Earned Wage Access: Employee Perk or Small Business Killer?

Harper Beasley

I. INTRODUCTION

In recent years, the earned wage access (EWA) market—which allows workers to collect wages they have earned before their scheduled paycheck date[1]—has been growing rapidly.[2] These programs are a lower-risk alternative to payday loans, and many hourly wage employees consider EWAs to be a valuable employee fringe benefit.[3] EWA programs (EWAs) all have slightly different operating structures, but they are often employee sponsored and offered to employees as a fringe benefit.[4] Many large companies, such as Walmart and Amazon, have partnered with third-party companies to provide EWAs as a benefit to their employees.[5]

Currently, regulatory uncertainty is a major concern for the EWA market.[6] Essentially, EWAs and companies that offer EWAs do not currently know how extant laws will be applied to their products.[7] The regulation of EWAs will influence the viability of various EWA structures. These regulations will impact both American workers and the businesses that employ a large number of those workers. As is often the case, small businesses will be hit particularly hard by this regulation. Certain EWA features make the programs difficult to implement in a small business environment. Specifically, EWAs that look less like credit products—receiving less regulatory scrutiny—are better suited for larger companies. Thus, many existing EWA structures, especially those structures with long-term viability, may not be practical for small businesses.

This Note examines existing critiques of EWA structures and reviews the current regulatory landscape. Then it adds to the scholarship by analyzing how the structures and regulatory landscape impact small businesses compared to large corporations. Additionally, this Note will recommend how the industry can be further regulated to protect

1. Nakita Q. Cuttino, *The Rise of "FringeTech": Regulatory Risks in Earned-Wage Access*, 115 NW. U. L. REV. 1505, 1508 (2021).

2. Jose Murillo, Boris Vallee & Dolly Yu, Fintech to the (Worker) Rescue: Earned Wage Access and Employee Retention 5 (Apr. 8, 2022) (unpublished manuscript), https://www.hbs.edu/faculty/Pages/item.aspx?num=62332 [https://perma.cc/55JA-DWRE] (finding that earned wage access withdrawals tripled from 2017 to 2020); *see also* Jeffrey Gangemi, *What is Earned Wage Access, and Should You Provide It?*, STAFFING.COM (Apr. 28, 2021), https://www.staffing.com/what-is-earned-wage-access-and-should-you-provide-it-untitled/ [https://perma.cc/TW55-JQ62] (describing the basics of earned wage access and its continued and projected growth).

3. Todd Baker & Snigdha Kumar, *The Power of Salary Link: Assessing the Benefits of Employer-Sponsored FinTech Liquidity and Credit Solutions for Low-Wage Working Americans and Their Employers* 2–3, 7–8 (Mossavar-Rahmani Ctr. for Bus. & Gov't, Harv. Kennedy Sch., Working Paper No. 88, 2018).

4. *See infra* Part II.A.2 (discussing different EWAs).

5. Cuttino, *supra* note 1, at 1513.

6. *See* Jim Hawkins, *Earned Wage Access and the End of Payday Lending*, 101 B.U. L. REV. 705, 742 (2021) (stating that the uncertainty on whether "[r]easonable courts or regulators" will conclude that EWAs are loans "inhibits the[ir] beneficial development").

7. *Id.* at 754.

EWA users without limiting small businesses' ability to offer the same perks as their larger counterparts.

II. BACKGROUND

A. The Earned Wage Access Market

1. The Game

EWAs are internet-based or mobile-based applications that allow workers to collect earned (but unpaid) wages *before* the date the workers typically receive their paycheck.[8] Simply put, it allows workers to get paid in advance. These programs use payroll data to calculate hours worked and then allow workers access to the wages accrued for those hours.[9] At the end of the pay period, those wages are deducted from the employees' paychecks.[10] Some programs work with the employer to collect payroll data, while other programs rely directly on the employee to determine the hours worked.[11] The EWAs allow employees to access the wages they have accrued nearly instantly.[12] Depending on the EWA, there are limits on the percentage of earned wages available to the employee in addition to limits on the number of wage withdrawals the employee can make in a given pay period.[13]

There are a variety of fee structures for EWA services.[14] These range from per-transaction fees, to monthly subscription costs, and even "voluntary" tip-based arrangements.[15] EWAs all have slightly different operating configurations. Details of the structures used by some prominent players in the EWA industry are described in Part II.A.2.

EWAs often advertise themselves as financial wellness tools.[16] EWAs may act as a lower-risk alternative to payday loans by "offer[ing] workers access to money without

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8. Memorandum from the Fin. Servs. Comm. Majority Staff to Members of Comm. on Fin. Servs. 3 (Oct. 28, 2021), https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-20211102-sd002.pdf [https://web.archive.org/web/20220919215309/https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-20211102-sd002.pdf].

9. *Id.*

10. Cuttino, *supra* note 1, at 1511.

11. Murillo, Vallee & Yu, *supra* note 2, at 5; *compare Frequently Asked Questions*, PAYACTIV, https://www.payactiv.com/faq/ [https://perma.cc/5XL5-QH9X] (working with employers to obtain relevant employee data), *and Frequently Asked Questions*, DAILYPAY, https://www.dailypay.com/frequently-asked-questions/ [https://perma.cc/PEW6-YTDY] (same), *with Frequently Asked Questions*, EARNIN, https://www.earnin.com/faqs [https://perma.cc/9JLK-7UC8] (obtaining relevant information directly from the employee).

12. Cuttino, *supra* note 1, at 1519–20.

13. *Id.* at 1519; *see infra* Part II.A.2.

14. Cuttino, *supra* note 1, at 1519; Lauren Hirota, *Tomayto, Tomahto: The Cunning New Face of Payday Lending*, 52 U. PAC. L. REV. 185, 192–93 (2020); *see infra* Part II.A.2.

15. Cuttino, *supra* note 1, at 1521; *see infra* Part II.A.2.

16. *See Financial Wellness Platform and Benefits for Employees*, PAYACTIV, https://www.payactiv.com/holistic-financial-wellness-platform/ [https://perma.cc/89CY-UPWG] (describing product as a "Holistic Financial Wellness"); Hawkins, *supra* note 6, at 710 ("Businesses offer these fintech products as part of financial wellness benefit packages, and the number of businesses offering such packages is increasing every year.").

cripplingly high costs,"[17] and many hourly wage employees consider EWAs an employment perk.[18]

2. *The Players*

The operational structures of four big EWAs—PayActiv, DailyPay, Even, and Earnin—are described below. There are other EWAs on the market, but these four are examined because they reflect the wide variety of structures utilized by EWAs today. Evidence of the popularity of these products is shown by their substantial funding and large client bases.

a. PayActiv

PayActiv is a third-party EWA that integrates with the employer's payroll system.[19] PayActiv deducts early accessed wages from the employee's paycheck directly before any of the employee's wages are sent via direct deposit to their bank.[20] PayActiv allows employees to withdraw up to 50% of their earned wages in a given pay period.[21] PayActiv currently functions with a per-transaction fee model.[22] Employees may choose to have wages instantly available on a PayActiv prepaid debit card. Alternatively, they can choose to have wages available in a bank account or other debit card within 48 hours.[23] All non-PayActiv card transfers have a $1 fee, and fees are capped at $5.00 total per pay period.[24] Card transfers to a non-PayActiv card can be made instantly for $1.99 per transaction.[25]

PayActiv has settled over $1 billion in transfers[26] and has prominent partnerships with Macy's and Aimbridge Hospitality (the world's largest third-party hotel operator).[27] As of

17. Hawkins, *supra* note 6, at 759.
18. Cuttino, *supra* note 1, at 1512; Baker & Kumar, *supra* note 3, at 8.
19. *Frequently Asked Questions*, PAYACTIV, *supra* note 11; Hawkins, *supra* note 6, at 716.
20. *Frequently Asked Questions*, PAYACTIV, *supra* note 11; Hawkins, *supra* note 6, at 715–16.
21. *Frequently Asked Questions*, PAYACTIV, *supra* note 11.
22. *Id.*; Herman Donner & Francis Daniel Siciliano, The Impact of Earned Wage Access on Household Liquidity and Financial Well-Being 15 (Dec. 10, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4007632 [https://perma.cc/YP76-72FP].
23. *Frequently Asked Questions*, PAYACTIV, *supra* note 11; Donner & Siciliano, *supra* note 22, at 15.
24. *Frequently Asked Questions*, PAYACTIV, *supra* note 11.
25. *Id.*; Donner & Siciliano, *supra* note 22, at 15.
26. Press Release, PayActiv, PayActiv Crosses $1 Billion in Processed Funds for Timely Earned Wage Access to the Underserved and Underbanked Workforce (Jan. 4, 2019), https://www.payactiv.com/press/payactiv-crosses-1-billion-in-processed-funds-for-timely-earned-wage-access-to-the-underserved-and-underbanked-workforce/ [https://perma.cc/NMN9-SLJU]; Cuttino, *supra* note 1, at 1512.
27. *Macy's Perks & Benefits*, MACY'S, https://ebwh.fa.us2.oraclecloud.com/hcmUI/CandidateExperience/en/sites/CX_1001/pages/95001 [https://perma.cc/LQZ9-PCAM]; Press Release, PayActiv, Aimbridge Hospitality Selects Payactiv to Deliver Financial Empowerment to 35,000 Associates (July 28, 2021), https://www.payactiv.com/press/aimbridge-hospitality-selects-payactiv-deliver-financial-empowerment/ [https://perma.cc/BG4X-4JCP].

