advocates most commonly seek to apply in consumer cases—are remedial and should be liberally construed to protect consumers.[41] Some EWA lenders even disclose APRs (usually a deceptive 0% APR), clear evidence that the parties viewed the transaction as a loan.

9.10.4.2 State Installment Loan Laws That Define Sale or Assignment of Wages as a Loan

In many states, a provision of the state installment loan law makes it quite explicit that any assignment of wages in return for an advance of funds is a loan. Many of these provisions track the language of either the Uniform Consumer Credit Code, a model law written by the Uniform Law Commission (then known as the National Conference of Commissions on Uniform State Laws or NCCUSL) in 1968 and revised in 1974,[42] or the Uniform Small Loan Law, issued in various versions starting in 1916.[43] For example, the loan chapter of Kansas's version of the Uniform Consumer Credit Code provides: "A sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings is deemed to be a loan to

36 *See* § 9.10.4.4, *infra*.

37 *See* §§ 9.10.4.3, 9.10.4.4, *infra*. *See generally* § 7.5.3.6, *supra* (non-recourse loans).

38 *See* § 9.10.4.5, *infra*.

39 *See* § 3.9, *supra*.

40 *See* Ch. 14, *infra*.

41 *See* §§ 7.2.13, 7.2.1.4, *supra*.

42 *See* § 2.3.10, *supra*.

43 *See* § 1.3.3, *supra*.

him secured by an assignment of earnings."[44] This exact language, or almost the same language, appears in the lending laws of fourteen states.[45] The reference to "unpaid" wages in these statutes makes it clear that they apply to wages that have already been earned, as long as they have not been paid. The Uniform Consumer Credit Code, on which these provisions are modeled, expressly provides that its provisions must be liberally construed.[46]

The lending laws in at least ten states have provisions that are quite similar but adhere more closely to language drafted as part of the Uniform Small Loan Act effort. Typical language in these states reads: "The payment of money, credit, goods or things in action, as consideration for any sale, assignment or order for the payment of wages, salary, commissions or other compensation for services earned or to be earned, shall, for the purposes of regulation under this chapter, be deemed a loan of money secured by the sale, assignment or order."[47] The reference to wages "earned or to be

44 Kan. Stat. Ann. § 16a-3-305(2).

45 Colo. Rev. Stat. § 5-3-206; Idaho Code § 28-43-304; Ind. Code § 24-4.5-3-403; Iowa Code § 537.3305; Kan. Stat. Ann. § 16a-3-305(2); Ky. Rev. Stat. Ann. § 286.4-570 (West); Me. Stat. Ann. tit. 9-A, § 3-305; Mo. Rev. Stat. § 408.210; N.M. Stat. Ann. § 58-15-21; N.C. Gen. Stat. § 53-180; Okla. Stat. tit. 14A, § 3-403; Or. Rev. Stat. § 725.355; S.C. Code Ann. § 37-3-403; Wyo. Stat. Ann. § 40-14-334. *See also* Colo. Rev. Stat. § 5-20-210 (applicable only to private student loans).

46 U.C.C. § 1.102 (1974 Model Code). *See generally* § 7.2.1.4, *supra*.

47 *See, e.g.*, Cal. Fin. Code § 18192 (West) ("The payment of money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, is, for the purposes of regulation under this division, a loan secured by such assignment"); Cal. Fin. Code § 22009 (West) ("The business of making consumer loans or commercial loans may include lending money and taking, in the name of the lender, … any lien on, assignment of, or power of attorney relative to wages, salary, earnings, income, or commission"); Cal. Fin. Code § 22335 (West) ("The payment by any person in money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, is, for the purposes of regulation under this division, a loan secured by the assignment"); Fla. Stat. § 516.26 ([t]he payment of $25,000 or less in money, credit, goods, or things in action as consideration for any sale or assignment of or order for the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, shall, for the purposes of regulation under, and the enforcement and interpretation of, any law, civil or criminal, relating to loans, interest charges, or usury, be deemed a loan secured by such assignment …); Minn. Stat. § 56.16 ("The payment of money, credit, goods, or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, shall, for the purposes of regulation under this chapter, be deemed a loan secured by the assignment…"); Neb. Rev. Stat. § 45-1021 ("The payment in money, credit, goods, or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commission, or other compensation for services, whether earned or to be earned, shall, for purposes of regulation under the

earned" leaves no doubt that these statutes apply to the earned wages that EWA transactions require the consumer to assign.

An interpretive opinion issued by the California Department of Financial Protection and Innovation describes the origins and purposes of this statutory language:

> Although the language pertaining to the sale or assignment of wages has changed over time, the current language appears to be modeled substantially

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Nebraska Installment Loan Act, be deemed a loan secured by such assignment ...."); Nev. Rev. Stat. § 675.330 ("The payment of money, credit, goods or things in action, as consideration for any sale, assignment or order for the payment of wages, salary, commissions or other compensation for services earned or to be earned, shall, for the purposes of regulation under this chapter, be deemed a loan of money secured by the sale, assignment or order.); N.J. Stat. Ann. § 17:11C-38 (West) ("The payment of $50,000 or less in money, credit, goods or things in action, as consideration for any sale, assignment or order for the payment of wages, salary, commissions or other compensation for services, whether earned or to be earned, shall, for the purposes of this act, be deemed a loan secured by the assignment. The transaction shall be governed by and subject to the provisions of this act and any such sale, assignment or order hereafter made shall, for the purposes of this act, be void and of no effect."); 7 Pa. Stat. & Cons. Stat. Ann. § 6218 (West) ("The payment of twenty-five thousand dollars ($25,000) or less, in money, credit, goods or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions or other compensation for services, whether earned or to be earned, shall, for the purposes of regulation under this act, be deemed a loan secured by such assignment, and the amount by which such assigned compensation exceeds the amount of such consideration actually paid shall for the purpose of regulation under this act, be deemed interest or charges upon such loan from the date of such payment to the date such compensation is payable. Such transactions shall be governed by and subject to the provisions of this act."); 19 R.I. Gen. Laws § 19-14.1-6 ("The payment in money, credit, goods, or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, shall, for the purposes of regulation under this chapter, be deemed a loan secured by the assignment…); 19 R.I. Gen. Laws § 19-14.2-6 (similar); Vt. Stat. Ann. tit. 8, § 2234 ("The payment in money, credit, goods, or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, for the purpose of regulation under this chapter, shall be deemed a loan secured by such assignment."); Va. Code Ann. § 6.2-1525 ("The payment of any amount in money, credit, goods or things in action, as consideration for any sale or assignment of, or order for, the payment of wages, salary, commission, or other compensation for services, whether earned or to be earned, shall for the purposes of this chapter be deemed a loan of money secured by the sale, assignment or order"). *See also* N.J. Stat. Ann. § 17:11C-41(a) (West) ("No consumer lender shall make any loan upon security of any assignment of or order for the payment of any salary, wages, commissions or other compensation for services earned, or to be earned, nor shall any such assignment or order be taken by a licensee at any time in connection with any consumer loan, or for the enforcement or repayment thereof, and any such assignment or order hereafter so taken or given to secure any loan made by any licensee under this act shall be void and of no effect").

on a model law, the Uniform Small Loan Law, which provided that:

> The payment of… money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, shall for the purposes of regulation under this Act be deemed a loan secured by such assignment…

(F. B. Hubachek, The Development of Regulatory Small Loan Laws, 8 *Law and Contemporary Problems* 108-145, 138, 142 (Winter 1941), https://scholarship.law.duke.edu/lcp/vol8/iss1/11.)

