# Earned Wage Access Laws Form A Prickly Policy Patchwork

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Law360 (October 15, 2024) --
Earned wage access, also known as paycheck advance products, have emerged as a critical solution for workers seeking early access to their earned wages. The Consumer Financial Protection Bureau estimates over 7 million workers used earned wage access, or EWA, products in 2022, totaling $22 billion in transactions.[1]


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These services are especially popular with younger consumers, 80% of whom expect employers will offer access to EWA or flexible payment services.[2]

However, this rise in popularity has been accompanied by an increasingly complex patchwork of state laws attempting to regulate EWA, creating compliance challenges for providers.

**The Role of States in Regulation of EWA and the Resulting Conflict**

Various state laws attempt to regulate EWA providers. But they do so in divergent ways, adding increased complexity to companies trying to navigate the regulatory landscape.

Nevada,[3] Missouri,[4] Wisconsin,[5] Kansas,[6] South Carolina,[7] Connecticut and California[8] are among the various states that are considering, or have passed, laws and/or regulations governing the provision of EWA services.

Unfortunately, much of this regulation has been patchy, with states trying to shoehorn EWA products into existing lending laws.

Regulatory efforts at the state level fall into two camps. One faction, led by Nevada, Missouri, Wisconsin, Kansas and South Carolina, has enacted laws that explicitly declare that EWA transactions are not loans or consumer credit, and the fees and gratuities associated with EWA services are not considered finance charges.

Accordingly, providers are generally exempt from state lending and disclosure requirements.

Despite their similar approach in classifying EWA products, these states still have differing regulatory requirements for providers. For example, some states, like Kansas, require EWA providers to register annually with the state regulator, while Nevada mandates that providers be licensed and submit an annual report detailing their products and services.

All states require EWA providers to make disclosures about fees and gratuities, treat all advances as nonrecourse, and not require a credit score to determine a consumer's eligibility. But some states, like Wisconsin and South Carolina, require EWA providers to offer at least one option for a consumer to obtain the EWA product at no cost.

On the other side of the split, California, Maryland and Connecticut have crafted frameworks that treat EWA as a traditional loan product. Under California's proposed law, EWA transactions are classified as loans, and gratuities and expedite fees are deemed finance charges.

This classification would require providers to comply with additional, state-mandated disclosure requirements regarding fees and gratuities earned, in addition to possible registration or licensing requirements.

While California's proposed rulemaking for EWA products remains in the notice and comment stage, Connecticut has already implemented its restrictive approach to EWA.

Instead of creating new legislation specifically for EWA products, the Connecticut Department of Banking released guidance in September 2023, defining EWA products as a type of "small dollar loan."[9]

This designation obligates EWA providers to disclose information similar to that required under the Truth in Lending Act, including the annual percentage rate that would apply to consumers.

The inclusion of expedited service fees and voluntary gratuities as finance charges led to many EWA offerings exceeding the state's 36% interest rate cap. The result: A significant number of EWA providers have stopped offering their products in Connecticut.

Finally, while Maryland has not yet enacted a law on EWA, its Office of Financial Regulation issued guidance in August 2023 stating that while employer-provided EWA products are not considered loans, direct-to-consumer EWA products may be loans depending on the "arrangement's facts and circumstances."[10]

The indecisive nature of the state's guidance has left EWA providers uncertain about how to comply with the law or offer their products.

**The CFPB's Push Into Regulating the EWA Industry**

Into this messy regulatory landscape stepped the CFPB. This July, the agency issued its own interpretive rule aiming to provide a more uniform regulatory framework for EWA products.[11]

Central to the CFPB's new rule is its interpretation that the obligation a consumer undertakes in an EWA transaction — to repay an advanced sum of money through future payroll deductions — constitutes a "debt" under the Truth In Lending Act.[12]

Under the bureau's view, all EWA products are considered consumer credit. Furthermore, the rule proposes that all voluntary tips and any additional fees, such as those for expedited fund delivery, be considered finance charges.

This interpretive rule marks a significant shift from an earlier 2020 advisory opinion, which had exempted certain EWA offerings from the Truth In Lending Act's disclosure requirements on the grounds that these products did not generate "debt" for consumers.[13]

**Takeaways for EWA Providers**

As opposed to uniform treatment, the conflicting nature of federal and state laws have forced EWA providers to adapt to a confusing regulatory landscape. Even those states that agree how to classify EWA products have varying licensing, registration, disclosure and product offering requirements. How should EWA providers navigate the differing regulatory regimes?