2020, PayActiv had received over $120 million in venture capital funding.[28] It is also a Certified B Corp and Public Benefit Corporation.[29]

b. DailyPay

Like PayActiv, DailyPay is a third-party employer-linked EWA.[30] DailyPay also works on a per-transaction fee model.[31] However, direct deposit transactions cost $1.25–$1.99 per transaction, and debit transfers cost $2.49–$2.99 per transaction.[32] Unlike PayActiv, DailyPay does not have a percentage-based withdrawal limit on earned wages.[33] DailyPay users can withdraw accrued wages up to three times per day at any value from $5.00– $1000.00.[34] In practice, there is no functional withdrawal limit on earned wages for participating workers.[35] DailyPay does not interact with the employee's paycheck. Instead, DailyPay requires employees to use the same direct deposit or debit account for both the employee's direct deposit from their employer and DailyPay's earned wage deposits.[36] DailyPay uses this employee bank account to make an auto-deduction on the employee's payday equal to the amount of accrued wages withdrawn during that pay period, as well as any associated fees from those transactions.[37]

Companies currently offering DailyPay include Six Flags Entertainment Corporation, Berkshire Hathaway, and The Kroger Company.[38] The service is available for employers with over 500 employees.[39] DailyPay received over $175 million in venture capital funding in 2021.[40]

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28. *PayActiv Raises $20 Million to Expand Financial Wellness Offering for Millions of Financially Stressed Workers*, BUS. WIRE (Aug. 10, 2018), https://www.businesswire.com/news/home/20181010005566/en/PayActiv-Raises-20-Million-to-Expand-Financial-Wellness-Offering-for-Millions-of-Financially-Stressed-Workers [https://perma.cc/BTV9-C2FL]; Press Release, PayActiv, PayActiv Secures $100 Million of Funding for Employer-Sponsored Financial Wellness Solutions (Aug. 13, 2020), https://www.payactiv.com/press/payactiv-secures-100-million-of-funding-for-employer-sponsored-financial-wellness-solutions/ [https://perma.cc/B6CE-N2N5].

29. Press Release, PayActiv, *supra* note 28.

30. *Frequently Asked Questions*, DAILYPAY, *supra* note 11.

31. *Id.*

32. *Id.*; Donner & Siciliano, *supra* note 22, at 16.

33. *Frequently Asked Questions*, DAILYPAY, *supra* note 11.

34. *Id.*

35. In a biweekly pay cycle, an employee that is employed for 40-hour weeks and making $37.50 per hour could withdraw all their accrued wages the day before payday without exceeding the limits.

36. *See* DAILYPAY, *supra* note 11.

37. *Id.*

38. *Earned Wage Access 2023: Impact on Retention & Hiring*, DAILYPAY (Nov. 30, 2022), https://www.dailypay.com/resource-center/blog/what-is-earned-wage-access// [https://perma.cc/8RS5-HKYN].

39. *DailyPay Instant Access to Earned Income*, ADP MARKETPLACE, https://apps.adp.com/en-US/apps/221925/dailypay-instant-access-to-earned-income/overview [https://perma.cc/EC83-U2ZP].

40. Luis Garcia, *Carrick Leads $175 Million Investment in DailyPay*, WALL ST. J. (May 18, 2021), https://www.wsj.com/amp/articles/carrick-leads-175-million-investment-in-dailypay-11621335605 [https://perma.cc/H2YD-4VBC].

c. Even

Even is another third-party, employer-linked EWA. It uses a "membership model" that charges employees a monthly membership fee to use the service.[41] The employer may subsidizes this fee.[42] For example, while typical users pay $8.00 per month, Walmart employees only pay $6.00 per month for Even's EWA service.[43] Even uses employer documentation of hours worked in the wage period to determine accrued wages and provides employers with the freedom to limit the percentage of earned wages accessible to employees (up to 50% of net pay, once per pay period).[44] Employees can be paid by direct deposit, a "paycard" (similar to a Visa prepaid card), or cash pickup at a Walmart Money Center.[45] These funds are generally available within two business days of the EWA request.[46] Even does not directly withdraw money from paychecks.[47] Instead, it deducts from the bank account linked to the employee's paycheck direct deposit.[48] There is conflicting documentation on whether the service automatically cancels after going unused for two months or if Even charges membership fees for months when wages are not accessed early.[49]

Even has provided more than $2.5 billion in on-demand pay for its members and has received $40 million in venture capital funding.[50] Even focuses on large, Fortune 1000 employers and partners with high-profile employers such as PayPal, Walmart, and Humana.[51]

d. Earnin

Unlike other leading EWA providers, Earnin eliminates all interaction with employers. The Earnin app determines hours worked by either referring to an employee-

41. *Even Terms and Conditions*, EVEN, https://www.even.com/legal/basic-and-plus-terms [https://perma.cc/7TQB-9MHB].

42. *See id.* Employees who sign up for Even Plus "agree to pay a regular monthly fee of $8 . . . ." *Id.* When employers partner with Even, however, the employer may include Even's base fee as a benefit of employment. *Id.* Walmart covers the cost of basic subscriptions to Even's EWA product for all associates and subsidizes Even Plus costs. WALMART, EVEN FAQ FOR WALMART ASSOCIATES 7–8 (2021), https://one.walmart.com/content/dam/themepage/pdfs/COVID_Walmart_Even_FAQ.pdf [https://perma.cc/YD8S-EC3Z]. How much of the Even Plus fee is covered by the employer is specific to the employer. *Even Terms and Conditions*, *supra* note 41 ("If you are participating in the Even program through an Employer Partner, your Even Plus Fee is set out in the relevant Employer Addendum.").

43. *See* sources cited *supra* note 42.

44. Donner & Siciliano, *supra* note 22, at 214; *Even Terms and Conditions*, *supra* note 41.

45. *Even Terms and Conditions*, *supra* note 41.

46. *Id.*

47. *Id.*

48. *Id.*

49. Juliana Feliciano Reyes, *Why Some Workers Think Walmart's Pay-in-Advance App Is a Lousy Deal*, PHILA. INQUIRER (Aug. 28, 2018), https://www.inquirer.com/philly/news/walmart-pay-in-advance-app-fees-20180828.html [https://perma.cc/H2YD-4VBC].

50. Jeff Kauflin, *VCs Bet $40 Million on Money App for Those Living Paycheck to Paycheck*, FORBES (July 19, 2018), https://www.forbes.com/sites/jeffkauflin/2018/07/19/payday-loans-be-gone-a-growing-set-of-startups-are-gunning-to-unseat-them/#18f219446850 [https://perma.cc/T52H-NR64].

51. EVEN, https://www.even.com/platform/product [https://perma.cc/S5YN-X3ZH].

supplied timesheet or, more commonly, using an app location feature.[52] Earnin does not have a fee structure, but suggests a tip for each transaction with a maximum tip of $14.00 per $100.00 transaction.[53] Earnin distributes accrued wages through direct deposit, and then directly debits the user's account on payday.[54] The app limits transactions to $250.00 per pay period when users first sign up.[55] This limit adjusts up to $500.00 per pay period when users practice responsible habits. Alternatively, the limit adjusts down to $50.00 per pay period when users repeatedly overdraw their accounts.[56] It is worth noting that overdrawing is not the only factor in determining the maximum payout.[57] Earnin is vague when describing how the equation that determines the maximum payout works, and that equation can change at any time, without notice.[58] Earnin also allows users to postpone the direct repayment until their next payday once per 180 days so long as the user notifies Earnin two business days prior to the direct repayment date.[59]

Earnin had 2.5 million active users in 2021[60] and has raised over $190 million in venture capital funding.[61]

B. Legal Issues in the Earned Wage Access Market

1. Regulatory Uncertainty

According to some commentators, "[t]he earned wage access market creates detrimental regulatory blind spots and enables regulatory arbitrage by blurring the lines between once-distinct financial services: money-transmission services and loan

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52. *Frequently Asked Questions*, EARNIN, *supra* note 11 (explaining how the app determines hours worked and noting that the location feature only functions if the employee works in a non-residential area); *see generally* Cuttino, *supra* note 1, at 1519 (outlining common earned wage program methods).

53. Steve Nicastro & Annie Millerbernd, *Earnin App 2023 Review: Paycheck Advance Loans*, NERDWALLET (Dec. 21, 2021), https://www.nerdwallet.com/reviews/loans/personal-loans/earnin-personal-loans [https://perma.cc/FDL6-VQ82].

54. *See id.* (explaining the process of receiving wages that Earnin deposits to the user's account).

55. *When Will My Pay Period Max Increase?*, EARNIN, https://help.earnin.com/hc/en-us/articles/223441608-When-will-my-pay-period-Max-increase- [https://perma.cc/NG7M-7VZV].

56. *Id.*

57. *Id.* (listing broad categories that relate to increasing the pay period maximum, such as money management and connecting with an individual's checking account). It is unclear if tipping has ever been a factor in the pay period max equation. Tips are at the user's discretion, but Earnin suggests a tip amount for each transaction. *See id.*

58. *See Cash Out User Agreement*, EARNIN, https://www.earnin.com/privacyandterms/cash-out/terms-of-service [https://perma.cc/5S5B-3WGG] (stating that "[Earnin has] the right to adjust the factors that impact your Daily Max or Pay Period Max at any time, at our sole discretion" and that Earnin's equation to calculate cash advances available to users is "based on a variety of factors including your bank balance, spending behavior, repayment history, and earnings each paycheck").

59. *Can I Reschedule My Debit?*, EARNIN, https://help.earnin.com/hc/en-us/articles/360035941693-Can-I-reschedule-my-debit- [https://perma.cc/9BDM-GZLU].

60. *See* Jenna Caswell, *Earnin Announces They Have Provided Access to $10 Billion in Earnings for Members*, BUS. WIRE (Nov. 2, 2021), https://www.businesswire.com/news/home/20211102006071/en/ [https://perma.cc/NRG2-FDBL] (stating that Earnin had 2.5 million active users as of 2021); *see also* Cuttino, *supra* note 1, at 1524 (citing sources estimating Earnin's active weekly users at 375,000 as of 2021).

61. *See Earnin*, CRUNCHBASE, https://www.crunchbase.com/organization/activehours [https://perma.cc/V9Z7-TJQ8] (showing that Earnin raised $190.1 million in venture capital funding).

services."[62] Money-transmission services are subject to certain federal and state regulations,[63] while loan services (also referred to as credit products) are subject to different federal and state regulations.[64] Thus, categorizing an EWA as either a loan service or a money-transmission service determines which regulations apply to that EWA.