A 1941 law review article explains that the section was added to the model law to prevent evasions of state usury laws. The author notes that during the first half of the 20th century, many large employers paid wages "one or two weeks" after they were earned. (*Id.* at 121.) Wage buyers would "go through the motions of purchasing a portion of the earned wages at a discount" and then roll over the transaction and charge additional fees if a recipient could not pay the amount owed on payday. (*Id.*) Although these transactions could ordinarily be proved to be loans in litigation, establishing that these transactions were loans was costly and "test cases were of no permanent value." (*Id.*) As a result, the drafters of the proposed law decided to control the practice by subjecting "all wage purchases, whether *bona fide* or not, to the small loan law." (*Id.*).[48]

The California opinion also notes that nothing in the language of the provision suggests that it applies only when the worker has a personal obligation to repay the advance: "The legislative history and legal interpretations discussed above suggest that Section 22335 applies whenever the financing provider's expectation in making advances is to recoup amounts advanced through receipt of an employee's wages. It is also immaterial whether collection occurs by agreement with a consumer's employer, deductions from a consumer's account, or any other arrangement that effectively results in the provider receiving payment of the employee's wages."[49]

The lending laws in other states should be checked carefully, as searching the statutory text for terms such as "salary," "income," and "wages" may reveal similar provisions. For example, Montana and Indiana restrict the activities of "wage brokers," broadly defined,[50] and provide that

48 Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 3–4 (Feb. 11, 2022), *available at* https://dfpi.ca.gov/.

49 *Id.* at 7 n.7.

50 Ind. Code Ann. § 22-2-7- 1(a) ("Any person, company, corporation, limited liability company, or association loaning money directly or indirectly to any employee or wage earner, except the employer of the employee, upon the security of or in consideration of any assignment of the wages or salary of such employee or wage earner shall be defined

a wage broker's purchase of wages is a loan.[51] Connecticut's installment loan law incorporates the sale or assignment of wages into its definition of "small loan," defining the term to include:

> the purchase of, or an advance of money on, a borrower's future income where the following conditions are present: (A) The amount or value is fifteen thousand dollars or less; and (B) the APR is greater than twelve per cent. For purposes of this subdivision, "future income" means any future potential source of money, and expressly includes, but is not limited to, a future pay or salary, pension or tax refund.[52]

Wages that have been earned but not yet paid, and that are not required by law to be paid until sometime in the future, would clearly qualify as "future income" under this definition. Delaware's lending law provides: "No order, warrant or claim of any kind, from any employee upon his or her employer, for any salary or part thereof due or to become due to such employee from such employer, shall be taken, accepted or agreed to be taken or accepted, as security for money loaned or to be loaned."[53] Maryland's consumer loan law provides that it applies "regardless of … [w]hether the transaction purports to be the purchase of wages."[54]

In states with these provisions, there should be little question that an advance made in return for a wage assignment is a loan and is governed by the state lending law. Given their legislative history and the abuses they were enacted to address, these provisions should be liberally construed to prevent evasions.[55] For example, the California regulator emphasized that consideration of the potential for evasions was critical in finding that an EWA provider with a unique business model was not a loan, as the provider was charging less than it could have had it been licensed as a lender.[56] However, advocates should research any decisions under their state's statute and look carefully for any exemptions that might apply to the EWA provider.

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and held to be a wage broker and subject to the provisions of this chapter"); Mont. Code Ann. § 31-1-303 ("Any person, company, corporation, or association parting with, giving, or loaning money, either directly or indirectly, to any employee or wage earner, upon the security of or in consideration of any assignment or transfer of wages or salary of such employee or wage earner, shall be deemed to be a wage broker within the meaning of this part").

51 Ind. Code § 22-2-7-6; Mont. Code Ann. § 31-1-308.

52 Conn. Gen. Stat. § 36a-555(11).

53 Del. Code Ann. tit. 5, § 2242(a).

54 Md. Code, Com. Law § 12-303(a)(2)(v).

55 *See, e.g.*, U.C.C. § 1.102 (1974 Model Code); Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 4, 5 (Feb. 11, 2022), *available at* https://dfpi.ca.gov. *See generally* § 7.2.1.4, *supra*.

56 *See* Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 4, 5 (Feb. 11, 2022), *available at* https://dfpi.ca.gov.

These statutes are most clearly applicable when a third party rather than an employer provides the cash advance and then is repaid from the worker's wages. Two states have found that if the employer itself pays the wages early, it is not a loan.[57] But if the employer itself pays the wages early, it is more likely that wage and hour laws would apply (and prohibit fees).[58] There is also no categorical reason why an employer cannot be considered a lender.

EWA providers may attempt to evade state loan statutes by putting clauses in their contracts denying that the wage assignment is a wage assignment. Such clauses should be given no effect, as it is universally accepted that substance rather than form controls, and that courts will look behind the face of the documents to determine the actual nature of a transaction.[59]

9.10.4.3 State Installment Loan Laws' Definitions of "Loan"

Assuming that a state's installment loan law does not explicitly provide that a sale or assignment of wages is a loan, the next question is whether the statute's general definition of a loan encompasses EWA transactions. EWA providers may argue that the word "loan," which is sometimes used in lending laws without being defined, does not encompass loans where the lender's only means of repayment is through the wage assignment, and the lender has no other recourse against the debtor. Similarly, if the state has a definition of "loan" that incorporates the word "debt," the EWA provider may argue that, unless the creditor has a right of recourse against the individual borrower, the transaction has not created a debt.

Some state definitions of "loan" may obviate the need for any analysis of these questions. As an example, Rhode Island's small loan law defines "loan" as "any advance of money or credit," followed by a list of examples, one of which is "any other advance of money."[60] An EWA transaction is clearly an advance of money. Washington's installment loan law provides that "loan" means "a sum of money lent at interest or for a fee or other

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57 *See id.* at 5 (suggesting that an EWA that is funded by an employer rather than a third party is not a wage assignment); Kansas Office of the State Commissioner, Interpretive Opinion–FlexWage Solutions LLC (July 7, 2022), *available at* https://www.nclc.org/libary.

58 *See* § 9.10.2, *supra*.

59 *See, e.g.*, Martin v. Pacific Mills, 158 S.E. 831, 832 (S.C. 1931) (holding that a purported sale of wages that provided "[i]t is distinctly understood by both parties hereto, that I am not to be a debtor to Ross & Co. and the attached bill of sale and order is hereby given that the buyer may collect what he has bought" was "cunningly devised, but thinly veiled, to make what was plainly a loan a bill of sale—an attempted evasion of the usury law"). *See generally* § 3.9, *supra*.

