EARNED WAGE ACCESS AND THE END OF PAYDAY LENDING

JIM HAWKINS*

ABSTRACT

Fintech companies have developed a product that allows employees to access wages that they have already earned before their scheduled payday. The fee for earned wage access is usually small, making this product an extremely attractive alternative to payday loans—the go-to resource for lower-income Americans for the past three decades.

This Article analyzes the earned wage access market, assesses the likelihood that it will displace payday lending, and reveals some of the dangers lurking beneath the low-cost surface of these transactions. It argues that earned wage access products have the potential to end the thirty-year reign of payday lending. But these products do not fit neatly into existing legal categories; policy makers need to establish legal certainty regarding this classification of earned wage access to facilitate its growth while at the same time ensuring that the law protects consumers.

* Alumnae College Professor in Law, University of Houston Law Center. I am thankful to members of the earned wage access industry for speaking with me, including Ijaz Anwar (Cofounder and Chief Operating Officer, PayActiv, Inc.); Alex Bradford (Cofounder and Chief Executive Officer, Rain Instant Pay, Inc.); Michael Park (Chief Compliance Officer and Chief Legal Officer, Cardplatforms, LLC); Jon Schlossberg (Chief Executive Officer, Even Responsible Finance, Inc.); Chris Suppa (Senior Vice President for Business Development, FlexWage Solutions LLC); Abigail Wald (Litigation Associate, Paul Hastings, LLP, Counsel for Earnin); and another anonymous market participant. I am also grateful for feedback from Emily Berman, Matthew Bruckner, David Fagundes, Anne Fleming, David Kwok, Nathalie Martin, Ronald Mann, Steve Willborn, and Rory Van Loo; state regulators; and participants at the 2019 Berkeley Consumer Law Scholars Conference and a workshop and colloquium at the University of Houston Law Center. For truly excellent research assistance, I thank Taylor Hood.

CONTENTS

INTRODUCTION

The iniquities of payday lenders have been well-documented.[1] Opponents contend that payday loans are debt traps,[2] lenders exploit consumers' cognitive biases,[3] and payday borrowers are more likely to declare bankruptcy.[4] The core of each of these arguments, however, is that payday loans are simply too expensive.[5] To see why price is the real problem, imagine a world in which

[1] For a very small sample of the extensive literature from the past two decades, see, for example, Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of* "*Payday*" *Loans in Military Towns*, 66 OHIO ST. L.J. 653, 672-76, 686-93, 822-32 (2005) (discussing how the payday lending industry exploits the especially vulnerable group of military service members); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 25-97 (2002); Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 573-77, 598-613 (2010) (reviewing payday lenders' practices, consumer understanding of payday loan terms, and legislation to combat abuses); Rebecca Schonberg, *Introducing* "*Abusive*"*: A New and Improved Standard for Consumer Protection*, 100 CALIF. L. REV. 1401, 1408-11, 1435-39 (2012).

[2] *See, e.g.*, Michael A. Stegman, *Payday Lending*, J. ECON. PERSPS., Winter 2007, at 169, 176 (discussing "rollover phenomenon" of payday lending); Ryan Baasch, Note, *Taming Title Loans*, 101 VA. L. REV. 1753, 1755, 1765-68 (2015) (describing "debt treadmill" that borrowers face from monthly rollovers); Richard J. Thomas, Note, *Rolling Over Borrowers: Preventing Excessive Refinancing and Other Necessary Changes in the Payday Loan Industry*, 48 WM. & MARY L. REV. 2401, 2409-12 (2007) (discussing "refinancing trap" from accumulation of monthly rollover fees).

[3] *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 44-45 (2008) (arguing that lenders rely on consumers to misestimate ability to repay loan and misunderstand fee structure); Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 J. FIN. 1865, 1889-91 (2011); Kathryn Fritzdixon, Jim Hawkins & Paige Marta Skiba, *Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. ILL. L. REV. 1013, 1016-17, 1041-54 (discussing empirical evidence that "customers suffer from behavioral biases that impede perfectly rational use of the title loan product"); Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 615, 627-33 (2010) ("[T]he underestimation bias may explain the frequency of payday-loan rollovers."). *But see* Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105, 109, 118-23 (2013) (showing that 60% of borrowers accurately estimated the length of time needed for loan repayment, and resisting notion that most extended payday loan usage stems from borrower cognitive biases).

[4] Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, 62 J.L. & ECON. 485, 486, 496-506, 513-17 (2019) ("[A]ccess to payday loans causes a significant increase in personal bankruptcy rates. The benchmark point estimate corresponds to a near doubling of the annual bankruptcy rate . . . .").