This Part will examine how EWAs have been categorized thus far. It will also provide an overview of existing regulations that may be interpreted to apply to EWAs in the future as well as the legal consequences of how EWAs are characterized in the future.

a. General FinTech Product Regulation

The FinTech Charter from the Office of the Comptroller of the Currency (OCC) attempts to create nationwide regulations all FinTech activities.[65] The FinTech Charter, however, has many compliance requirements and poses long-term viability issues.[66] Namely, the OCC's statutory authority to create the FinTech Charter is facing legal challenges.[67] The New York State Department of Financial Services brought an Administrative Procedure Act action against the OCC's FinTech Charter, arguing that the regulation exceeds the OCC's statutory authority under the National Bank Act because the National Bank Act authority extends to the "business of banking" that requires national banks to take deposits.[68] The United States District Court for the Southern District of New York held that "the OCC exceeded its authority under the National Bank Act because the Act unambiguously requires national banks to engage in deposit-taking."[69] On appeal, the United States Court of Appeals for the Second Circuit reversed this holding, concluding the Department of Financial Services "lack[ed] Article III standing because it failed to allege that the OCC's decision caused it to suffer an actual or imminent injury in fact," and that the claims were "constitutionally unripe for substantially the same reason."[70] Further,

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62. Cuttino, *supra* note 1, at 1505. "Western Union is the classic example of a money-transmission firm, but FinTech firms have reconceptualized the market to potentially include digital wallets like ApplePay, peer-to-peer payment services like Venmo, and even cryptocurrencies like Bitcoin." *Id.* at 1528.

63. *See* Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 86 (2013) (stating how internet and mobile payment methods are growing rapidly); *see also* Cuttino, *supra* note 1, at 1527–34 (describing the operation of earned wage access programs).

64. For a thorough, if not critical, analysis of federal and state regulation of consumer credit products, see Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 70–90 (2008).

65. Press Release, Off. of the Comptroller of the Currency, OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies (July 31, 2018), https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html [https://perma.cc/F2LZ-YPQU]; *see also* OFF. OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (Dec. 2016), https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-special-purpose-nat-bank-charters-fintech.pdf [https://perma.cc/K4HG-JXUS] (seeking feedback on initial fintech charter plan and providing insight into how and why the OCC would like to regulate FinTech lending).

66. Lenore Palladino, *Small Business Fintech Lending: The Need for Comprehensive Regulation*, 24 FORDHAM J. CORP. & FIN. L. 77, 101 (2018); *see* Lacewell v. Off. of Comptroller of Currency, 999 F.3d 130 (2d Cir. 2021) (holding that the Second Circuit will not address the merits of a challenge to the OCC's decision to accept applications for special-purpose national bank charters from "fintechs" because the New York State Department of Financial Services did not have standing and the issue was not ripe).

67. *See, e.g.*, *Lacewell*, 999 F.3d at 134.

68. *Id.*

69. *Id.* (discussing the district court holding).

70. *Id.*

the FinTech Charter does not clarify which laws apply to EWAs—lending or money-transmission—nor does it directly address specific consumer protection concerns of the users of EWAs.[71] It would simply allow the OCC to oversee and regulate registered EWAs.

b. Money-Transmission Service Characterization

EWAs have generally operated under the framework used for money-transmission services.[72] The theory behind this categorization is that EWAs do not lend money; rather, they transfer the wages employees have already earned to the employee's bank account before a traditional pay period system would.[73] This money-transmission characterization means that EWAs are required to protect consumers with certain privacy disclosures.[74] Money transmission law at the federal level, however, is silent on other consumer protections.[75]

The law of money transmitters does not focus on many of the risks presented by EWAs, namely those risks that make EWAs look like payday loans in disguise.[76] While federal laws addressing consumer data privacy protection—such as the Gramm-Leach-Bliley Act[77] and the Safeguards Rule[78]—are appropriate regulations for EWAs, most other money-transmitter regulation is concerned with the complex transfers associated with money laundering.[79] These multiple transfer situations are not a function of the two- or three-party transactions occurring in EWAs.[80]

If EWAs are categorized merely as money-transmitter products, then laws that apply to nonbank lenders—such as the Truth in Lending Act (TILA)—do not apply to the

71. Cuttino, *supra* note 1, at 1566. The OCC is concerned with the systematic risks of national banking and the OCC does not regulate payday loans or other products offering small consumer credit offerings. *Id.* This makes the OCC ill-suited to effectively regulate EWAs. *Id.*

72. *Id.* at 1527.

73. *Id.* at 1508; Brian Tate, *It's Time to Give Workers Easier Access to Their Pay*, BLOOMBERG L. (Dec. 9, 2021), https://news.bloomberglaw.com/daily-labor-report/its-time-to-give-workers-easier-access-to-their-pay [https://perma.cc/P5AP-SRL9]; *see also Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products: Hearing on H.R. 4277 Before the H. Comm. on Fin. Serv.*, 117th Cong. (2021) (statement of Brian Tate, President and CEO, Innovative Payments Association) ("Simply put, EWA programs allow consumers to access their own money prior to payday . . . EWA products are not loans or credit programs.").

74. *See* Tu, *supra* note 63, at 98 (noting that money transmitter regulation is focused on stopping money laundering, requiring reporting of "(1) any transaction in currency in excess of $10,000; (2) any instance where currency in excess of $10,000 is physically transported from abroad into the United States or vice versa; and (3) the occurrence of any other suspicious transaction," among other reporting requirements) (footnotes omitted); *see also* 31 C.F.R. §§ 1010.310–14, 1010.340, 1022.310–14, 1010.320, 1022.320 (describing regulatory requirements for money services businesses).

75. Cuttino, *supra* note 1, at 1529; *see* Tu, *supra* note 63, at 98 ("While federal money transmitter regulation does not impose obligations to provide surety bonds and similar financial security devices or involve the burdens of compliance with differing rules across jurisdictions, federal regulation does nonetheless impose arduous recordkeeping and reporting requirements.").

76. Cuttino, *supra* note 1, at 1560–61.

77. 15 U.S.C. §§ 6801–09 (requiring financial institutions to disclose how they share information and safeguard customer data).

78. 16 C.F.R §§ 313.4–.9 (2016) (requiring and regulating privacy notices).

79. Cuttino, *supra* note 1, at 1560; Tu, *supra* note 63, at 98.

80. Cuttino, *supra* note 1, at 1560.

EWAs.[81] Such laws reveal the true costs of borrowing from non-bank lenders. By labeling EWAs as money-transmission services, consumers may be at risk to predatory EWAs and the fees associated with these programs.[82]

c. Credit Product Characterization

Despite the prevailing-money transmission service characterization, EWAs also display many of the features associated with credit products and loan services.[83] All EWAs incorporate deferred repayment transactions because workers have access to earned wages days or even weeks before the wages must be reimbursed.[84] In addition, EWA fee arrangements may be considered interest payments.[85] This combination of deferred repayment and fees for repayment makes EWA transactions resemble loans.[86]

Other deferred repayment transactions such as payday loans have been recategorized as credit products under federal law and are now subject to TILA.[87] State usury laws define transactions with delayed payment as loans.[88] Thus, a court could find that the standard earned-wage transfer is both a credit product under TILA and a loan under many state usury laws.[89]

Deferred repayment transactions create information asymmetries because consumers overvalue commodities in the present and undervalue commodities in the future.[90] Further, the fees, repayment terms, and other features of EWAs are difficult to compare for the average consumer.[91]

TILA defines a creditor as a party "who regularly extends consumer credit that is subject to a finance charge."[92] Regulation Z also excludes "participation fees" from credit lending.[93] This creates an analytical spectrum with respect to what constitutes an interest payment: a fact-intensive inquiry is required to determine if EWAs' fee structures are

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81. *Id.* at 1531.

82. *Id.* at 1528–29. *See* Press Release, Nat'l Consumer L. Ctr., CFPB Urged to Reverse Earned Wage Actions That Threaten to Create Dangerous Fintech Payday Loan Loopholes (Oct. 12, 2021), https://www.nclc.org/cfpb-urged-to-reverse-earned-wage-actions-that-threaten-to-create-dangerous-fintech-payday-loan-loopholes/ [https://perma.cc/5F2K-B9FF] (discussing controversy surrounding potential exemption loopholes); 31 U.S.C. § 5311; 12 C.F.R. §§ 21.11, 21.21 (2004).

83. Hawkins, *supra* note 6, at 742.

84. Cuttino, *supra* note 1, at 1538–39; Hawkins, *supra* note 6, at 747; *see supra* Parts II.A.1, II.A.2.

85. *See, e.g.*, 12 C.F.R. § 1026.2(a)(17)(i) (2019) (defining "creditor"); 12 C.F.R. § 1026.4(c)(4) (2019) (stating that "[f]ees charged for participation in a credit plan, whether assessed on an annual or other periodic basis" are not finance charges).

86. Hawkins, *supra* note 6, at 752.

87. Cuttino, *supra* note 1, at 1540–42; Lisa Blaylock Moss, *Modern Day Loan Sharking: Deferred Presentment Transactions & the Need for Regulation*, 51 ALA. L. REV. 1725, 1737–39 (2000).

88. *See generally* Cuttino, *supra* note 1, at 1542 ("[T]ransactions where payment is delayed or the issuer otherwise forbears its right to collect payment constitute loans.").

89. *See id.* at 1542; Press Release, Nat'l Consumer L. Ctr., *supra* note 82. ("The letters urged the Bureau to . . . [t]reat earned wage access products as credit and revoke the EWA advisory opinion or revise it to focus only on whether providers of free programs are 'creditors' covered by TILA . . . .").

90. Cuttino, *supra* note 1, at 1539–40.

91. *Id.*

92. 12 C.F.R. § 1026.2(a)(17)(i) (2019).

93. 12 C.F.R. § 1026.4(c)(4) (2019). Regulation Z applies TILA to consumer credit products. 12 C.F.R. § 1026.1 (2017).