60 19 R.I. Gen. Laws § 19-14-1(12).

charge and includes both open-end and closed-end loan transactions."[61] The definition is somewhat circular in that it uses the word "lent" to define "loan," but it does not suggest any requirement about the methods by which the creditor is to be repaid.

Other state lending laws do not define the term "loan," although they may embed that term in other definitions. For example, Arizona's installment loan law defines "consumer loan" as "the direct closed end loan of money, whether unsecured or secured by personal or real property, in an amount of $10,000 or less…,"[62] but does not provide a definition of "loan." Similarly, California's Financing Law, which governs non-bank installment loans, refers to the word "loan,"[63] but does not define it.

In states where the lending law itself does not define the term "loan," courts may turn to a definition found in some other section of the state's laws. For example, a 2020 California law that created the Department of Financial Protection and Innovation defines "credit" as "the right granted by a person to another person to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for those purchases."[64] (The same statute also defines "debt," as discussed § 9.10.4.4.2, *infra*.) This definition does not limit itself to debts that are to be repaid by one method vs. another. Another California statute, the state's legal interest rate law, defines a "loan of money" as "a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed."[65] While this definition indicates that it is the debtor who is obliged to return an equivalent sum, it does not specify how that obligation is to be carried out or suggest that an obligation to return that sum by means of payroll deduction or authorization to offset incoming direct deposits is insufficient.

Black's Law Dictionary defines "loan" as "a grant of something for

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61 Wash. Rev. Code § 31.04.015(14).

62 Ariz. Rev. Stat. Ann. § 6-601(7).

63 *See, e.g.*, Cal. Fin. Code § 22203 (West) (definition of "consumer loan" as a loan, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for personal, family, or household purposes…"); Cal. Fin. Code § 22204 (West) ("(a) In addition to the definition of consumer loan in Section 22203, a 'consumer loan' also means a loan of a principal amount of less than five thousand dollars ($5,000), the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes.").

64 Cal. Fin. Code § 90005(h) (West).

65 Cal. Civ. Code § 1912 (West). *See* Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 3 (Feb. 11, 2022), *available at* https://dfpi.ca.gov (citing this statute in analyzing whether an EWA transaction is a loan).

temporary use."[66] This definition also easily encompasses EWA products that are made by a third party.[67] While an employer's early payment of wages that the worker has already earned may be considered to be a permanent transfer of that money, an advance that will have to be repaid out of the worker's wages (by payroll deduction or another method) or from the worker's bank account is only for temporary use.[68] The California opinion drew a distinction between payments directly by employers, which simply satisfied part of the employer's existing financial obligation, and payments by third parties, which were for temporary use:

> [I]t is essential both that the employer, not FlexWage, is the source of the funds, and that the funds available are limited to what the employer owes the recipient. A third-party with no financial obligation to the employee could not rely upon this reasoning, because the funds provided would be for the recipient's temporary use, and the third-party would presumably arrange to recoup the amounts it advanced.[69]

While the case for treating EWAs as loans is particularly strong when the funds are advanced by a third party, California's conclusion regarding EWAs paid by employers is not without question. State laws often prohibit fees from being deducted from wage payments,[70] and employer-based EWAs are typically repaid later through payroll deduction, making the early payment much more of a loan than an actual wage payment.

EWA providers may argue that, at least in the absence of a statutory definition, the term "loan" does not apply to a non-recourse loan—one for which the debtor will not be personally liable if the loan is not repaid through the designated mechanism. Some courts have held, usually in a business context, that the non-recourse nature of a transaction such as the sale of accounts receivable is a factor that weighs on the side of finding the transaction not to be a loan.[71] Nonetheless, a number of courts have still found sales of accounts receivable and similar business transactions to be

66 *Loan*, Black's Law Dictionary (11th ed. 2019).

67 *See* Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 5 (Feb. 11, 2022), *available at* https://dfpi.ca.gov.

68 *See* Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 5 (Feb. 11, 2022), *available at* https://dfpi.ca.gov. (making this distinction). *But see* Arizona Attorney Gen. Opinion No. 122-005 (R22-011), Earned Wage Access Prodcs. (Dec. 18, 2022), *available at* https://www.azag.gov (asserting that a third-party EWA product is a permanent transfer of money to the borrower; mischaracterizing the California opinion and ignoring its repeated statements that it applies only to employer-paid wage advances). *See* § 9.10.4.8, *infra* (discussion of the many flaws in this Arizona opinion letter).

69 *See* Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 5 (Feb. 11, 2022), *available at* https://dfpi.ca.gov.

70 *See* § 9.10.2, *supra*.

71 *See* § 14.3.4, *infra*.

loans.[72]

In the consumer context, courts and government agencies routinely treat non-recourse transactions as loans.[73] For example, reverse mortgage transactions are treated as loans even though the agreement provides that the lender can collect only by proceeding against the property, not against the borrower.[74] Foreclosure rescue scams typically involve a purported "sale" of the borrower's home. The homeowner has the right to buy it back, but no obligation to do so. Courts have had no hesitation in recognizing these transactions as mortgage loans even though the borrower has no personal obligation to repay the lender by buying back the home.[75] Similarly, courts have held that pawn transactions are loans even though the transaction is structured as the sale of an item of personal property with the right to buy it back at a higher price within a specified time.[76] Indeed, regulators have often applied stricter scrutiny to loans that are based on the ability to seize collateral.[77]

Rejecting the analogy to the sale of accounts receivable is particularly appropriate in the EWA context. Wages advanced to a consumer and repaid by payroll deduction from the consumer's wages or by debiting the consumer's bank account are nothing like a commercial company's purchase of an asset of uncertain value at less than face value, recovery on which depends on payments by third parties. Many loans are repaid via payroll

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72 *Id.*

73 *See* § 7.5.3.6, *supra*.

74 National Consumer Law Center, Mortgage Lending § 9.3.5 (3d ed. 2019), *updated at* www.nclc.org/library

75 *See, e.g.*, Metcalf v. Bertrand, 491 P.2d 747 (Alaska 1971). McElroy v. Grisham, 810 S.W.2d 933, 935–936 (Ark. 1991). *Accord In re* Eyler, 2008 WL 4833096, at *4 (D. Md. Oct. 28, 2008) (finding foreclosure rescue transaction usurious; "While the transaction was characterized as a sale, the substance of the transaction as marketed to the Eylers was a loan"). *See also* Moran v. Kenai Towing & Salvage, Inc., 523 P.2d 1237 (Alaska 1974) (commercial transaction; sale-leaseback with option to purchase was usurious loan). *See generally* § 7.5.3.6, *supra* (non-recourse transactions).