[5] *Cf.* Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 592 (2012) [hereinafter Hawkins, *Credit on Wheels*] ("Several of the most powerful critiques of title lending are merely different ways of stating the simple argument that title loans are too expensive. For example, the argument that people roll their loans over repeatedly, paying only the interest fee, exhibits concern about the ultimate price

payday loans had annual percentage rates of 10%. Very few people would be concerned about a borrower spending less than $25 in total interest for a $300 payday loan that the borrower rolled over repeatedly for six months (even if lenders structured the product to exploit cognitive failures and encourage rollovers). Payday loans are problematic because, at current market prices, such a loan would cost $540 in interest alone.[6]

States have had various degrees of success in eliminating payday loans, but even success in that context may really be failure.[7] Empirical research about the net welfare effects of eliminating access to short-term, small-dollar loans is unclear—even those at very high price points.[8] At the federal level, the Consumer Financial Protection Bureau ("CFPB") promulgated regulations aimed at maintaining the payday loan product while curbing abusive practices,[9]

of title loans. The critique of the structure of title loans as single lump sum payments really reflects a concern over the price borrowers pay for the loan, because the lump sum often requires multiple payments of fees.").

[6] CONSUMER FED'N AM., ABUSIVE SMALL DOLLAR LENDING IN TEXAS: TIME TO CLOSE THE LOOPHOLE, https://consumerfed.org/pdfs/TX-Brief-fact-sheet_Policy-Page-and-CSO-Loophole.pdf [https://perma.cc/7Z86-D23G] (last visited Feb. 15, 2021) (listing the "[a]verage loan cost for a payday loan borrower [as] $840 for a $300 loan").

[7] Most states set usury caps so low that payday lenders cannot operate. *See, e.g.*, N.H. REV. STAT. ANN. § 399-A:16(I) (2020) (setting maximum interest rate of 36% per annum); N.Y. BANKING LAW § 14-a(1) (McKinney 2020) (setting maximum interest rate of 16% per annum); N.Y. PENAL LAW § 190.40 (McKinney 2020) (setting usury cap at 25% per annum "or the equivalent rate for a longer or shorter period").

[8] *See generally* Neil Bhutta, Jacob Goldin & Tatiana Homonoff, *Consumer Borrowing After Payday Loan Bans*, 59 J.L. & ECON. 225, 256 (2016) (finding that although restrictive state laws "are effective at curbing the use of payday loans[,] . . . this reduction in payday loan use is accompanied by an increase in the use of pawnshop loans, with no effect on the use of credit card debt or consumer finance loans," suggesting that "payday loan restrictions do[] not appear to meaningfully reduce the fraction of the population that utilizes alternative financial services"); Richard Hynes, *Payday Lending, Bankruptcy, and Insolvency*, 69 WASH. & LEE L. REV. 607, 613 (2012) ("[C]hanges in state law are more consistent with the beneficial view of payday lending than the debt-trap hypothesis. When a state legalizes payday lending, bankruptcy filing rates tend to fall in counties with large military communities . . . ."); Brian T. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q.J. ECON. 517, 520 (2011) (finding that payday loan "access leads to increased difficulty paying mortgage, rent and utilities bills"); Adair Morse, *Payday Lenders: Heroes or Villains?*, 102 J. FIN. ECON. 28, 42 (2011) (concluding that access to payday loans mitigates foreclosures and larcenies following natural disaster); Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap*, 34 J. BANKING & FIN. 546, 554 (2010) (finding that "restricting access to expensive consumer credit on payday loan users . . . hinders productive investment and/or consumption smoothing"). For the best review of the empirical literature, see John P. Caskey, *Payday Lending: New Research and the Big Question*, *in* THE OXFORD HANDBOOK OF THE ECONOMICS OF POVERTY 681, 685-96 (Philip N. Jefferson ed., 2012).

[9] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. pt. 1041 (2020). For a summary of the provisions, see generally *Recent Regulation: Consumer*

but the Trump Administration rewrote that rule to reduce its restrictions on payday lenders.[10] Thus, it is unclear whether ending payday lending through regulatory intervention is optimal or possible.

A key component that has been missing from the critique of payday lending is a plausible alternative. Recently, however, a small number of fintech companies have entered this space and claim to have developed a solution for the short-term liquidity crises that American employees face while they wait for payday. While the name of the product is not entirely settled, this Article refers to it as an "earned wage access product." Earned wage access companies work with employers to learn information about employees' wages and to access employees' paychecks. These companies give participating employees the wages that the employees have already earned but have not yet been paid under an agreement that the employer will deduct the amount advanced from the employee's next paycheck or deduct it from the employee's bank account.[11] This service is generally provided at very low cost to the employee, meaning these fintech companies solve payday lending's biggest problem—price.