"finance charges" or merely "participation fees."[94] Facts to consider are whether fees are explicitly associated with the extension of funds, or if the primary feature of the EWA is the wage advance.[95] Courts have not thoroughly examined the clause of Regulation Z that defines participation fees.[96]

Whether an EWA looks more or less like a credit product depends on how the EWA functions. An EWA that does not charge fees of any kind for services and provides wage advances directly from the employer's treasury looks less like a credit product.[97] By contrast, an EWA that charges fees per advance, and provides wage advances from third-party funds that are later deducted from the employee's bank account, looks more like a credit product.[98]

At the end of 2020, the Consumer Financial Protection Bureau (CFPB) concluded that a limited type of EWA is not a credit product under TILA or Regulation Z.[99] The factors that the CFPB used in their guidance include (1) direct contract between the EWA and an employer; (2) the amount cannot exceed the employees earned wages, verified by their employer; (3) no charge to the employee to access the EWA service; (4) repaid by employer-facilitated deduction from the employee's paycheck; (5) nonrecourse; (6) prior to transacting, the EWA discloses and warrants to the employee that factors 3 and 5 are true; and (7) no assessment of employee creditworthiness.[100] However, TILA defines credit as "the right to defer payment of debt or to incur debt and defer its payment,"[101] and EWAs are not one of the products exempt from Regulation Z.[102] Thus, because some EWAs do not meet all of the factors enumerated in the CFPB guidance, some EWAs may qualify as a credit product under TILA.[103] In addition, the CFPB noted its interpretation of § 1041.3(d)(8) excludes tips that are truly voluntary from being considered fees or interest, but that "nothing prevents the Bureau from reconsidering these assumptions in a future rulemaking if there is evidence that such products are harming consumers."[104]

94. *See* Hawkins, *supra* note 6, at 748 (discussing the exclusion of participation fees); 12 C.F.R. § 1026.4(c)(4). The official interpretation of this section states that the participation fee exception "does not apply to fees imposed separately on individual closed-end transactions," and "[m]inimum monthly charges, charges for non-use of a credit card, and other charges based on either account activity or the amount of credit available under the plan are not excluded." *Id.*

95. Hawkins, *supra* note 6, at 748.

96. *Id.* at 748–49.

97. *Id.* at 752.

98. *Id.*

99. Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79404, 79405 (Dec. 10, 2020) (codified at 12 C.F.R. pt. 1026); *see also* Justin B. Hosie & Chris Capurso, *Earned Wage Access and the CFPB: A Path Toward Regulatory Acceptance?*, AM. BAR ASS'N (Mar. 11, 2021), https://www.americanbar.org/groups/business_law/publications/blt/2021/03/earned-wage-access/ [https://perma.cc/C9LY-MLG8].

100. *See* Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. at 79405–06.

101. 12 C.F.R. § 1026.2(a)(14) (2019).

102. *See* 12 C.F.R. § 1026.3 (setting out transactions exempt from Regulation Z).

103. Hawkins, *supra* note 6, at 747.

104. *See* CFPD, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54547–48 (Nov. 17, 2017).

TILA was created to bring transparent and consistent disclosure of credit terms to borrowers.[105] TILA requires disclosure of important agreement terms in a uniformly agreed upon format, such as interest charged converted to an APR, reducing the information asymmetry discussed above and allowing users to compare loan terms more easily.[106] Federal law would also limit fees (or tips) to 36% APR for military members.[107]

If current state rules for nonbank lenders applied to EWAs,[108] fees or tips would have a ceiling based on the APR because many state laws prohibit APRs above a specific rate.[109] The law of nonbank lenders, however, is not consistent across states. This inconsistency would lead to varied burdens on EWAs that operate across state lines; in some states, EWAs may not function at all as currently structured.[110]

For example, a Earnin user who takes out $100.00 of accrued wages one week before payday and pays the default "tip" of $9.00 has created the equivalent of a 469% APR loan.[111] This rate would be illegal on a payday loan in 15 states where Earnin currently operates.[112] Further, if the user does not have $100.00 in their bank account on payday, there is the potential for overdraft fees.[113] For reference, the median fee for a payday loan is $15.00 for every $100.00 borrowed, with a 14-day-median loan term.[114] This results in an APR of 391%.[115] The average payday loan actually results in a lower APR than the APR created by Earnin's suggested tip. It is unlikely the average consumer would undertake to consider the costs of using Earnin in comparison to traditional payday loans,

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105. *See What Is a Truth-in-Lending Disclosure? When Do I Get to See It?*, CONSUMER FIN. PROT. BUREAU (June 8, 2016), https://www.consumerfinance.gov/ask-cfpb/what-is-a-truth-in-lending-disclosure-when-do-i-get-to-see-it-en-787/ [https://perma.cc/3E2V-CAAG] (explaining TILA disclosure requirements).

106. Cuttino, *supra* note 1, at 1562; *See What Is a Truth-in-Lending Disclosure?*, *supra* note 105.

107. Cuttino, *supra* note 1, at 1562.

108. *Id.*

109. *See generally* Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110 (2008) (providing an empirical study of state usury laws).

110. Cuttino, *supra* note 1, at 1563.

111. The APR in this example was calculated using this equation: $\mathrm{APR} = ((((\mathrm{Fees} + \mathrm{Interest})/\mathrm{Principal})/n) \times 365) \times 100$, where: Interest = total interest paid; Principal = loan amount; n = number of days in the loan term. Jason Fernando, *Annual Percentage Rate (APR: What It Means and How It Works)*, INVESTOPEDIA (Nov. 4, 2022), https://www.investopedia.com/terms/a/apr.asp. [https://perma.cc/6E6J-PWAL] (using the formula, $\mathrm{APR} = (((9/100)/7) \times 365) \times 100 = 469\%$); Cuttino, *supra* note 1, at 1545; *see When Will My Pay Period Max Increase?*, EARNIN, https://help.earnin.com/hc/en-us/articles/223441608-When-will-my-pay-period-Max-increase- [https://perma.cc/PBK4-PT2A] (noting that tips are at the users' discretion, but Earnin suggests a tip amount for each transaction and it is unclear if tipping has ever been a factor in Earnin's pay period maximum transaction amount equation); *see also* Hirota, *supra* note 14, at 194. For loan amounts and tips by Earnin users, see Cyrus Farivar, *Millions use Earnin to get cash before payday. Critics say the app is taking advantage of them*, NBC NEWS (July 26, 2019), https://www.nbcnews.com/tech/internet/millions-use-earnin-get-cash-payday-critics-say-app-taking-n1034071 [https://perma.cc/WBG3-ZZ2R].

112. Cuttino, *supra* note 1, at 1545.

113. *Terms and Privacy*, EARNIN (Oct. 22, 2022), https://www.earnin.com/privacyandterms/terms-of-service [https://perma.cc/TZ2P-CK5W].

114. Cuttino, *supra* note 1, at 1543; *Payday Loans, Auto Title Loans, and High-Cost Installment Loans: Highlights from CFPB Research*, CONSUMER FIN. PROT. BUREAU (June 2, 2016), https://files.consumerfinance.gov/f/documents/Payday_Loans_Highlights_From_CFPB_Research.pdf [https://perma.cc/HE2E-PLNB].

115. *Payday Loans*, *supra* note 114.

especially when Earnin and other EWAs market themselves as empowering financial wellness tools for consumers.[116]

d. Consequences of Future Characterization

The uncertainty of how to legally characterize EWAs is itself a limitation on the development of EWAs.[117] If courts or regulators determine that EWAs are loans after the programs have operated under the assumption that they are not loans, the programs may find that operation is no longer a viable business plan.[118] In addition, the EWAs would have to become licensed lenders in many states, change behavior to comply with state and federal laws regulating loans, comply with state usury limits,[119] and follow restrictions on wage assignments.[120]

2. Consequences of Direct Payroll Link

The direct payroll link of some EWAs "enables earned-wage programs to offer near-risk-free advances, which in turn allows for operation costs that can be lower than other short-term liquidity solutions."[121] This direct link can cause significant problems because of the inflexible nature of the repayment terms.[122] The direct link binds employees strictly to the terms of repayment, not allowing them to make the financial decision to defer the repayment for urgent financial needs such as mortgage payment or unexpected medical expenses.[123] Anti-wage-assignment laws seek to protect employees from becoming financially trapped by their employers in ways not seen since the days of "company towns" and "company stores,"[124] but EWAs work around these laws.[125] The direct payroll link stops employees from making the most economical employment decisions by effectively trapping them in a cycle of dependance on early access to wages. Unlike traditional loan products, the direct payroll link does not give EWA users an option for how to allocate

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116. *See supra* note 16 and accompanying text.

117. Hawkins, *supra* note 6, at 742.

118. *Id.* at 742–43, 743 n.162 (noting that once rent-to-own transactions were ruled loans in Wisconsin and Minnesota the rent-to-own businesses in those states largely ceased to exist).

119. Palladino, supra note 66, at 96 (discussing state regulation of Fintech lenders and state usury caps).

120. Hawkins, *supra* note 6, at 742–43.

121. Cuttino, *supra* note 1, at 1556.

122. *Id.*; Hawkins, *supra* note 6, at 729 ("Current law supports [the right to default on a loan to use cash for other needs]. It ensures employees access to their paychecks with limited creditor interference, reflecting an underlying policy goal of giving employees decision-making power over how their wages are allocated.").

123. Cuttino, *supra* note 1, at 1557. Further, for the worker to be aware that they are subject to these strict terms of repayment, they would have to read both the Terms and Conditions and the FAQ thoroughly.

124. *See Company Towns: 1880s to 1935*, VCU LIBR. SOC. (Aug. 11, 2015), https://socialwelfare.library.vcu.edu/programs/housing/company-towns-1890s-to-1935 [https://perma.cc/G7Y8-4LAP]. Beginning in the 1890s "company towns" were common in remote industry locations such as coal mining. *Id.* The mine would develop a town for their remote employees to live in with the company building much of the housing and often owning all stores in town. *Id.* Without competition, the stores in these company towns could charge exorbitant prices that forced the workers into debts that the workers would have to pay off before they could leave their jobs and the company towns. *Id.* This cycle effectively locked workers into their jobs for the companies. *Id.*

125. Cuttino, *supra* note 1, at 1556.

their funds in a given month,[126] for example, by defaulting on a loan in order to pay a mortgage. The direct payroll link may also stop employees from taking a better job opportunity because of obligations or dependency on the EWA.

3. Onerous Contract Terms

EWAs' contractual terms often contain features that do not align with the altruistic image they outwardly present.[127] DailyPay, Even, and PayActiv all have arbitration clauses in their contracts that waive the user's right to sue in court and participate in a class action.[128] By giving up the right to sue as part of a class action, users of these services are unlikely to bring a case. This is because the damages pursued in an individual user's claim are likely to be too small in comparison to the legal costs of bringing a suit against an EWA.