76 *See, e.g.*, McGhee v. Ark. State Bd. of Collection Agencies, 289 S.W.3d 18, 24 (Ark. 2008); Sleeper v. Sweetser, 446 S.W.2d 228 (Ark. 1969) (unopposed evidence that borrower pawned a $500 ring for $50 with an option to repurchase it within ten days for $50 plus $5 interest sufficient to uphold trial court's ruling that transaction structured as pawn was a disguised loan); Gilmore v. Pawn King, Inc., 98 A.3d 808, 821 (Conn. 2014) (pawn transaction is subject to state's general usury statute, which applies to anyone who "directly or indirectly[] loan[s] money to any person; "[i]t would be inconsistent with the remedial purposes of the statute to allow pawnbrokers to impose oppressive rates on borrowers merely by structuring a transaction as a repurchase agreement rather than as a loan."). *See generally* § 7.5.3.6, *supra*.

77 *See* National Consumer Law Center, Federal Ability-to-Repay Requirements for Small Dollar Loans and Other Forms of Non-Mortgage Lending (Nov. 2021), *available at* https://www.nclc.org.

deduction without this payment mechanism raising a question whether they are loans. The application of state usury statutes to non-recourse loans is discussed in more detail in § 7.5.3.6, *supra*.

Indeed, if a clause providing that a loan was to be repaid solely through a wage assignment meant that it was not a loan, payday lenders would routinely use this ploy to evade state lending laws. They could take an assignment of wages,[78] subject only to any limits in the state's wage assignment law. Rather than increasing the risk of nonpayment, obtaining a wage assignment in place of another payment mechanism increases the certainty of repayment of a loan made to a cash-strapped borrower.[79] A recent article observed:

> Further, when loan repayments are pulled directly out of a consumer's paycheck, called payroll-attached lending, it de-risks a loan significantly. It is akin to a loan that is securitized with a consumer's income stream, or by factoring a consumer's paycheck, rather than a true unsecured loan where the lender depends on the customer's willingness to repay. This sort of "voluntary garnishment" can reduce losses for lenders … [P]ulling directly from payroll puts the lender in question at the top.[80]

There is no logical basis for making the definition of "loan" dependent on the source of payment. Payroll deduction is a method of payment.

Another important issue to investigate is whether the EWA provider's characterization of an EWA as non-recourse is accurate. An advocate should not take such an assertion at face value. The terms of the transaction may give the provider recourse against the consumer in a number of circumstances. For example, the fine print of the agreement may require the consumer to represent and warrant that, to the best of their knowledge, their wages have been earned, have not been assigned to another person, and are not subject to garnishment.[81] If, because of a garnishment, the

78 The FTC's Credit Practices Rule, 16 C.F.R. § 444.2(a)(3), would limit a wage assignment to unearned wages if the transaction was considered a credit transaction under federal law. *See* National Consumer Law Center, Federal Deception Law § 2.3 (4th ed. 2022).

79 The CFPB has described the special power that lenders have when borrowers are required to agree to repay money due through payroll deduction: "Wage assignments represent a particularly extreme form of a lender taking the control of a borrower's funds away from a borrower. When wages are assigned to the lender, the lender does not even need to go through the process of submitting a request for payment to the borrower's financial institution; the money is simply forwarded to the lender without ever passing through the borrower's hands." CFPB, Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,583 n.621 (Nov. 17, 2017).

80 Anish Acharya, Seema Amble, and Rex Salisbury, Andreessen Horowitz, The Promise of Payroll APIs (Oct. 20, 2020), *available at* https://a16z.com.

81 *See* § 9.10.1, *supra*.

consumer's wages are insufficient to repay the EWA provider, the provider may have the right to claim that the consumer has breached this warranty and is therefore liable to the provider.

9.10.4.4 State Law Definitions of "Loan" that Incorporate the Word "Debt"

9.10.4.4.1 Interpreting the language of the state lending law

Some state lending laws use the term "debt" to define the term "loan." For example, the Uniform Consumer Credit Code, upon which many states' lending laws are based, has a broad definition of "loan" that includes "the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third person for the account of the debtor."[82] Eleven states have enacted this provision verbatim or almost verbatim in their installment loan laws.[83] (In most of these states the lending law also provides that the sale or assignment of wages is *per se* a loan,[84] making the general definition of "loan" a moot point in the EWA context, but the issue of whether the definition of "loan" encompasses EWA transactions may still arise in states with similar definitions). This definition does not require or imply that the debt must be repayable directly or even indirectly by the debtor, but only that the money be paid to or for the account of the debtor and that it create a debt.[85] It would be hard to interpret this definition to exempt loans simply because the debt was to be repaid by payroll deduction or offset of incoming wages rather than directly by the debtor. In *Decision Point, Inc. v. Reece & Nichols Realtors, Inc.*,[86] the Kansas Supreme Court held that this language encompassed a transaction whereby real estate agents assigned real estate commissions to a company in return for a cash advance.

EWA providers may nonetheless argue that a debt is not a debt if it is

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82 U.C.C.C. § 1.301.

83 Colo. Rev. Stat. § 5-1-301; Idaho Code § 28-41-301; Iowa Code § 537.1301; Ind. Code § 24-4.5-3-106; Kan. Stat. Ann. § 16a-1-301(27) ; Me. Stat. tit. 9-A, § 1-301; Okla. Stat. tit. 14A, § 3-106; S.C. Code Ann. § 37-3-106; W. Va. Code § 46A-1-102; Wis. Stat. § 421.301; Wyo. Stat. Ann. § 40-14-306. *See also* 14 Guam Code Ann. § 3106.

84 *See* § 9.10.2.3.2, *supra*

85 *See* State *ex rel*. Salazar v. Cash Now Store, Inc., 31 P.3d 161 (Colo. 2001) (sale of right to receive tax refund at 50–60% of face value is loan even though borrower has no obligation to lender unless refund is less than expected; noting at p.166 n.2 that the UCCC's definition of "loan," which Colorado has adopted, "does not include the requirement of repayment").

86 144 P.3d 706 (Kan. 2006) (holding transactions to be loans despite langauge in the agreement that they were not loans but were sales of business accounts receivables at a discount; agreements required the agents to pay any shortfall if the assigned commission did not satisfy the obligaiton, and to repurchase accounts if the underlying real estate transaction failed to close).

to be repaid directly or indirectly by the employer's withholding of the employee's wages, without direct recourse against the employee if the wage deduction falls through.[87] Fake EWA providers that debit bank accounts have also claimed that their loans are not loans because they disclaim the ability to use a third-party debt collector or to hold the consumer liable for unpaid advances. But merely disavowing the right to collect a loan by other means does not mean that it is not debt.

The Colorado Supreme Court rebutted the providers' argument in *Oasis Legal Finance Group, L.L.C. v. Coffman*,[88] a decision holding that litigation financing transactions—advances to tort plaintiffs in exchange for a share of the ultimate recovery, if any, in their tort suits[89]—create a debt which brings those transactions within the UCCC definition of loan. The court noted:

> Debt is a broad concept. The UCCC contemplates the creation of debt whenever a lender makes a payment of money to a consumer.[90]

It held: "In sum, a debt is an obligation to repay. We conclude that the transactions here create debt because the plaintiffs receive a payment of money and, in exchange, they commit to fully compensate the finance companies from the future litigation proceeds."[91] The court rejected the position that a loan exists only where the borrower has an unconditional repayment obligation, and refused to "shoehorn the word 'recourse' into the statute's definition of loan."[92]

An unreported decision from a federal court in Indiana, *Blakley v. Celadon Group, Inc.*,[93] is not to the contrary. It holds that an employer's reduction of an employee's wages to recoup wage advances it had made did not create a debt, but was merely an accounting measure by which the employer ensured that it was not overpaying the employees. The court therefore held that it was not a loan under the state installment loan act or payday loan law. The case did not involve an EWA provider or any sort of assignment of unpaid wages to a third party to repay a wage advance. The court did, however, conclude that it was a fact question whether the

87 *See* Arizona Attorney Gen. Opinion No. 122-005 (R22-011), Earned Wage Access Prodcs. (Dec. 18, 2022), *available at* https://www.azag.gov (accepting this argument; see § 9.10.4.8, *infra*, for a discussion of the many flaws in this opinion letter).