While the number of companies currently offering earned wage access is low, this market is exploding and has tremendous growth potential. Earned wage access companies have partnered with major employers, including market giants such as McDonald's, Taco Bell, Walmart, and Wendy's.[12] By partnering with payroll processing companies, fintech companies can offer their product to hundreds of thousands of employers, including small employers. One major player in the market, PayActiv, partnered with Automatic Data Processing ("ADP") in July 2018, giving over 600,000 businesses access to PayActiv's services.[13] Businesses offer these fintech products as part of financial wellness benefit packages, and the number of businesses offering such packages is increasing every year.[14]

Financial Regulation — CFPB's Final Payday Lending Rule Deems It an "Unfair" and "Abusive" Practice to Make Payday Loans Without Determining Borrower Ability to Repay, 131 HARV. L. REV. 1852 (2018).

[10] *See* Kate Berry, *CFPB to Scrap Key Underwriting Portion of Payday Rule*, AM. BANKER (Jan. 14, 2019, 12:38 PM), https://www.americanbanker.com/news/cfpb-to-scrap-key-underwriting-portion-of-payday-rule.

[11] *See What Is Earned Wage Access?*, PAYACTIV, https://www.payactiv.com/earned-wage-access/ [https://perma.cc/QB66-UCKC] (last visited Feb. 15, 2021).

[12] *See* David Reidy, Susan Rodriguez, Brian Coughlan & Christine Mastromonaco, *Time for Regulators to Embrace Earned Wage Access*, LAW360 (Oct. 24, 2018, 12:26 PM), https://www.law360.com/articles/1094136/time-for-regulators-to-embrace-earned-wage-access.

[13] Press Release, PayActiv, PayActiv Raises $20 Million to Expand Financial Wellness Offering for Millions of Financially Stressed Workers (Oct. 10, 2018), https://www.payactiv.com/20-million-series-b-funding-expand-financial-wellness-offering/ [https://perma.cc/MJ7C-K8M3].

[14] *See* John Adams, *Prepaid Finds a Role as an Employee Perk*, PAYMENTSSOURCE (Jan. 7, 2019, 12:01 AM), https://www.paymentssource.com/news/prepaid-finds-a-role-as-an-

Earned wage access companies have raised substantial capital and are experiencing growth due to high demand for the product. Even Responsible Finance ("Even") launched its earned wage access app for smartphones in December 2017 and has partnered with Walmart to offer its services to Walmart employees.[15] By 2018, Even had raised more than $52 million in capital, was projected to generate $20 million in revenue, and was available to over 1.4 million employees, including around 100,000 Walmart employees who used the app daily.[16] Another company, FinFit, provides its "financial wellness benefit platform" to 125,000 employers[17] and over 1 million employees.[18] Over 10 million users have downloaded Earnin's earned wage access app, and the company is likely already worth more than $1 billion.[19] The market demand for instant access to earned wages is very strong. Within just a few months of Uber creating an instant pay option for its drivers, "well over 80,000 drivers signed

---

employee-perk ("More plan sponsors are offering financial wellness as a benefit package, with 21 percent of U.S. companies offering the service in 2018, up from 16 percent in 2016, according to Market Strategies."); Melody Hahm, *Walmart Employees Should Use the New Early Pay Policy as a Last Resort*, YAHOO! FIN. (Dec. 14, 2017), https://finance.yahoo.com/news/walmart-employees-use-new-early-pay-policy-last-resort-215800636.html [https://perma.cc/XS3S-93N4] (describing features of Walmart's earned wage access program, including access to budgeting tools); James Rufus Koren, *Need a Loan? Forget the Corner Payday Lender—Your Boss Has You Covered*, L.A. TIMES (Aug. 5, 2018, 3:00 AM), https://www.latimes.com/business/la-fi-trueconnect-comcast-20180805-story.html ("The survey of 150 multinational companies found that financial wellness benefits will probably become much more common. Just 14% of employers said they already have a strategy for helping employees improve their financial well-being, but 62% said they will within the next three years.").

15 Jeff Kauflin, *VCs Bet $40 Million on Money App for Those Living Paycheck to Paycheck*, FORBES (July 19, 2018, 11:00 AM), https://www.forbes.com/sites/jeffkauflin/2018/07/19/payday-loans-be-gone-a-growing-set-of-startups-are-gunning-to-unseat-them/#7c93689d6850.

16 *Id*.

17 Press Release, FinFit, FinFit Announces Partnership with Pilgrim's Pride Corporation (Dec. 7, 2018), https://www.finfit.com/2018/12/07/pilgrims-pride-partnership/ [https://perma.cc/YL8N-F4L8].