Many of the contracts also include waivers of express warranties.[129] These clauses allow companies to make representations upon which users may rely; however, companies can later rescind and repudiate those representations.[130] While courts often find these clauses to be unenforceable, they can still have an impact on consumers who often have no idea these clauses will not be enforced.[131] In addition, the EWAs listed above each "asserted a right to unilaterally modify the contract with the user, sometimes without even giving notice to the other party to the agreement."[132] This contract clause creates the potential for contract terms added after signing to become more onerous for consumers without the user's knowledge.[133]

4. Current State Legislation

As of May 2021, seven states have attempted to pass legislation regulating EWAs.[134] California has led this charge: in 2020, California adopted legislation that overhauled

126. Hawkins, *supra* note 6, at 755.

127. Hawkins, *supra* note 6, at 734.

128. *Id.*; *see generally* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75 (2004) (providing an in-depth examination of the use of arbitrations clauses to eliminate class action suits and class action arbitrations).

129. Hawkins, *supra* note 6, at 736.

130. *Id.* at 737.

131. *See id*. at 738–39 (discussing the economic impacts of waivers of express warranty).

132. *Id.*

133. *Id.* at 738.

134. Bill Matthew Kopko, *Earned Wage Access and the Law: A Regulatory Revue*, JD SUPRA (May 13, 2021), https://www.jdsupra.com/legalnews/earned-wage-access-and-the-law-a-9556586/ [https://perma.cc/V7LA-ATJK] [hereinafter Kopko, *Earned Wage*] (elaborating on legislation in California, New Jersey, New York, South Carolina, Georgia, Utah, Nevada, and North Carolina that regulates "employer-based on-demand pay services"); *see also* CAL. FIN. CODE § 90000 (West 2021) (enacting statutory measures to protect California residents from financial abuses in the marketplace for financial products and services); H.B. 370, 2021 General Sess. (Utah 2021) (failed to pass house); S.B. 2397, 220th Leg., Sess. (N.J. 2022); S.B. S6778A, 2021–2022 Reg. Sess. (N.Y. 2021) (currently in committee); S.B. 532, 124th Legis. Sess. (S.C. 2021) (currently in committee); H.B. 674, 2021–2022 Leg. Sess. (Ga. 2021) (dead/failed/vetoed, 4/4/2022); S.B. 198, 81st Legis. Sess. (Nev. 2021) (last passing through Nevada Senate); S.B. 467, 2021 Legis. Sess. (N.C. 2021) (introduced

California's Department of Business Oversight, restyling it after the federal financial watchdog, and renaming it the Department of Financial Protection and Innovation (DFPI).[135] The DFPI has new powers to regulate almost any "financial product or service."[136] This is an alternative strategy to prior legislative and regulatory attempts that faltered—because of excessive detail and a failure to enact legislation—before becoming obsolete in a quickly evolving fintech landscape.[137] The goal of the department is to allow for flexibility to act quickly and to write functional rules.[138]

The DFPI's first action was to sign Memorandums of Understanding (MOU)[139] with five major EWAs: Even, Earnin, Brigit, PayActiv, and Branch.[140] Other EWAs quickly followed suit.[141] These MOUs ensure that the EWAs may continue operating in advance of the California Consumer Financial Protection Law, which might require EWAs to register as covered financial services.[142] In exchange for this assurance of continued operation, EWAs have agreed to provide the DFPI with substantial operational information including, but not limited to, quarterly reports relating to product payment volume, fees, delinquency rates, and ratios of money advanced to paycheck amount.[143] The DFPI also reserves the right to examine the EWAs' books and records with ten business days' notice,

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April, 2021); Paul Soter, Scott J. Hyman & Laszlo Ladi, *California's New Debt Collection Licensing Scheme and Mini-CFPB Legislation Create New Regulatory and Compliance Obligations for Collecting Consumer Debts in California*, 74 CONSUMER FIN. L.Q. REP. 136, 138 n.3 (2020) (quoting the California Senate Rules Committee's statement that consumer protection legislation is aimed at "ensur[ing] greater consumer protection through enhanced oversight").

135. *Department of Financial Protection and Innovation History*, DEP'T FIN. PROT. & INNOVATION (Mar. 11, 2022), https://dfpi.ca.gov/history/ [https://perma.cc/92ZM-SLDU].

136. *See* Kopko, *Earned Wage*, *supra* note 132; CAL. FIN. CODE § 90000 (West 2021); *see generally* Soter, Hyman & Ladi, *supra* note 134.

137. *See* Kopko, *Earned Wage*, *supra* note 134. In 2019, California introduced Senate Bill 472, which ballooned into a detailed, prescriptive piece of legislation that proved unworkable in the quickly innovating fintech field. Utah had similar legislation fail for comparable reasons. *Id.*; *see* Matthew Kopko, *INSIGHT: California Hits a Homerun With New Fintech Watchdog*, BLOOMBERG L. (Sept. 17, 2020), https://news.bloomberglaw.com/us-law-week/insight-california-hits-a-home-run-with-new-fintech-watchdog [https://perma.cc/NDB6-9U8F] [hereinafter *INSIGHT*] (stating that the new California legislation, AB 1864 and SB 819, avoids "enshrining in law a complex set of rules for ever-evolving companies, rules that could become obsolete by the time they became law").

138. Kopko, *INSIGHT*, *supra* note 137.

139. Press Release, Cal. Dep't of Fin. Prot. & Innovation, The DFPI Signs MOUs Believed to be Among the Nation's First with Earned Wage Access Companies (Jan. 27, 2021), https://dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/ [https://perma.cc/8AXS-7VW7]; Jeremy Mandell & Nancy Thomas, *A Sign of Things to Come: The California DFPI Exercises Its New Authority in Regulating Earned Wage Access Products*, JD SUPRA (Feb. 1, 2021), https://www.jdsupra.com/legalnews/a-sign-of-things-to-come-the-california-7049753/ [https://perma.cc/2WLQ-3FBV].

140. Press Release, Cal. Dep't of Fin. Prot. & Innovation, *supra* note 139.

141. *Actions and Orders*, CAL. DEP'T FIN. PROT. & INNOVATION, https://dfpi.ca.gov/actions-orders-and-administrative-hearing-decisions/ [https://perma.cc/9KCM-MSZT] (search for "Memorandum of Understanding" results will show a list of all EWA Memorandums of Understanding to date).

142. Press Release, Cal. Dep't of Fin. Prot. & Innovation, *supra* note 139.

143. *Id.*; *see also* Stephanie Mendivil & Bridget Fogarty Gramme, *Department of Financial Protection and Innovation*, 26 CAL. REGUL. L. REP. 250, 258 (2021) ("DFPI . . . signed memoranda of understanding (MOUs) with five earned wage companies . . . .").

and the EWAs must include language in their product agreement stating that the EWA is not licensed or regulated by the DFPI.[144]

The New Jersey Senate introduced and assigned a bill in early 2021 to the Senate Budget and Appropriations Committee that would function similarly to the CFPB advisory opinion.[145] The New Jersey legislation creates a licensing procedure for employer-based EWAs.[146] Georgia, New York, Nevada, North Carolina, and South Carolina have all followed a similar path by providing a registration and reporting system for employer-based systems—though what qualifies as an employer-based system varies from state to state.[147] No state currently has any protections or "safe harbors" for direct-to-consumer EWAs.[148]

C. Concerns of Small Business Owners

Small businesses[149] generate significant economic activity in the United States.[150] Forty-eight percent of private-sector employees[151] and 41.2% of private-sector payroll comes from small businesses.[152] However, starting a small business is a risky endeavor.[153] Fifty percent of small businesses fail in their first five years.[154] Lack of cash flow, ability to make payroll, and employee turnover are all issues that impact the success of small businesses and their employees.[155]

144. Richard Eckman, Ethan Ostroff & Nicholas Ramos, *California DFPI Signs First Memoranda of Understanding with Earned Wage Access Companies*, JD SUPRA (Feb. 18, 2021), https://www.jdsupra.com/legalnews/california-dfpi-signs-first-memoranda-1438311/ [https://perma.cc/U7AD-C6RQ]; *see also* CAL. DEP'T OF FIN. PROT. & INNOVATION, MEMORANDUM OF UNDERSTANDING, ACTIVEHOURS, INC. D/B/A EARNIN 2 (Jan. 4, 2021) (showing terms in agreement); CAL. DEP'T OF FIN. PROT. AND INNOVATION, MEMORANDUM OF UNDERSTANDING, EVEN 3 (Jan. 4, 2021) (showing terms in agreement).

145. S.B. 2397, 2022 Leg., 220th Sess. 2022–2023 (N.J. 2022).

146. *Id.*

147. Kopko, *Earned Wage supra* note 134.

148. *Id*.; Soter, Hyman & Ladi, *supra* note 134.

149. Definitions of "small businesses" vary greatly. *See* TIM MAZZAROL & SOPHIE REBOUD, SMALL BUSINESS MANAGEMENT 3 (4th ed. 2020). The common definition of small businesses, and the one followed in this Note, are firms with 1–499 employees. *Economic Bulletin*, U.S. SMALL BUS. ADMIN. OFF. ADVOC. (Nov. 2021), https://cdn.advocacy.sba.gov/wp-content/uploads/2021/11/09101157/November-2021-Economic-Bulletin.pdf [https://perma.cc/S6KC-FNJ6].

150. MAZZAROL & REBOUD, *supra* note 149, at 7; Press Release, U.S. Small Bus. Admin. Off. Advoc., Small Businesses Generate 44 Percent of U.S. Economic Activity (Jan. 30, 2019), https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/ [https://perma.cc/5QZN-KZKJ]; *Economic Activity*, JPMORGAN CHASE & CO., https://www.jpmorganchase.com/institute/research/small-business/small-business-dashboard/economic-activity [https://perma.cc/H9PD-UEMK] (stating "[s]mall businesses are an anchor of the US economy. . . . ."); Palladino, *supra* note 66, at 78.

151. Susan Turner & Al Endres, *Strategies for Enhancing Small-Business Owners' Success Rates*, 16 INT'L J. APPLIED MGMT. & TECH. 34, 34 (2017); Georgia McIntyre, *What Percentage of Small Businesses Fail? (And Other Need-to-Know Stats)*, FUNDERA (Nov. 20, 2020), https://www.fundera.com/blog/what-percentage-of-small-businesses-fail [https://perma.cc/E7KS-C9WY].