88 361 P.3d 400 (Colo. 2015).

89 *See* § 14.6, *infra* (discussion of litigation funding).

90 361 P.3d at 407.

91 *Id.* at 407–408.

92 *Id.* at 408–409

93 2017 WL 2403189, at *3 (S.D. Ind. June 2, 2017).

employer had violated the state wage assignment law.[94]

9.10.4.4.2 Finding other statutory definitions of "debt"

Whenever a lending law's definition of "loan" uses the word "debt" without defining it, advocates should examine definitions of the term in other statutes. Some definitions in other statutes are very broad, and a court interpreting the lending law may look to them for guidance. For example, in evaluating the meaning of "debt" in the UCCC definition, the Colorado Supreme Court cited broad definitions from *Black's Law Dictionary*, a Colorado debt collection practices statute, the Uniform Fraudulent Transfer Act, the Uniform Commercial Code, and the Colorado Foreclosure Protection Act, plus the definition in the federal Bankruptcy Code.[95]

The Bankruptcy Code's definition is of particular note since it is in effect in all jurisdictions. It defines "debt" as a "liability on a claim."[96] The Code defines a "claim" to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[97]

The U.S. Supreme Court has rejected the argument that "claim" means "enforceable claim." Rejecting the argument that a debt beyond the statute of limitations was not a "claim," the Court explained:

> A "claim" is a "right to payment." 11 U.S.C. § 101(5)(A). State law usually determines whether a person has such a right…. And Alabama's law, like the law of many States, provides that a creditor has the right to payment of a debt even after the limitations period has expired….
>
> Johnson argues that the Code's word "claim" means "enforceable claim." … The word "enforceable" does not appear in the Code's definition of "claim." See 11 U.S.C. § 101(5)…. And it is difficult to square Johnson's interpretation with our later statement that "Congress intended ... to adopt the broadest available definition of 'claim.'" Johnson v. Home State Bank, 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991).
>
> Similarly, § 101(5)(A) says that a "claim" is a "right to payment," "whether or not such right is ... fixed, *contingent,* ... [or] *disputed*." If a contingency does

94 *Id.* at *5. *See* § 9.10.3, *supra*

95 Oasis Legal Fin. Group, L.L.C. v. Coffman, 361 P.3d 400, 407 (Colo. 2015).

96 11 U.S.C. § 101(12) ("The term 'debt' means liability on a claim."). *See* Oasis Legal Fin. Group, L.L.C. v. Coffman, 361 P.3d 400, 407–408 (Colo. 2015) (citing this definition and concluding that litigation funding agreement created a debt even though it was nonrecourse).

97 11 U.S.C. § 101(5)(A). Part B of Code § 101(5) goes on to define a "claim" as a right to equitable remedies for breach of performance.

> not arise, or if a claimant loses a dispute, then the claim is unenforceable. Yet this section makes clear that the unenforceable claim is nonetheless a "right to payment," hence a "claim," as the Code uses those terms.[98]

Just as the word "claim" has a broad meaning, courts have also observed that " 'debt' is to be given a broad and expansive reading for purposes of the Bankruptcy Code, and that when a creditor has a claim against a debtor—even if the claim is unliquidated, unfixed, or contingent—the debtor has incurred a debt to the creditor."[99]

Another widely-used source is *Black's Law Dictionary*, which defines "debt" as a "[l]iability on a claim; a specific sum of money due by agreement or otherwise."[100] EWAs easily meet this definition, as they involve a "specific sum of money" that is "due by agreement."[101] The agreement specifies exactly how that money is to be paid—by the payroll deduction authorization.

State financial services or debt collection laws may also contain useful definitions. For example, while the California lending law does not define "debt," two other California statutes do. The 2020 California Consumer Financial Protection Law—part of the law expanding the jurisdiction and powers of the state's regulator—defines the term as "any obligation of a person to pay another person money *regardless of whether the obligation is absolute or contingent*, has been reduced to judgment, *is fixed, contingent, matured, unmatured,* disputed, undisputed, secured, or unsecured and *includes any obligation that gives rise to right of an equitable remedy for*

98 Johnson v. Midland Funding, L.L.C., 581 U.S. 224, 137 S. Ct. 1407, 1412, 197 L. Ed. 2d 790 (2017).

99 *In re* Chase & Sandborn Corp., 904 F.2d 588, 595 (11th Cir. 1990); *In re* Energy Cooperative, Inc., 832 F.2d 997, 1001 (7th Cir. 1987) (rejecting argument that a contingent obligation was not a debt); Gecker v. LG Funding, L.L.C. (*In re* Hill), 589 B.R. 614, 622 (N.D. Ill. 2018) (even if sale of accounts receivable is not treated as a loan under New York law because the borrowers' obligation to pay is contingent on their receipt of future receivables, it creates a debt under the bankruptcy law).

100 *Debt*, Black's Law Dictionary (11th ed. 2019).

101 *See* Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 5 (Feb. 11, 2022), *available at* https://dfpi.ca.gov (noting that EWAs where a third party with no obligation to the employee advances earned wages would meet the *Black's* definition as "the funds would be provided for the recipient's temporary use, and the third-party would presumably arrange to recoup the amounts it advanced"); Oasis Legal Fin. Group, L.L.C. v. Coffman, 361 P.3d 400, 407–408 (Colo. 2015) (citing this definition and concluding that litigation funding agreement created a debt even though it was nonrecourse); Decision Point, Inc. v. Reece & Nichols Realtors, Inc., 144 P.3d 706 (Kan. 2006) (citing this definition; cash advance to real estate agents in return for their agreement to repay the money either through assignmenty of commissions or repurchase of the account is creates a debt).

breach of performance if the breach gives rise to a right to payment."[102] An EWA advance clearly creates an obligation on the part of the consumer to repay the advance through a payroll deduction. Moreover, EWA agreements often require a "warranty" that the consumer has earned the net wages in question and has a reasonable expectation of receiving them, or that those wages are not subject to reduction due to a lien or garnishment.[103] If the consumer breaches one of these "warranties," then the EWA provider could attempt to claim the right to proceed directly against the consumer to recover the advance. Another California statute, the Rosenthal Fair Debt Collection Practices Act, defines "debt" as "money, property or their equivalent which is due or owing or alleged to be due or owing from a natural person to another person."[104] At the point that the EWA has been advanced, there is money due and owing on payday, with an agreement to repay it by payroll deduction.