18 Briana Adhikusuma, *Virginia Beach-Based Finfit's Financial Wellness Is Catching On*, INSIDE BUS. (Apr. 3, 2018, 11:53 AM), https://www.pilotonline.com/inside-business/article_317f2c14-3757-11e8-9118-2baf1a272819.html [https://perma.cc/Q73U-UYD2] (describing FinFit's growth and estimating that between 30% and 40% of employees begin using service within one year of employer's adoption).

19 Kevin Dugan, *Popular Cash Advance App Earnin Operating in Payday Loan 'Gray Area,' Critics Claim*, N.Y. POST (Mar. 21, 2019, 10:05 PM), https://nypost.com/2019/03/21/popular-cash-advance-app-earnin-operating-in-payday-loan-gray-area-critics-claim/ [https://perma.cc/P5UV-MFTS].

up for Instant Pay with the Uber Debit Card from GoBank."[20] Within months, hundreds of thousands of drivers signed up, and Instant Pay paid "$1.3 billion . . . in cash-outs by drivers in its first year alone."[21]

Despite these products existing for more than five years (decades in fintech time), very little research exists about earned wage access products. Legal academics have noted their promise in passing, but there are few independent, sustained analyses of the legal status of these products.[22] Todd Baker and Snigdha Kumar have done excellent work evaluating the relative cost of earned wage access and payday loans, but they have compared only the two products on that single metric.[23] Given the history of employer loans trapping workers in

[20] Michael, *Instant Pay: Your Money, When You Want It*, UBER: NEWSROOM (Aug. 16, 2016), https://www.uber.com/newsroom/instant-pay/ [https://perma.cc/TW3G-PKP8] (citation omitted).

[21] Darrell Etherington, *Uber's Instant Pay Has Cashed Out $1.3B to Drivers in Just One Year*, TECHCRUNCH (Apr. 5, 2017, 9:00 AM), https://techcrunch.com/2017/04/05/ubers-instant-pay-has-cashed-out-1-3b-to-drivers-in-just-one-year/ [https://perma.cc/RDR5-E3N6].

[22] Nakita Cuttino's new article presents a detailed legal and policy analysis of the earned wage access product. *See generally* Nakita Q. Cuttino, *The Rise of "FringeTech": Regulatory Risks in Early Wage Access*, 115 NW. U. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3531798 [https://perma.cc/SLJ4-G3RF]. *See also generally* Alexis Christensen, Note, *Early Wage Access Products: Twenty-First Century Innovations or Harbingers of Debt?*, 27 GEO. J. ON POVERTY L. & POL'Y 429 (2020). Other authors have mentioned earned wage access companies in passing. *E.g.*, Shmuel I. Becher, Yuval Feldman & Orly Lobel, *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans*, *in* LEGAL APPLICATIONS OF MARKETING THEORY (Jacob Gersen & Joel Steckel eds.) (forthcoming 2021) (manuscript at 20), https://ssrn.com /abstract=3235810 [https://perma.cc/V7MG-AW24] (discussing earned wage access programs as one of several alternatives to high-cost payday lending); Eliza Platts-Mills & Justin Chung, *Challenging Payday Lenders by Opening Up the Market for Small-Dollar Loans*, 33 BYU J. PUB. L. 101, 140-41 (2018) (summarizing concept of earned wage access platforms as one fintech solution to high-fee lending problem). One *Law360* opinion piece discusses the legal status of earned wage access, but the authors represent a major earned wage access company as a client, suggesting the need for additional research. Reidy et al., *supra* note 12.

[23] *See* Todd Baker & Snigdha Kumar, *The Power of the Salary Link: Assessing the Benefits of Employer-Sponsored FinTech Liquidity and Credit Solutions for Low-Wage Working Americans and Their Employers* 8 (Harvard Kennedy Sch. Mossavar-Rahmani Ctr. for Bus & Gov't Assoc. Working Paper Series, Paper No. 88, 2018), https://www.hks.harvard.edu /sites/default/files/centers/mrcbg/working.papers/88_final.pdf [https://perma.cc/2AM3-6PCY] (seeking to answer the question of whether the two current earned wage access products are comparatively less expensive "by comparing the cost of accessing the products provided by SalaryFinance and PayActiv with the cost of using market equivalents"). Baker and Kumar recognize the needs for "deeper investigation of the impact of these products." *Id.* at 4. Like the authors of "Time for Regulators to Embrace Earned Wage Access," Reidy et al., *supra* note 12, Kumar also has a link to PayActiv. Baker & Kumar, *supra*, at 19 n.16 ("Co-author Snigdha Kumar completed a summer internship with PayActiv in 2017."). Baker also has a paper that looks at other fintech products that could affect small-dollar loan markets.

debt, a critical analysis of earned wage access is needed.[24] Are earned wage access products the modern equivalent of the "company store," or do they represent the end of payday lending?