First, EWA providers should adopt a proactive approach to compliance, monitoring both federal and state regulations closely. With differing licensing, registration and disclosure requirements, there is no one-size-fits-all approach to EWA compliance.

Moreover, now that the CFPB has taken a stance on how it views EWA products, expect more states to introduce their own regulatory frameworks that mirror the bureau's approach.

As such, it is crucial for EWA providers to invest in meeting ever-changing legal requirements, and to adjust their business models where necessary.

Second, EWA providers should proactively seek support from their trade associations or directly engage with state regulators to actively participate in the rulemaking process. The impact of classifying EWA products as loans can have unintended consequences, as Connecticut's approach has shown.

Third, assuming the bureau's interpretive rule is implemented as proposed, it still could be subject to a challenge under the U.S. Supreme Court's decision in Loper Bright Enterprises v. Raimondo to overturn the Chevron doctrine this past summer.[14] Loper Bright would not directly apply to interpretive rules that are not promulgated under the Administrative Procedures Act.

However, that does not mean litigants cannot contest the bureau's approach in federal court in the context of an enforcement action, for example, and challenge whether its classification of EWA products as "credit" fits under the definition of the Truth In Lending Act.

Moreover, given that the bureau refused to engage in formal rulemaking in its efforts to regulate EWA products, a new CFPB director could just as easily rescind the interpretive guidance.

Finally, given where state and federal regulations are trending, providers should prioritize transparency in their operations, especially regarding fees, terms and conditions of EWA access.

Clear and understandable terms of service and disclosures will limit regulatory scrutiny, foster trust with users and underscore how preferable EWA products are to other financial products in the marketplace.

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[1] Consumer Financial Protection Bureau, Data Spotlight: Developments in the Paycheck Advance Market (July 18, 2024), available at https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/.

[2] Eighty percent of consumers aged 18-44 expect their employers to provide EWA or flexible pay products. As Earned Wage Access Grows, Oversight Tries to Catch up, Federal Reserve Bank of Kansas City (May 15, 2024), available at https://www.kansascityfed.org/research/payments-system-research-briefings/as-earned-wage-access-grows-oversight-tries-to-catch-up/.

[3] S.B. 290, 2023 Leg., 82nd Sess. (Nev. 2023).

[4] S.B. 103, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).

[5] A.B. 574, Reg. Sess. (Wis. 2024).

[6] H.B. 2560, Reg. Sess. (Kan. 2024).

[7] S.B. 700, 125th Gen. Assemb., Reg. Sess. (S.C. 2024).

[8] California Department of Financial Protection and Innovation, Notice of Third Modification to Proposed Rulemaking, PRO 01-21 on Income-Based Advances (July 2, 2024), https://dfpi.ca.gov/wp-content/uploads/sites/337/2024/07/PRO-01-21-Notice-of-Third-Modification.pdf. https://portal.ct.gov/dol/knowledge-base/articles/wage-and-workplace-standards/wage-and-workplace-standards-division-notice-to-employers-utilizing-earned-wage-access-products?language=en_US.

[9] Connecticut Department of Banking Issues Industry Guidance Regarding Public Act 23-126 (September 11, 2023), https://portal.ct.gov/-/media/dob/consumer-credit-division/09-11-23-department-issues-industry-guidance-reg-pa-23-126.pdf.

[10] Maryland Office of Financial Regulation, Guidance on Earned Wage Access Products (August 1, 2023) https://www.labor.maryland.gov/finance/advisories/advisory-ind-earnedwageaccess.pdf.

[11] Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work, 89 Fed. Reg. 61358 (proposed July 18, 2024) (to be codified at 12 C.F.R. pt. 1026), https://files.consumerfinance.gov/f/documents/cfpb_paycheck-advance-marketplace_proposed-interpretive-rule_2024-07.pdf [hereinfter 2024 Proposed Rulemaking].

[12] Proposed Rulemaking, supra note 2 at 10–11 ("[C]onsumers . . . incur a 'debt' when they obtain money with an obligation to repay via an authorization to debit a bank account or using one or more payroll deductions. It does not matter that the obligation to repay is

sometimes satisfied via payroll deduction.").

[13] Consumer Financial Protection Bureau, Advisory Opinion on Earned Wage Access Programs (Nov. 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf [hereinafter 2020 Opinion].

[14] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).