A CFPB advisory opinion issued at the end of 2020 held that a very narrowly defined EWA program did not create "debt" within the meaning of the federal Truth in Lending Act.[105] The program in question met seven criteria, including that it: was offered through an agreement with an employer; did not involve any payment of fees by the employee, voluntary or required; was repaid only by a single attempted payroll deduction; and gave the provider no right to require payments directly or indirectly from employees at any time. The CFPB stated that such a program did not create "debt" and thus was not "credit" as defined by the Truth in Lending Act.

The CFPB based this conclusion on the theory that the EWA transaction did not create a liability of the employee but rather "facilitates employees' access to wages … to which they are already entitled."[106]

The CFPB failed to recognize that an employee has no legal right to payment of earned wages until the date specified in the state's wage and hour laws, and that the employee is obligated to repay the advance from the payroll deduction.[107] Aside from the lack of "debt," the CFPB also found that the free EWAs described were not "credit" within the meaning of TILA because they were analogous to the TILA exemption for loans against the accrued cash value of an insurance policy or pension account if there is no independent obligation to repay; and because the "totality of the

102 Cal. Fin. Code § 90005(h) (West) (emphasis added).

103 *See* § 9.10.1, *supra*.

104 Cal. Civ. Code § 1788.2(d) (West).

105 85 Fed. Reg. 79,404 (Dec. 10, 2020). *See* 15 U.S.C. § 1602(f) ("the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment").

106 *Id.* at 79,406.

107 *See* § 9.10.4.5, *infra*.

circumstances" indicated that EWAs are not credit.[108]

Barely a year later, citing "significant confusion that the opinion letter had caused, the CFPB stressed that it applies only to products that do not include the payment of any voluntary or involuntary fee: "Products that include the payment of any fee, voluntary or not, are excluded from the scope of the advisory opinion and may well be TILA credit."[109] The letter stressed that the opinion had no bearing on "whether these products would be 'credit' under state law."[110]

A second CFPB action at the end of 2020,[111] now rescinded, approved the application of PayActiv, an EWA provider, to operate with specified conditions under the Bureau's "sandbox" program—a now-rescinded program under which the CFPB could grant a safe harbor from TILA liability for a regulated entity's provision of a specified product or service.[112] The PayActiv approval order deviated from the much narrower approach in the 2020 advisory opinion. In it, the CFPB extended its conclusion that certain EWA programs do not create "debt" and are not "credit" under TILA to a program that charged specified fees and might debit future payrolls if a first attempted deduction failed.[113]

The Bureau concluded that PayActiv's earned wage advance product did not amount to creation of a "debt," so was not credit, because it was non-recourse and involved providing access to the wages that the consumer had already earned. However, as discussed above, non-recourse

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108 The CFPB cited three decisions—*Meyers v. Clearview Dodge Sales, Inc.*, 384 F. Supp. 722, 728 (E.D. La. 1974), *aff'd in part, rev'd in part,* 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977); *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 436 (5th Cir. 1998); and *Arrington v. Colleen, Inc.*, 2001 WL 34117735 (D. Md. Mar. 29, 2001)—for its assertion that it could apply a "totality of the circumstances" test to conclude that a transaction was not credit, but all three merely say that substance controls over form, and all three *reject* lenders' characterization of their transactions or practices as falling outside TILA. *See* National Consumer Law Center, Truth in Lending § 2.1.2 (10th ed. 2019), *updated at* www.nclc.org/library (substance controls over form in interpreting TILA); National Consumer Law Center, Truth in Lending § 2.5.9a.3 (10th ed. 2019), *updated at* www.nclc.org/library (discussing this opinion letter).

109 Letter from Acting CFPB General Counsel Seth Frotman to Beverly Brown Ruggia, et al. 2 (Jan. 18, 2022), *available at* https://www.nclc.org.

110 *Id.*

111 CFPB, Approval Order (Dec. 30, 2020), *available at* https://files.consumerfinance.gov. This approval letter, along with the company's application and the CFPB's 2022 order rescinding the approval, are available at https://www.consumerfinance.gov.

112 84 Fed. Reg. 48,246 (Sept. 13, 2019). *See* National Consumer Law Center, Truth in Lending § 1.5.3.3.5 (10th ed. 2019), *updated at* www.nclc.org/library.

113 *See* CFPB, Press Release, Consumer Financial Protection Bureau Issues an Approval Order to Facilitate Employee Access to Earned but Unpaid Wages (Dec. 30, 2020), *available at* https://www.consumerfinance.gov; CFPB, Approval Order (Dec. 30, 2020), *available at* https://www.consumerfinance.gov.

transactions can still create debt and credit,[114] and it is a fiction that wages which an employee has earned but are not yet due are the employee's "own money."[115]

Consumer advocates sharply criticized the PayActiv sandbox order,[116] and in 2022 the CFPB rescinded both it[117] and the entire sandbox program.[118] Even when it was in effect, it was entitled to little or no deference. The CFPB's former "sandbox" program allowed the agency to grant just a time-limited safe harbor for a single provider under specified provisions of the Truth in Lending Act.[119] The PayActiv order applied only to PayActiv, was to be in effect only for twenty-four months, and did not create any general rule for EWA products generally.

These CFPB actions should have no effect on the question whether an EWA program is governed by state lending laws. First, the rescission of the sandbox order is a strong indication that the CFPB does not endorse the analysis in that letter, and its General Counsel's letter about the confusion caused by the advisory opinion makes it completely clear that that opinion should not be construed as having any impact on state law. Both determinations interpret a federal statute, and that statute deals with disclosure requirements rather than setting rate caps and other substantive limits on consumer loans.

Second, the advisory opinion is solely limited to free programs that are likely exempt from TILA for other reasons,[120] so should have no bearing on programs that charge or accept fees or other amounts from consumers.[121]

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114 *See* § 9.10.4.3, supra.

115 *See* § 9.10.4.5, *infra*.

116 *See* NCLC, et al., Letter to Director Consumer Financial Protection Bureau Expressing Concern About Prior Leadership's Finding That Certain Earned Wage Access Products Are Not "Credit" Under TILA (Oct. 12, 2021), *available at* https://www.nclc.org/.

117 Order to Terminate Sandbox Approval Order, *In re* Payactiv, Inc. (FRB-CFPB June 30, 2022), *available at* https://files.consumerfinance.gov. *See also* Press Release, CFPB Rescinds Special Regulatory Treatment for Payactiv (June 30, 2022), *available at* https://files.consumerfinance.gov (noting that Payactiv requested the termination after the CFPB informed Payactiv that it was considering terminating the approval order in light of certain public statements the company made wrongly suggesting a CFPB endorsement of its products).

118 CFPB, Statement on Competition and Innovation (eff. Sept. 30, 2022), *available at* https://files.consumerfinance.gov/

119 84 Fed. Reg. 48,246 (Sept. 13, 2019). *See* National Consumer Law Center, Truth in Lending § 1.5.3.3.5 (10th ed. 2019), *updated at* www.nclc.org/library (describing the sandbox program).