Lawmakers across the country have started paying attention to this market, with some bills enabling the industry and other bills and enforcement actions pushing back against it. The California State Assembly is poised to pass a bill to enable market participants,[25] but a Missouri State Senator is proposing a law likely aimed at stifling the industry.[26] Regulators in eleven states are investigating potential wrongdoing by earned wage access companies.[27]

This Article is the first sustained legal and empirical analysis of this market. Drawing from a series of interviews with earned wage access companies, existing empirical data on the market, and the wealth of data on payday lending, this Article argues that earned wage access has the potential to end payday lending and radically improve the small-dollar loan arena. In order for this to happen, however, the law must change to specifically exempt earned wage access from credit regulations and to establish safeguards to protect employees using this product.

The Article proceeds as follows. Part I describes the business models and the fee structures in the earned wage access market. Part II weighs the upsides and dangers of earned wage access, especially in comparison to payday loans and makes the case that earned wage access products could eliminate payday

---

Todd H. Baker, *FinTech Alternatives to Short-Term Small-Dollar Credit: Helping Low-Income Working Families Escape the High-Cost Lending Trap* 46-76 (Harvard Kennedy Sch. Mossavar-Rahmani Ctr. for Bus. & Gov't Assoc. Working Paper Series, Paper No. 75, 2017), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/75_final.pdf [https://perma.cc/E97J-PXDH] (examining fintech alternatives to short-term, small-dollar credit including digital credit access, digital credit-builder lenders and services, digital financial and cash-flow management software solutions, alternative digital banks, digital income/expense variability–management solutions, and digital savings solutions).

[24] *See* Steven L. Willborn, *Indirect Threats to the Wages of Low-Income Workers: Garnishment and Payday Loans*, 45 STETSON L. REV. 35, 40 (2015).

[25] *See* S.B. 472, 2019-2020 State Assemb., Reg. Sess. (Cal. 2019) (requiring licensing for and regulation of wage-, work-, and income-based advances); Kevin Wack, *As California Mulls Rules for Payday Loan Alternative, Rifts Emerge*, AM. BANKER (June 24, 2019, 12:50 PM), https://www.americanbanker.com/news/as-california-mulls-rules-for-payday-loan-alternative-rifts-emerge (discussing enabling effects of proposed legislation, including exempting earned wage access companies from lending laws and licensing requirements).

[26] *See* H.B. 253, 100th Gen. Assemb., Reg. Sess. (Mo. 2019); Cyrus Farivar, *Millions Use Earnin to Get Cash Before Payday. Critics Say the App Is Taking Advantage of Them.*, NBC NEWS (July 26, 2019, 4:41 AM), https://www.nbcnews.com/tech/internet/millions-use-earnin-get-cash-payday-critics-say-app-taking-n1034071 [https://perma.cc/3THL-A44H] (discussing Jill Schupp's plans to include earned wage access companies in her proposed payday-lending regulation).

[27] Kevin Dugan, *Online Lenders Under Investigation by Regulators in 11 States, Puerto Rico*, N.Y. POST (Aug. 6, 2019, 10:46 AM), https://nypost.com/2019/08/06/online-lenders-under-investigation-by-regulators-in-10-states-puerto-rico/ [https://perma.cc/3FP7-5T25].

lending. Part III describes the regulatory uncertainty currently surrounding these products, which do not clearly fall within or outside federal and state laws governing credit products. It suggests that regulations aimed at eliminating legal uncertainty and ensuring growth in the market will best protect the employees who use earned wage access products.

I. THE EARNED WAGE ACCESS MARKET

Fintech companies that work with employers to advance earned wages have adopted a variety of business models and fee structures. The market is dynamic, with companies changing names and approaches. To assess the market's ability to disrupt payday lending, its status under existing law, and any regulatory intervention needed, this Article creates a taxonomy of the business models and fee structures used in the market. Based on interviews with market participants, analysis of marketing material, and existing media stories and academic research about the industry, this Part examines the companies in the earned wage space.

A. *Earned Wage Access Business Models*

Some employers themselves offer employees advances on their earned wages without help from third parties. Uber, for instance, has a program called Instant Pay that allows drivers to access their earnings up to five times a day.[28] The wages are transferred to the driver's personal debit card for a $0.50 fee or to an Uber Debit Card from GoBank for no fee.[29] In a more conventional context, many smaller employers offer loans or advances to their employees off the books and without the involvement of any other company.[30]

The focus of this Article, however, is third-party companies that offer wage advances by partnering with employers. Each company offering earned wage access has a slightly different business model, but these business models fall within two major categories: direct-to-business models and direct-to-consumer models. It is important to categorize how these businesses work because different business structures may affect whether regulators or courts consider these products loans under applicable law.[31]

---

[28] *Your Money When You Want It*, UBER, https://www.uber.com/info/instant-pay/ [https://perma.cc/TUA4-436J] (last visited Feb. 15, 2021).