152. Turner & Endres, *supra* note 151; McIntyre, *supra* note 151.

153. MAZZAROL & REBOUD, *supra* note 149, at 18.

154. Turner & Endres, *supra* note 151, at 34; *see also* McIntyre, *supra* note 151.

155. *2021 Small Business Trends*, GUIDANT, https://www.guidantfinancial.com/small-business-trends/ [https://perma.cc/HU65-Z3TK]; *see also* MAZZAROL & REBOUD, *supra* note 149, at 19 (discussing major causes of small business bankruptcy).

General cash flow issues are usually the biggest concern of small businesses.[156] This often stems from struggles to access adequate capital financing. As of 2015, 27% of small business owners reported not being able to obtain sufficient capital.[157] For these businesses, the lack of capital impacted their ability to grow, forcing them to reduce their number of employees and employee benefits.[158]

A third of small businesses struggle to make payroll, often due to cash flow timing issues.[159] Balancing accounts payable, receiving payment for outstanding accounts, and other significant cash concerns can force employers to make tough decisions.[160] Due to insufficient funds, these decisions can include choosing between paying employees on time, paying their vendors, maintaining their businesses, and taking advantage of a new project opportunities.[161] This lack of flexibility for small businesses can cost companies in the long-term while they try to pay their obligations in the short-term.[162] The consequence of this can make small businesses less stable in the long term.

D. Benefits of Earned Wage Access Programs

While the jury is still out on whether EWAs are positive for employees' long-term financial health,[163] many employees see EWAs as a perk of employment. The availability of an EWA can assuage short-term financial concerns for employees. This increases employee efficiency by allowing workers to focus while at work, rather than worrying about their financial situation.[164] Many of these financial concerns stem from a lack of savings for unexpected expenses.[165] Access to EWAs creates a cushion for employees

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156. *2021 Small Business Trends*, GUIDANT, https://www.guidantfinancial.com/small-business-trends/ [https://perma.cc/PT3B-2EDH] (excluding COVID-19 business concerns); MAZZAROL & REBOUD, *supra* note 149, at 19.

157. McIntyre, *supra* note 151.

158. *Id.* Of the 27% of small businesses that reported difficulty getting the needed capital, "33% said this left them unable to grow their business and expand, 18% reported that a lack of capital forced them to reduce employee size," and "12% said they had to reduce employee benefits."

159. Jeff Goldman, *A Third of Small Businesses Struggle to Pay Bills, Make Payroll*, SMALL BUS. COMPUTING (Feb. 7, 2019), https://www.smallbusinesscomputing.com/news/a-third-of-small-businesses-struggle-to-pay-bills-make-payroll/ [https://perma.cc/6S97-HK2V]. "Sixty-one percent of small businesses worldwide struggle with cash flow, and 32 percent are unable to pay vendors, repay loans, or pay themselves or their employees as a result . . . ." *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Donner & Siciliano, *supra* note 22, at 19; *Compare* Hawkins, *supra* note 6, at 721 ("Based purely on cost, earned wage access products, for the most part, are a radical step forward for consumers who need access to money before payday."), *with* Hawkins, *supra* note 6, at 727 ("The low cost of earned wage access is extremely attractive, but other dangers lurk within this product."); *see also* Alexis Christensen, Comment, *Early Wage Access Products: Twenty-First Century Innovations or Harbingers of Debt?*, 27 GEO. J. ON POVERTY L. & POL'Y 429, 436–38 (2020) (summarizing advantages and disadvantages of EWA products for consumers).

164. *Visa Insights 2019 Earned Wage Access*, VISA (2019), https://usa.visa.com/dam/VCOM/global/run-your-business/documents/visa-earned-wage-access-insights-report.pdf [https://perma.cc/864U-W5AS]. "From an employer perspective, these programs seemingly help reduce labor costs associated with high turnover and low productivity amongst employees who may be financially distressed, without a need to increase wages." Cuttino, *supra* note 1, at 1512.

165. VISA, *supra* note 164; Steve Werner & David B. Balkin, *Strategic Benefits: How Employee Benefits Can Create a Sustainable Competitive Edge*, J. TOTAL REWARDS 1, 17 (2021).

when they face such expenses, which can result in lower employee turnover, increased employee productivity, and fewer unplanned employee absences.[166]

Due to these perceived benefits of EWAs, employers become more attractive to workers by providing an EWA. Workers are more likely to both seek and retain employment if the employer offers an EWA.[167] Further, workers favor employers that offer EWAs over those that do not offer EWAs as an employment benefit.[168]

III. ANALYSIS

A. Why Does It Matter If Small Businesses Can Offer EWAs?

Nearly half of the workforce in the United States is employed by small businesses.[169] With small businesses employing such a large portion of the workforce, it is clear that the economy is reliant on small businesses.[170] Accordingly, helping small businesses succeed helps the overall economy.[171] Small businesses often rely on quality workers to make their businesses successful. When choosing where to work, the difference-making factor for the employee often relates to a comparison of the available benefits.[172]

1. EWAs Are Perceived as an Employee Benefit

People are more likely to take a job with a business that offers an EWA as a benefit. For small businesses to compete with their larger, highly corporatized competition, they must have the opportunity to offer comparable benefits. Not only are they more likely to stay in that job, but they are also generally better performing employees when an EWA is available.[173]

166. Christensen, *supra* note 163, at 437; Baker & Kumar, *supra* note 3, at 16 ("[A]ctive use of the PayActiv product by an employee is associated with a materially lower turnover rate as compared to those employees who think about using the product but don't use it actively."); EARNIN, WHITE PAPER: ON-DEMAND PAYROLL 7 (Mar. 23, 2016), https://d3jlszua3q4cyr.cloudfront.net/content/web/EarninWhitePaper.pdf [https://perma.cc/5A6N-2MGK] ("89% of on-demand pay users report being more motivated and productive at work" and "74% of on-demand pay users say their attendance at work has greatly improved"); Murillo, Vallee & Yu, *supra* note 2, at 9 (finding workers more likely to stay at their job when they used an EWA product).

167. *See* VISA, *supra* note 164, at 11 ("95% [of employees] are interested in working for an employer that offers an EWA. 89% [of employees] would be willing to work longer for an employer who offers an EWA."); Cuttino, *supra* note 1, at 1527.

168. *See* VISA, *supra* note 164, at 11 ("79% [of employees] would be willing to switch to an employer who offers an EWA."); Donner & Siciliano, *supra* note 22, at 15 ("[O]ffering frequent pay becomes a competitive advantage in attracting workers.").

169. Turner & Endres, *supra* note 151, at 34; McIntyre, *supra* note 151; Palladino *supra* note 66, at 78.

170. *Economic Activity*, JPMORGAN CHASE & CO., https://www.jpmorganchase.com/institute/research/small-business/small-business-dashboard/economic-activity [https://perma.cc/H9PD-UEMK] (stating that "[s]mall businesses are an anchor of the US economy. . . .").

171. *Id.*

172. *See* Turner & Endres, *supra* note 151, at 34 (discussing the challenges of keeping employees happy); Chloe Goodshore, *Top 5 Reasons to Offer Employee Benefits*, BUSINESS.ORG (Feb. 25, 2021), https://www.business.org/hr/benefits/top-reasons-to-offer-employee-benefits/ [https://perma.cc/5TE3-48R7].

173. Christensen, *supra* note 163, at 437 ("[A]ccording to a study commission by Earnin, employees using the app reported positive attitudinal changes toward their work; '89 percent of users reported feeling more motived and productive at work when they had access to their wages before payday, and 74 percent reported having fewer unplanned absences.'"); *see* VISA, *supra* note 164, at 11–14 (detailing more statistics for EWA with employees).

If small businesses are unable to offer EWAs, it becomes more difficult for small businesses to recruit the most capable candidates for the job. The top talent employee would view large employers as offering an additional perceived benefit. Small businesses should have the opportunity to offer their employees equivalent benefits to their larger competitors wherever possible—especially since simply having an EWA available makes employees more efficient and committed to their job.[174]

2. EWAs Reduce Employee Turnover

In addition, employee turnover is expensive, and this cost hits small businesses disproportionately. For many small businesses, labor costs are their largest expense, [175] and changes to the costs of labor are disproportionately hard on small businesses.[176] Studies have estimated that it costs between 16%–20% of an employee's yearly salary to replace a low- to mid-wage employee.[177] In addition, turnover rates are staggeringly high in low-wage jobs; for example, the average rate of employee turnover is 59% in retail jobs.[178] When assessed together, these statistics show how large of an impact reducing employee turnover can have on all businesses.[179] For example, consider a small business with ten employees[180] working in retail for ten dollars per hour. The business can expect to replace six employees in a year, at the cost of $3000 per employee, totaling an $18,000 cost to the business for the year. If the EWA improves employee retention by just 20%,[181] the company benefits—namely, by retaining one employee per year and the $3000 associated

174. *See* VISA, *supra* note 164, at 11, 13 (discussing broad employee interest in EWAs); Christensen, *supra* note 163, at 437; Baker & Kumar, *supra* note 3.

175. Goldman, *supra* note 159; Kelly Main, *Small Business Statistics of 2023*, FORBES ADVISOR (Dec. 7, 2022), https://www.forbes.com/advisor/business/small-business-statistics/ [https://perma.cc/QH2L-VC8J] ("[Labor] makes up 70% of a business's spending.").

176. Press Release, Nat'l Fed'n of Indep. Bus., NFIB Opposes Dramatic Minimum Wage Hike (Feb. 4, 2021), https://www.nfib.com/content/analysis/economy/nfib-opposes-dramatic-minimum-wage-hike/ [https://perma.cc/S4H6-YCJF] ("While big businesses have the profits and revenues to cushion the blow, small businesses are less able to absorb additional cost increases, forcing them to cut back on expenses, including labor, or close their doors.").

177. Baker & Kumar, *supra* note 3, at 12 (citing a study from The Center for American Progress) ("For example, the cost to replace a $10/hour retail employee . . . would be $3,328. . . . [T]he cost to replace a $40k retail manager would be $8,000."). Low wage jobs are focused on because turnover costs tend to be consistent across all but the most highly skilled and high paying jobs, which have significantly larger costs of turnover. HEATHER BOUSHEY & SARAH JANE GLYNN, THERE ARE SIGNIFICANT BUSINESS COSTS TO REPLACING EMPLOYEES (2012).