120 This EWA provider is likely not a "creditor" as defined by TILA because it does not impose a finance charge or require repayment in more than four installments. *See* 15 U.S.C. § 1602(g)(1).

121 *See* Letter from Acting CFPB General Counsel Seth Frotman to Beverly Brown Ruggia,

Moreover, both opinions were undertaken without notice and comment rulemaking,[122] so do not have the force of law[123] and would deserve little deference even if they addressed the interpretation of state law.

9.10.4.5 "It's the Consumer's Own Money"

Another argument sometimes made to support the claim that EWAs are not credit is that their wage advances are not loans because consumers are merely accessing their own money.[124] EWA fees have been analogized to ATM fees. But many other types of loans, such as home equity loans or pawn loans, are made against an asset the consumer already owns and merely facilitate access to the value of that asset. As another example, reverse mortgage loans enable a homeowner to have early access to home equity that the homeowner already owns. Without pointing to some language in the specific state lending statute in question that excludes loans that borrow against an existing asset, there is no basis for excluding EWAs on this ground.

Moreover, it is a misstatement to say that the earned wages are the consumer's own money before they are paid. First, unlike funds in a demand deposit account that can be accessed through an ATM or a bank teller, the employee has no right to those wages until payday. Indeed, the state's wage and hour laws may not require the employer to pay this debt until some later date after the scheduled payday.

Second, the consumer's employer may not even have the money yet. The employer may be able to make payroll only after some payments from customers come in, or it may have to take out a loan to make payroll. Or it may not make payroll at all. The earned wages represent a debt that the employer owes. This is a high-priority debt for the employer to pay, and there are penalties if the employer does not pay it, but the money to pay it

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et al. 2 (Jan. 18, 2022), *available at* https://www.nclc.org (stressing that CFPB advisory opinion "on its face is limited to circumstances in which 'the employee makes no payment, voluntary or otherwise … and the provider or its agents do not solicit or accept tips or any other payments from the employee.' … Products that include the payment of any fee, voluntary or not, are excluded from the scope of the advisory opinion and may well be TILA credit.").

122 *See* CFPB, Policy on the Compliance Assistance Sandbox, 84 Fed. Reg. 48,246, 48251 (Sept. 13, 2019) (sandbox rulings would not be legislative rules and will not require notice and comment rulemaking).

123 PDR Network, L.L.C. v. Carlton & Harris Chiropractic, Inc., ___ U.S. ___, 139 S. Ct. 2051, 2055, 204 L. Ed. 2d 433 (2019).

124 The CFPB made this argument in 2020, analogizing EWAs to loans against the accrued cash value of an insurance policy or a pension account if there is no independent obligation to repay, which the Federal Reserve Board exempted in official comments in 1981 when implementing the Truth in Lending Simplification and Reform Act. *See* CFPB, Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79,404 (Dec. 10, 2020) (quoting 46 Fed. Reg. 20,848, 20,851 (Apr. 7, 1981)).

does not necessarily even exist at the time the worker obtains an EWA.

Third, the employer may receive, or may have already received, a garnishment. A garnishment would mean that some other entity has a claim to a portion of those wages that is superior to the worker's claim, so again the earned but unpaid wages would not be the worker's money. The lender's use of a wage assignment still makes repayment far more assured than if it had to rely on the borrower to repay the loan after receiving the wages, but the possibility of a garnishment is another demonstration of the inaccuracy of the claim that the lender is merely providing access to money that is already the consumer's own money.

The EWA lenders' argument also ignores the many state laws, discussed in § 9.10.4.2, *supra*, that specifically provide that an assignment of wages in return for an advance of funds is a loan.

9.10.4.6 State Payday Loan Laws

Most state payday loan laws apply only where the lender takes a post-dated check or ACH authorization as part of the transaction. An EWA program that relies on payroll deduction or offsetting incoming direct deposits as the method of repayment is unlikely to fall within the scope of the state payday loan law. However, some EWA programs require the consumer to give it a post-dated authorization to debit the bank account into which the consumer's wages will be deposited. A state's payday loan law should apply to these programs, and thus require the lender to be licensed if it wishes to charge more than the general or legal usury limit. An opinion by the California financial services regulator holds that the state payday loan law did not apply to wage advances that were made directly by an employer itself and that were limited to wages that a worker had already earned, but that earned wage advances funded by third parties could not rely on the opinion.[125]

Of course, most payday loan laws authorize extremely abusive transactions, so in most states winning a ruling that the state's payday loan law applied to EWAs would not prevent abusive EWAs. However, application of the payday loan law, which might limit the size of loans or have some restrictions, might be better than a complete absence of regulation. In addition, if advocates succeeded in amending the payday loan law to impose an APR cap and other protections, those would apply to EWAs as well.

9.10.4.7 Legal Interest Rate Statutes

The state installment loan laws and payday loan laws discussed in the preceding sections regulate specific types of non-bank lenders. Whether or

125 Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage 6–7 (Feb. 11, 2022), *available at* https://dfpi.ca.gov (page citations to *Lande* omitted).

not such a statute applies to an EWA provider, the state may have a general usury statute or a legal interest rate statute that applies. For example, the Sixth Circuit interpreted a Kentucky statute that capped the interest rate for "money due or to become due upon any contract or other obligation in writing" to be applicable to a litigation funding contract even though repayment was contingent on the success of the litigation.[126] The court held that it was irrelevant whether the transactions were termed loans or "non-recourse investments," because the statute was not limited to loans.

While the case involved litigation funding rather than an EWA transaction, its reasoning would be equally applicable to EWA transactions, and would obviate the need to determine whether they are loans. To the extent that EWA providers do not have licenses required under those other statutes or otherwise argue that other lending statutes do not apply, the legal interest rate statute might be the default statute to apply. However, advocates should examine their legal interest rate statutes carefully. Some do not apply when another statute sets a different rate cap, and some of these statutes' interest rate caps have significant loopholes. Legal interest rate statutes are cited in Appendix B, *infra*.

9.10.4.7a State Regulatory Activity

The CFPB's issuances with respect to EWAs are discussed in § 9.10.4.4.2, *supra*. In addition, a number of state regulatory agencies and attorneys general have issued opinion letters or undertaken actions regarding EWAs. The state activities are described below.

California. In 2022, the California Department of Financial Protection and Innovation issued an interpretive opinion that interprets California law in several significant ways as it applies to EWAs.[127]This interpretive opinion has been cited throughout the preceding subsections' discussion of EWAs.

The opinion begins by articulating several basic principles under California law:

- The state's consumer lending law, the California Financing Law (CFL), should be liberally construed and applied to protect borrowers against unfair practices.[128]
- The provision of the CFL that defines the payment of money in return for the sale of assignment of wages must be broadly construed, and encompasses "any transaction where a worker grants someone an interest, or otherwise agrees to allow … someone else to receive, their earned or unearned wages."[129]

126 Boling v. Prospect Funding Holdings, L.L.C., 771 Fed. Appx. 562 (6th Cir. 2019), *aff'g* 2017 WL 1193064 (W.D. Ky. Mar. 30, 2017).