[29] *Id.*

[30] Richard A. Hunt & Mathew L.A. Hayward, *Value Creation Through Employer Loans: Evidence of Informal Lending to Employees at Small, Labor-Intensive Firms*, 29 ORG. SCI. 284, 285 (2018) ("Closer inspection reveals that employer loans to employees in small firms are commonplace, and many of these loans are made informally, or 'off the books.'"); *id.* at 291 ("The 83 businesses included in the study issued an average of 5.5 employee loans, with a low of 1 loan to a high of 16 loans. Twenty-seven businesses issued only [off-the-book] loans, 17 issued only formal loans, and 39 issued both kinds of loans . . . .").

[31] *See infra* Figure 2.

1. Direct-to-Business Model

The first business model involves earned wage access companies working directly with the employer to offer wage access to employees. This model is called the direct-to-business or business-to-business model. The employer signs a commercial contract with the earned wage access company, hiring the company to facilitate employee wage access.[32]

Some earned wage access companies operate under the direct-to-business umbrella to provide the technological platform and support for employees to access wages that they have already earned directly from the employer's treasury. The employer then deducts these advances from the employee's next paycheck.

FlexWage describes how its product, OnDemand Pay, uses FlexWage technology but employers' funds for advances.

> OnDemand Pay is an on demand, patented, financial wellness benefit that allows employers to give early access to already earned wages, helping employees avoid expensive short-term borrowing costs and overdraft fees. . . .
>
> Our patented system interfaces directly with companies' Payroll and Time & Attendance software to calculate employees' earned wages. Employees may access a portion of their earned wages prior to payday when cash flow challenges arise. Companies' policies govern the frequency and percentage of the earned wages that employees may access. There is no financial risk as the employee has already earned the pay.[33]

Similarly, Instant Financial facilitates employees getting advances directly from their employers' payrolls; the advances are put on a prepaid debit card.[34]

But some employers do not want to be involved in offering access to wages because they do not want to navigate payroll laws. Smaller employers also may not want to use their funds to advance wages.[35] Thus, earned wage access companies in the direct-to-business space have developed other product models beyond this employer-funded model.

A second model within the direct-to-business approach is for the earned wage access company to fund the advances itself, after which the employer deducts

---

[32] Telephone Interview with Ijaz Anwar, Cofounder & Chief Operating Officer, PayActiv, Inc. (Jan. 9, 2019) [hereinafter PayActiv Interview].

[33] *Less Wait for Your Money ('Cause Bills Won't Wait for You).*, FLEXWAGE, https://flexwage.com/ondemand-pay/ [https://perma.cc/QXK3-XK3Z] (last visited Feb. 15, 2021).

[34] *Get Started with Instant Today*, INSTANT, https://www.instant.co/faq/ [https://perma.cc/DGF3-PQZP] (last visited Feb. 15, 2021) (explaining details of the Instant program, including access to Instant Card prepaid Visa debit card loaded with funds by employer).

[35] Telephone Interview with Chris Suppa, Senior Vice President for Bus. Dev., FlexWage Sol., LLC (Jan. 21, 2019) [hereinafter FlexWage Interview].

the advance from the employee's next paycheck and uses it to repay the wage-advance company. PayActiv is one service that uses this model. In marketing to employers, PayActiv makes clear that its app does not change the employer's cash-flow process because PayActiv fronts the money themselves.[36] It is repaid when the employer deducts the money from the employee's next paycheck.[37] Even also follows this model in some transactions,[38] as does InstantWage, a product created by Cardplatforms that funds advances upfront (delivering them to a prepaid card) before deducting payments directly from the paycheck.[39]

The exact legal structure of the transactions used in this second business model is not clear from the companies' public information. In one contract, the earned wage access company purchases the right to receive the wages from the employee, and the employee pays a fee for the sale:

> From time to time, Seller [i.e., the employee] may identify Unpaid Earnings it wishes for DailyPay to purchase from Seller. DailyPay may offer to purchase all or part of the Unpaid Earnings that Seller has requested DailyPay purchase. If you accept DailyPay's offer, DailyPay will pay you the Purchase Price. At the time DailyPay pays you the Purchase Price, you sell, transfer, convey, and assign to DailyPay all of your right, title, and interest in and to the related Purchased Unpaid Earnings. DailyPay does not assume any liabilities or obligations related to any Purchased Unpaid

[36] *Frequently Asked Questions*, PAYACTIV [hereinafter *PayActiv Frequently Asked Questions*], https://www.payactiv.com/faq/ [https://perma.cc/F7R7-K828] (last visited Feb. 15, 2021) (responding "No. PayActiv fronts the cash to the employees" to the question "Will PayActiv have an impact on an employer's cash flow?").