178. Baker & Kumar, *supra* note 3, at 10–11 (highlighting turnover rates of "30% among bank tellers", "100% in fast food", "60–300% in hotels", "100% in supermarkets", and "59% in retail generally").

179. Available statistics on employee turnover often come from large companies, or fail to define the size of employer, focusing more on employee demographics including skill, education level, industry, and salary bracket. *See* BOUSHEY & GLYNN, *supra* note 177 (summarizing costs of employee replacement in various business sectors and salary ranges based on 30 case studies). However, usage of EWAs is concentrated in low-wage employees. Cuttino, *supra* note 1, at 1505.

180. Small businesses employ an average of ten employees. *Small Business Statistics*, SMALL BUS. TRENDS, https://smallbiztrends.com/small-business-statistics#:~:text=How%20many%20people%20work%20in,workforce%2C%20on%20a%20percentage%20basis [https://perma.cc/HNE7-SU5E].

181. Baker & Kumar, *supra* note 3, at 16 (using CraftWorks data for example).

costs of replacing said employee. These savings can make the difference in survival for small businesses.[182]

The cost of employee turnover hits small businesses extremely hard. Small businesses' labor costs are such a large proportion of the total expenses of a small business that any additional cost due to employee turnover will be especially difficult to absorb.[183] Being able to provide an EWA to employees can help small businesses with this struggle.

3. EWAs Are Riskier to Implement in Small Businesses

Since over 50% of small businesses fail in their first five years of operating,[184] EWAs will inevitably need to look elsewhere to maintain revenue. This turnover will result in repeated implementation costs as well as the inefficiency costs associated with finding new small businesses that wish to partner with the EWA. EWAs that integrate with small businesses will likely charge higher fees to offset the additional risks and decreased efficiency associated with working with small businesses. These fees will either be paid by the employee or the employer. If the employee pays them, the transaction is more likely to look like a credit transaction.[185]

B. How Do EWA Structures Impact Small Businesses?

Many of the factors that make an EWA look more like a credit product are also factors that make an EWA more accessible for small businesses. In addition, large companies can more easily offer EWAs that look less like credit products.

This Part will examine standard EWA features used to distinguish credit products from non-credit products. Then, it will focus on the limited EWA format protected by the CFPB at the end of 2020 and examine how these features result in a negative, disproportionate impact on small businesses.

EWAs vary in how they distribute earned wages, with various common structures, including: advances made from the employer's treasury; advances made from the EWA's funds, but reimbursed directly from the employee's paycheck; and advances made from the EWA's funds, but reimbursed from the employee's bank account after the employee's paycheck direct deposit is completed.[186] The more these systems of distribution resemble a traditional pay structure, the less they resemble a credit product. The more they resemble a traditional pay structure, however, the more challenging it is for small businesses to offer EWAs.

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182. Large businesses with larger sales volumes and better access to financing are better able to withstand a smaller profit margin than small businesses. *See* Jonathan Wygonski, *Net Neutrality Enforcement Is Necessary to Provide Small Businesses with the Opportunity for Fair Competition*, 13 OHIO ST. BUS. L.J. 403, 419–421 (2019) (describing the dramatic effect of profit margin on small business viability); *see also* MAZZAROL & REBOUD, *supra* note 149, at 526–27 (describing financial issues particularly impacting small businesses).

183. MAZZAROL & REBOUD, *supra* note 149, at 526.

184. Turner & Endres, *supra* note 151, at 34; McIntyre, *supra* note 151.

185. *See supra* sub-Part II.B.1.c.

186. *See* Hawkins, *supra* note 6, at 752 fig.2.

1. *Earned Wage Advances Directly from the Employer's Treasury*

When earned wage advances are made directly from the employer's treasury, it can create issues for small businesses. Even with the traditional paycheck schedule, a third of small businesses struggle to make payroll.[187] Often, the struggle to make payroll stems from cash flow timing issues.[188] Small business cash flow events, such as accounts payable, receive payment for outstanding accounts, payroll, and other business expenses, all have schedules. Cash flowing *into* the business does not always temporarily align with when the cash is flowing *out*.[189] Small businesses offering an EWA to their employees that draws directly from the employer's treasury exacerbates these cash flow timing issues. Rather than planning around a predictable payroll schedule, the small business will be required to keep assets liquid throughout the pay period to ensure that employees can use the EWA benefit. This effectively ties up funds the company would otherwise be able to use for the myriad of other business expenditures. This can also limit the business' ability to take advantage of new project opportunities due to insufficient available cash funds.[190] While payroll is generally not an issue for large companies, it is for small businesses. As a result of having to ensure adequate capital for payroll, small businesses' ability to be flexible and functional is limited by earned wage deductions made directly from the employer's treasury.

2. *Earned Wage Advances from EWA Funds*

Even using an EWA that draws from the EWA's funds rather than the employer's, small firms are still at a disadvantage relative to large ones. EWAs will likely have lower profit margins when implemented in smaller companies.[191] Of the small businesses with at least one employee, the average number of employees is ten.[192] By comparison, of the Fortune 1000 companies, 97% have over a thousand employees.[193] Simply by employing fewer employees, the EWA will cost more per employee when the EWA is integrated into a small business. EWAs that integrate with employers often function by taking earnings and timecard information from the employer and earning money on a per employee or per transaction basis.[194] Thus, the cost of implementation for the EWA stays relatively level as the size of the company increases, but the income of the EWA increases fairly linearly

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187. Goldman, *supra* note 159; Danielle Ernst & Carolyn Linck, *QuickBooks Study: Cash Flow Woes Mean a Third of Small Businesses Can't Make Payroll, Pay Bills*, BUS. WIRE (Feb. 6, 2019), https://www.businesswire.com/news/home/20190206005224/en/QuickBooks-Study-Cash-Flow-Woes-Small-Businesses [https://perma.cc/HJ9T-Y27B] ("[T]he majority of small businesses around the world (61%) struggle with cash flow, and nearly a third (32%) are unable to either pay vendors, pay back pending loans, or pay themselves or their employees due to cash flow issues.").

188. *See* sources cited *supra* note 182 (describing small business cashflow issues).

189. Goldman, *supra* note 159; Ernst & Linck, *supra* note 187.

190. Even without having to withhold these funds, "U.S. small business owners are losing $43,394 [on average] annually by foregoing a project or sales due to issues created by insufficient cash flow." Ernst & Linck, *supra* note 187.

191. *See* discussion *supra* Part III.A.3 (discussing EWAs being perceived as an employee benefit).

192. *2021 Small Business Trends*, *supra* note 155.

193. *Fortune 500*, FORTUNE (2020), https://fortune.com/fortune500/2020/search/?f500_%20employees=desc [https://perma.cc/7TVP-64DV].

194. *Frequently Asked Questions*, PAYACTIV, *supra* note 11; *Even Terms and Conditions*, *supra* note 41; *Frequently Asked Questions*, DAILYPAY, *supra* note 11.

as the number of employees at the company grows. Because of this, EWAs are more profitable to implement in larger companies. This is likely why EWAs, like Even, focus their efforts on large companies.[195]

3. *Earned Wage Advances Funded by EWA but Repaid Directly from Employee Paychecks*

Small businesses implementing EWAs that fund earned wages through the third-party provider but repay directly from employee paychecks may also struggle. Of the 61% of small businesses that struggle with cash flow, 43% have frequently been at risk of not being able to pay their employees on payday.[196] If the employer is at risk of not being able to pay their employees, then the EWA is at risk of not being paid back for the earned wages it paid the employee. Therefore, the EWA is counting on small businesses to have the funds to issue their paychecks on time. As risk is increased, the EWA will either charge higher fees to the employer or employees, or it will avoid working with higher-risk small businesses altogether.

4. *EWAs that Fall Under the CFPB*

EWAs that fall under the CFPB definition of what does *not* constitute a credit product have significant advantages for large employers, which accordingly puts small businesses at a severe disadvantage. To be covered by the CFPB definition of EWAs that are not credit-products under the TILA and Regulation Z, the EWAs must include:

1. A direct contract between the EWA and an employer;
2. No charge to the employee;
3. Repaid by employer-facilitated deduction from the employee's paycheck;
4. Not exceeding the wages earned by the employee;
5. Nonrecourse;
6. Characteristics explained by the provider to the employee;
7. No assessment of employee creditworthiness.[197]

As discussed above, repayment by the employer—when the employer is a small business—can create additional risk for the EWA. Moreover, the requirements that the EWA be nonrecourse and that—beyond wage replacement—fees must be financed by the employer also put small businesses at a disadvantage when compared to their larger competitors.

Requiring EWAs to be nonrecourse is another feature that places burdens of risk on either the EWA itself or the employer offering the EWA benefit. Since the money paid to employees is nonrecourse, any chance that the earned wages financed by the third party will not be repaid is magnified because the EWA will be unable to seek out further compensation if wages are not repaid. Increased risk means the EWA will need to charge higher fees to make operation worth their consideration, and these fees will disproportionately disadvantage the already cash-strapped small businesses.

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195. EVEN, *supra* note 51; *see also* Donner & Siciliano, *supra* note 22 (discussing Walmart and Wendy's adoption of EWAs at relatively low costs).

196. Ernst & Linck, *supra* note 187.

197. Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79404, 79405–06 (Dec. 10, 2020) (codified at 12 C.F.R. pt. 1026).

Prohibiting EWAs from charging employees for their services places all of the cost of implementing the benefit on the employer (or the EWA). While this is a benefit for employees on a surface level, it may functionally exclude small businesses from offering the service. This, in turn, may have the effect of disincentivizing otherwise willing employees from working for small businesses due to a perceived increase in financial wellness gained by working for an employer offering an EWA.[198] If employees pay for these fees, it removes some of the burden from the employer, and the employee can appropriately prioritize whether or not the EWA is a service they value.

These features make an EWA less likely to be considered a credit product, and therefore not regulated under TILA or Regulation Z. They are also features that disproportionately disadvantage small businesses.

IV. Recommendation

EWAs are an innovation with complex risks and benefits. The same regulatory methods previously used on money-transfer technologies and credit products are not always the best strategies to regulate EWAs. Instead of using the same strategies used to regulate in those arenas, the methodology behind those regulations needs to be examined and revised to create new strategies appropriate for the use cases of EWAs.