127 Calif. DFPI, File No: OP 8206, Interpretive Opinion–FlexWage (Feb. 11, 2022), *available at* https://dfpi.ca.gov (page citations to *Lande* omitted).

128 *Id.* at 3.

129 *Id.* at 4.

- A wage advance by a third party is a loan as defined by *Black's Law Dictionary*, as the funds would be for the recipient's temporary use and the third-party lender would presumably arrange to recoup the funds it advanced.[130]

After announcing these principles, the opinion applies them to the EWA program at issue. That program was unlike most EWA programs, in that the funds were paid directly by the employer, not advanced by a third party. The EWA provider did not provide the advanced funds itself or assist the employer in securing financing for the advances. The program was integrated with the employer's payroll and time/labor systems, enabling the provider to calculate an accurate net wage and practically eliminating any risk that the advance would exceed the worker's next paycheck.[131]

In light of these facts, the agency determined that this particular EWA product was not a loan. In reaching this conclusion, the agency relied on two "necessary" elements.

First, the agency repeatedly emphasized that it was essential to its analysis that the employer rather than the third-party provider was the source of the funds and that the funds were limited to the amount the employer owed the worker.[132]

The second necessary element was that the EWAs fee structure did not suggest that the product was being marketed to evade the state lending law's limits, as the fees charged were lower than were permitted under the consumer loan law.[133]

The California agency distinguished the case where an employer advances amounts exceeding the worker's earned wages.[134] The agency also stressed that, while the EWA program in question was non-recourse, that fact was immaterial to its analysis.[135]

A year earlier, the Department had entered into a series of memoranda of understanding (MOU) with several EWA, fake EWA, and other types of wage advance providers, requiring them to provide information to the Department so that it could study the programs and determine how to regulate them.[136] The MOUs gave the providers temporary permission to

130 *Id.* at 5.

131 *Id.* at 1–2.

132 *Id.* at 4, 7 n.7.

133 *Id.* at 5–6, 7.

134 *Id.* at 5.

135 *Id.* at 7.

136 Memorandum of Understanding, Even Responsible Finance, Inc. (Jan. 6, 2021), *available at* https://dfpi.ca.gov/; Memorandum of Understanding, Activehours, Inc. (Jan. 4, 2021), *available at* https://dfpi.ca.gov/; Memorandum of Understanding, Bridge IT, Inc. (Jan. 8, 2021), *available at* https://dfpi.ca.gov/; Memorandum of Understanding,

operate in California, in exchange for an agreement to report data, but did not determine whether the providers were offering loans covered under California's lending or licensing laws. The EWA providers also agreed that, in the interim, they would calculate an APR for these transactions pursuant to Truth in Lending Act rules, though the agreements specified that virtually all of the fees that the providers charge, such as "tips," access fees, expedite fees, and participation fees, need not be included in the APRs.[137] These MOUs were explicit that they did not purport to announce any policies or interpret any laws.

Kansas. In 2022, the Kansas financial services regulator issued an interpretive opinion[138] on the same loan product offered by the same EWA provider as the 2022 California opinion (under which, unlike most or all other EWA providers, the employer directly pays the earned wages). Its very short letter concludes that the provider does not require a license under the Kansas UCCC to operate its EWA program. The Kansas interpretive opinion makes it clear that the agency's "determination is based on employer funding, no advancement of unearned wages, and the lack of a repayment obligation." It is consistent with the California regulator's approach and does not amount to approval of any other approach.

Arizona. In late 2022, the Arizona Attorney General, in his last days in office, issued an opinion letter that deviates from the California and Kansas approach.[139] The opinion holds that earned wage advances are not "consumer loans" based on two theories. First, it finds that they are not loans because they are supposedly "non-recourse." That conclusion is not based on any provision of Arizona's lending laws. Instead, it relies on a distortion of the California interpretive opinion, inappropriate application of the CFPB's 2020 advisory opinion,[140] and the curious assertion that the cash

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Payactiv, Inc. (Jan. 14, 2021); Memorandum of Understanding, Branch Messenger Inc. (Jan. 22, 2021), *available at* https://dfpi.ca.gov/.

137 The MOUs may have made unjustified assertions about TILA's requirements.

138 Kansas Office of the State Commissioner, Interpretive Opinion–FlexWage Solutions LLC (July 7, 2022), *available at* https://www.nclc.org/library. The substantive portion of the opinion reads in full: "At this time, we have determined the services you provide do not require a supervised loan license. This determination is based on employer funding, no advancement of unearned wages, and the lack of a repayment obligation. Loan, in the UCCC is defined as several mechanisms to either create or defer debt; see K.S.A. 16a-1-301 (27) for the full definition. Since access to already earned wages are employer funded, Flexwage is not creating a debt for the employee. The fee structure for data services to ensure this process was also considered."

139 Arizona Attorney General, Earned Wage Access Products, Opinion No. I22-005 (R22-011) (Dec. 18, 2022), *available at* https://www.azag.gov.

140 *See* § 9.10.4.2.2, *supra* (discussion of the CPB advisory opinion and the CFPB's reminder that it addresses only EWA programs that do not involve payment of any voluntary or involuntary fee and does not provide guidance as to what constitutes "credit" or a "loan" under state law).

advanced by a third-party EWA provider belongs permanently to the consumer.[141]

The second basis for the opinion is that the Arizona lending law defines a loan as one subject to a finance charge and exempts certain limited fees from the definition of "finance charge." However, the opinion ignores the limits of the fee exceptions. In fact, EWAs in Arizona are likely to be charging fees that are "finance charges" under Arizona law. The errors in the Arizona opinion are thoroughly laid out in a 2023 letter seeking rescission of the opinion.[142]

State regulators' multi-state investigation. In 2019, twelve state regulators announced a multi-state investigation into the payroll advance industry and allegations of unlawful online lending. The press release announcing the investigation stated:

> Members of the industry purport to provide consumers access to wages already earned prior to payroll. However, some of these firms appear to collect usurious or otherwise unlawful interest rates in the guise of "tips," monthly membership and/or exorbitant additional fees, and may force improper overdraft charges on vulnerable low-income consumers. The investigation focuses on whether companies are in violation of state banking laws, including usury limits, licensing laws and other applicable laws regulating payday lending and consumer protection laws.[143]

The investigation appears to have expanded beyond the "tips" model to encompass employer-based products. The subsequent onset of the coronavirus crisis may have delayed progress on the investigation, and no further news has been announced as of early 2023, though the investigation is said to be ongoing.

141 *See* § 9.10.4.3, *supra*.

142 *See* Letter from NCLC et al. to Arizona Attorney General Kris Mayes (Jan. 24, 2023), *available at* https://www.nclc.org.

143 *See* Press Release, New York Dep't of Fin'l Svcs., Superintendent of Financial Services Linda A. Lacewell Leads Multistate Investigation of the Payroll Advance Industry (Aug. 6, 2019), *available at* https://www.dfs.ny.gov. *See generally* § 4.2.2, *supra (*whether voluntary payments are interest).