[37] *The PayActiv Platform*, PAYACTIV, https://www.payactiv.com/holistic-financial-wellness-platform [https://perma.cc/4AU8-BSJ2] (last visited Feb. 15, 2021) ("The money taken using PayActiv is deducted from upcoming paychecks when payroll is processed.").

[38] *FAQs*, EVEN [hereinafter *Even FAQs*], https://www.even.com/employees/support [https://perma.cc/2N3V-4PCY] (last visited Feb. 15, 2021) (responding "Your employer may be able to process the repayment as a deduction on your paycheck. If that isn't an option, the repayment will come from your connected bank account on payday, after you receive your paycheck" to the question "How do I pay back my Instapay?"). Similarly, it appears that DailyPay used its own funds for advances because it expressly took on the risk that the employer may not repay DailyPay after an advance in its contract with employees. *Terms and Privacy: Program Terms*, DAILYPAY [hereinafter *DailyPay Terms and Privacy*], https://www.dailypay.com/legal/#program-terms [https://perma.cc/K2R5-HTXR] (last updated Dec. 16, 2020) ("Our right to receive your Daily Earnings is non-recourse. This means that if the Hiring Entity pays us an amount that is less than the amount of the Daily Earnings—for example, if the Hiring Entity is unable to make payment because its business has slowed down or closed in the ordinary course of business—and if you have not breached these Program Terms, then you will owe us nothing.").

[39] Telephone Interview with Michael Park, Chief Compliance Officer & Chief Legal Officer, Cardplatforms, LLC (Feb. 4, 2019) [hereinafter Cardplatforms Interview].

> Earnings; any such liabilities and obligations will remain solely with Seller.[40]

Other contracts are similar.[41]

This arrangement works similarly to accounts or receivable factoring. Factoring describes a transaction in which a business, the factor, purchases accounts receivable from a company at a discount. Then, the company that had previously owned the accounts receivable has its customers pay the factor the money owed to the company.[42] Usually, the factor pays the company less than the company is owed because the factor takes on the risk that the debtor will not pay in full.[43]

An alternative structure would be for the earned wage access company to advance the wages (like a loan) in exchange for the employee promising to instruct the employer to deduct those wages from the employee's next paycheck. Lawyers who represent an earned wage access company have raised the possibility that the Truth in Lending Act[44] ("TILA") could affect earned wage advances, so it is possible that other companies do not follow the sale-of-wages paradigm but instead use an advance-and-repay structure.[45] Whatever the exact legal structure of the transaction, this first group of earned wage access companies all work directly with employers to offer employees access to wages.

2. Direct-to-Consumer Model

The other major group of earned wage access companies is involved in direct-to-consumer transactions. In this business model, the earned wage access company pays the advance to the employee and then deducts the advance after

[40] This quote comes from an older version of DailyPay's website. *See Terms of Use*, DAILYPAY (Mar. 6, 2019) [hereinafter *DailyPay Prior Terms of Use*], https://web.archive.org/web/20190306095301/https://www.dailypay.com/terms.

[41] For example, an older version of *Branch Terms of Service* stated,

> When you receive an advance of [earned wages], you sell and transfer to Branch, all right, title and interest in and to those [earned wages]. Then the amount of the advance plus any delivery fees associated with the transaction are deducted from your paycheck by your employer on the normal pay day in accordance with federal and state regulations, and paid to Branch through an ACH transfer. You receive your paycheck minus the amount of the [earned wage] advance and any associated delivery fee.

See, e.g., *Terms of Service*, BRANCH [hereinafter *Branch Prior Terms of Service*], https://web.archive.org/web/20201108190137/https://www.branchapp.com/terms (last visited Feb. 15, 2021).

[42] *See* John A. Gebauer, 24A FLA. JUR. 2D *Factors and Commission Merchants* § 3 (2020).

[43] *See, e.g.*, Citigroup Inc., Exchange Act Release No. 83,858, 2018 WL 3913653, at *2 (ALJ Aug. 16, 2018) (order) ("Under an accounts receivable factoring program, Banamex typically 'discounted' or 'factored' the invoice by advancing to its customer an amount less than the face value of the factored invoice.").

[44] 15 U.S.C. §§ 1601-1667f.