Regulation of EWAs must acknowledge the benefits that EWAs provide to employers while simultaneously considering how the regulation of EWAs will impact small employers. The impact on employers is an element not often considered in the credit product space nor in money-transfer technologies. Regulation that keeps both the employer's and the employee's interests in mind will spur EWAs to grow gradually and advance the goals of improving financial wellness while maintaining the freedom of EWAs to experiment with different structures.

As regulation of EWAs becomes more common, the entities regulating EWAs need to reevaluate how the regulation is applied: it is not enough to take into consideration how the EWA features will impact users. The regulation must also consider how EWA regulations will impact small businesses. This Part will examine how the federal government can support EWA structures that function best for small businesses without creating additional risks for consumers. These regulations will focus on protecting users' well-being without handcuffing the EWAs in how they can function (so long as their behavior is not predatory).

A. Regulation for User Protection

The recommendations below are intended to prioritize user protection without negatively impacting EWAs' abilities to provide features that work well in small businesses.

198. Donner & Siciliano, *supra* note 22, at 2 ("[F]or the more than 20% of U.S. households that are either unbanked or underbanked and have no other option but to resort to payday loans or other forms of expensive credit, EWA can result in substantial savings and a net improvement of their financial wellbeing."); *see generally Impact*, PAYACTIV, https://www.payactiv.com/impact/ [https://perma.cc/58Y4-ZFUB] (listing the benefits of EWA services to users).

1. *Regulation of the Direct Payroll Link*

EWA regulation should allow employees more flexibility to repay rather than focus on whether the EWA pulls wages directly from paychecks or the employees' bank accounts after the paycheck deposits. A regulation that focuses on how repayment is processed instead of where the repayment comes from will provide this flexibility. The main issues with direct deposit deductions occur when the deduction either empties the account or when the EWA repeatedly attempts to pull funds when the account is already overdrawn.[199] By regulating how the direct payroll link functions for consumers, rather than dissuading EWAs from utilizing the direct payroll link, the EWAs will not have to use payroll links that are detrimental to the small business implementation of the EWA.[200]

2. *Solving the Empty Account Issue*

Putting regulatory limits on the percentage of earned wages that users may access during a given pay period will guarantee that employees do not have an empty account balance as soon as the deduction occurs—for example, PayActiv's limit allows employees to withdraw up to 50% of their paycheck.[201] PayActiv's limit gives the employee access to half of their paycheck early if needed and holds half the salary back so that, at the end of the pay period, at least half of the wage remains in the employee's account. An ideal regulation will similarly strike a balance between the flexibility sometimes needed for unexpected expenses and creating saving habits so that the employee will not be sucked into a cycle of reliance on the EWA.

Limiting the percentage of earned wages that employees may access will also have similar benefits when applied to a direct payroll link repayment. Including the limit in both direct-payroll link and direct deposit deductions will increase the options EWAs can offer. This will benefit small businesses without impairing consumer protections.

3. *Solving the Overdraft Issue*

EWAs direct deposit deductions should be regulated to minimize overdrafts of EWA users' accounts. The EWA cannot function by repeatedly attempting to draw from the account. These attempts to draw will result in repeated overdraft fees for the user. Instead, when insufficient funds are available, EWAs should be required to notify the employee, then provide a waiting period to allow the employee to make sure that the funds have been deposited appropriately or attempt to troubleshoot with their employer. Extensive overdraft fees will be much less common if these measures are implemented in conjunction with the

199. *See* discussion *supra* Part II.B.3 (explaining how third-party EWAs use direct deposit for employees); Complaint at 2, Perks v. Activehours, Inc., No. 5:19-cv-05543, 2019 WL 9667767 (N.D. Cal. Sept. 3, 2019) (emphasizing how the Court considered using payment through direct deposit or looking at an electronic transmission system); *see Complaints: Earnin*, BETTER BUS. BUREAU, https://www.bbb.org/us/ca/palo-alto/profile/financial-services/earnin-1216-642613/complaints [https://perma.cc/VJ3C-4CJF] (listing complaints filed with the Better Business Bureau regarding Earnin's practices).

200. *See supra* Part II.B.1.b (explaining the specific ways of which EWAs function for background knowledge); Part III.B.2 (analyzing specifically the implementations of advancement of wages in EWAs); Part III.B.4 (examining how shifting burdens, and improvements following regulations by EWAs).

201. *Frequently Asked Questions*, PAYACTIV, *supra* note 11.

limitations on the percentage of earned wages that the employee may withdraw. When users of the EWA are not incurring overdraft fees, the risks of direct deposit are mitigated.

4. Regulation of Contract Terms

EWA contract terms that make users of the products vulnerable should be prohibited. Earned wage access is a developing field, and flexibility in how the products function allows for the critical experimentation needed to create the best EWAs possible. However, there must be a meaningful mechanism for consumers to respond if the EWAs are not working correctly or if they are taking advantage of the consumers. The contract terms disallowing participation in class action suits should not be allowed in EWA contracts. The ability for EWA users to sue hinges on the aggregation of a class action because the individual damages of an improperly functioning EWA are minimal.[202]

Regulation should also remove assertions of a right to unilaterally modify the contract without notice to the consumer from EWA contracts. Achieving financial wellness requires the user to understand their options. Critical to users understanding their options is knowing what it will cost to use the product and other essential contract terms, such as how and when any transactions occur. The option to unilaterally modify contracts gives EWAs the ability to alter how EWA transactions occur, how fees are associated, and how other essential elements of EWA function.

Imagine, for instance, that a user is counting on a $1.99 transaction fee for early access to $100. They are counting on this term because that is the contract term they agreed to when they signed up for the EWA. They have also been charged the $1.99 fee every month they have used the EWA prior to this transaction. Instead, much to the user's surprise, the fee has been changed to $2.99, and the user was not given notice of this change. While a one-dollar increase in the per-transaction cost seems innocuous, when considered over multiple transactions as the user tries to make an informed decision on how much money to access through the EWA, the fee cost information is critical. The user may have elected instead for early access to $150.00 instead to keep the fee ratio even, for example. In addition, while the user is relying on the $1.99 fee, they may have only $102.00 in their bank account on the day the EWA deducts the early accessed wages and fees because the user relies on the fee term of their EWA contract. The user who acted in reliance on their contract terms now incurs additional overdraft fees they have to pay in addition to the already increased fee for the transaction. This example highlights why EWA contract terms must be transparent and why employees must be given sufficient notice of any changes to the contract terms.

B. Financing Small Business EWA Implementation

The recommendations below are intended to prioritize EWAs' abilities to provide features that work well in small businesses while still providing adequate protections to users of the programs.

202. *See supra* Part II.B.3; *see also* Perks v. Activehours, Inc., No. 5:19-cv-05543, 2019 WL 9667767 (N.D. Cal. Sept. 3, 2019) (explaining that, among other problems with individual suits, "the claims of the individual members of the class are not sufficiently large to warrant vigorous individual prosecution considering all of the concomitant costs and expenses attending thereto.").

1. *Regulation of Fee Structures*

Regulating how fee structures function rather than completely eliminating employee fee structures will help EWAs provide viable benefits to small businesses. When no fees for transactions or use of EWAs are charged to the employee, it burdens the employer with the entire cost of implementing and running the EWA. Fee structures should not automatically force an EWA strategy under scrutiny. Instead, EWA fee structures should be limited to reasonable, effective APR loan standards.

Disallowing high fees for very small transactions will help protect employees from making poor financial decisions. Adding or setting a higher minimum transaction amount and setting a fixed per-transaction fee will set a maximum effective interest on the transaction. Allowing reasonably regulated fees will help make the EWAs accessible to small employers. It is more expensive to implement EWAs in small business environments.[203] Fees allow flexibility for EWAs to structure themselves in unique ways that work for small businesses. Placing some of the cost of EWAs on the employees who perceive the EWA as a benefit is not bad for the employee unless the fees allow for the employee to be taken advantage of by the EWA.

2. *Offsetting Small Business Implementation Costs*

In the alternative, EWAs could offset the additional costs of implementation and risk associated with small businesses by increasing their prices for large companies. The federal government can incentivize this action from EWAs by providing tax breaks to EWAs that offer their products to small businesses, thereby making it more economically advantageous for EWA providers to find a solution that is effective in the small business market.

While this strategy is not particularly intuitive, it works appropriately when considered in conjunction with what many EWAs state to be their goals. Many EWAs advertise themselves as financial wellness tools.[204] In addition, some are Certified B Corps or Public Benefit Corporations.[205] Making small businesses competitive against their larger rivals is a vital public benefit to the communities where the employees who are benefiting from EWAs live. By placing some of the burdens of providing their service to small businesses on the larger businesses, the EWA also benefits. The EWA can effectively serve both the employees' interests and the small employers' interests and provide benefits to small employers and their employees. This strategy will diversify the types of businesses that the EWA provides service to, and it will be a boon on the EWAs' reputation as a benefit to the public. Not to mention, it will allow EWAs to be offered in communities without major corporate employers.

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203. *See supra* Parts III.A.3, III.B.

204. Cuttino, *supra* note 1, at 1511; *see Financial Wellness Platform*, PAYACTIV, *supra* note 16 (describing the product as a "holistic approach to financial wellness").

205. Press Release, PayActiv, PayActiv Secures $100 Million of Funding for Employer-Sponsored Financial Wellness Solutions (Aug. 13, 2020), https://www.payactiv.com/press/payactiv-secures-100-million-of-funding-for-employer-sponsored-financial-wellness-solutions/ [https://perma.cc/B6CE-N2N5].

V. Conclusion

The EWA market continues to grow and develop with the potential to benefit employees and employers. Regulation that protects the direct user of the EWA and the employers who offer the EWA is critical. Such regulation will assure that the continued growth of the EWA market is healthy for the economy. This regulation must consider the interests of small businesses because these small businesses make up a considerable portion of the economy. Small businesses must be capable of offering comparable benefits to their large counterparts to stay competitive in the hiring market. Regulation that effectively achieves these policy goals must focus on increasing EWA transparency, limiting the risks of use for uninformed consumers, and maintaining flexibility for EWAs to experiment with their structures.