[45] *See* Reidy et al., *supra* note 12 (discussing unsettled regulatory landscape regarding earned wage access laws).

payday from the employee's bank account. Earnin, a company backed by more than $200 million in private investment, relies on users to provide it access to user bank accounts and employment information.[46] Earnin uses the employee's phone to track how long the employee is at work to determine how much the employee is eligible to seek.[47] Then, when the employee requests the wages, it deposits money into the employee's account. On payday, Earnin withdraws money directly from that account.[48] Earnin is not the only direct-to-consumer company. As just one example, Dave offers a 0% interest cash advance for people a few days from payday, up to $100 for people who bank with Dave.[49] Some companies, like Branch, operate under both direct-to-business and direct-to-consumer models.[50]

3. Distinctive Features in this Market

Two other features are distinctive about this market. First, remarkably, earned wage access companies often allow any employee with a partner business to obtain an advance without regard to the employee's creditworthiness. PayActiv uses little or no credit scoring to determine to which employees it will advance wages.[51] Thus, even for the consumers with thin credit files or poor credit—the core of the payday-lending market[52]—earned wage access companies offer access to funds before payday.

---

[46] Paul Sawers, *Earnin Raises $125 Million for Payday Advance Platform Without Fees*, VENTUREBEAT (Dec. 20, 2018, 6:00 AM), https://venturebeat.com/2018/12/20/earnin-raises-125-million-for-payday-advance-platform-without-fees/ [https://perma.cc/K7SD-YK2W] ("To access Earnin's service, users must first connect their bank account and enter their employment information — the company has deals with a number of payroll providers to help manage payments.").

[47] *What Are Automagic Earnings?*, EARNIN, https://help.earnin.com/hc/en-us/articles/226806367-What-are-Automagic-Earnings- [https://perma.cc/ZBR4-BDRB] (last visited Feb. 15, 2021) ("Automagic Earnings replaces the need for a timesheet. For it to work, we need your phone's GPS (location services) to be on at all times, and you must have a fixed work address.").

[48] *See* EARNIN, https://www.earnin.com [https://perma.cc/28QG-2YF3] (last visited Feb. 15, 2021).

[49] *See* DAVE, https://www.dave.com [https://perma.cc/LKV9-E9ZW] (last visited Feb. 15, 2021).

[50] *Branch Terms of Service*, BRANCH, https://www.branchapp.com/terms [https://perma.cc/V3GF-RTEE].

[51] Baker & Kumar, *supra* note 23, at 10-11.

[52] Michael A. Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 ECON. DEV. Q. 8, 9 (2003) ("We then examine the size and composition of the market for payday loans, in terms of the aggregate demand and the characteristics of consumers who use the product. As one might expect, what most borrowers have in common is significant credit constraints, including poor and impaired credit histories.").

Second, some companies make advances that are nonrecourse while others give the earned wage access company the right to pursue money from the employee. DailyPay, for instance, does not collect repayment for advances from employees beyond the payroll deduction.[53] PayActiv even indemnifies the employer for losses; in response to the question "What happens if an employee accesses funds and their employment discontinues?," PayActiv states: "This is at Zero Risk to the employer. PayActiv indemnifies the employer against financial loss associated with the PayActiv service."[54]

For other businesses, however, the earned wage access company does reserve the right to seek compensation directly from the employee. Instant Financial's agreement states,

> We and your Employer, where applicable, reserve the right to deduct funds from your Card Account in order to correct a previous error or overpayment to you, and you authorize us (a) to share information as necessary with your Employer in connection with resolving any errors or overpayments related to Payroll loads to the Card and (b) to the extent applicable, to accept instructions from your Employer to add or deduct funds from your Account and, in the case of deductions, to return those funds to your Employer.[55]

FlexWage uses its technology to advance funds from the employer's treasury without ever collecting money from employees, allowing employers themselves to recoup any overpayments caused by mistakes or employment changes.[56] Given the fact that employers have remarkable power to correct overpayments, this issue is a significant problem for employees who may contest the mistake or may not be able to absorb a sudden loss of income on a future paycheck.[57] Thus, depending on the specific company, an employee may be personally liable for money owed to the earned wage access company.

B. *Earned Wage Access Fee Structures*

In addition to having various business models, earned wage access companies also charge fees in a variety of ways. First, some companies charge employees each time they obtain an advance. FinFit's WageNow product, for instance, used

[53] *See DailyPay Terms and Privacy*, *supra* note 38.

[54] *PayActiv Frequently Asked Questions*, *supra* note 36.

[55] INSTANT FIN., INSTANT FINANCIAL PREPAID VISA CARD: PAYROLL CARD CARDHOLDER AGREEMENT/TERMS & CONDITIONS 11 (2018) [hereinafter INSTANT TERMS & CONDITIONS], https://www.instant.co/wp-content/uploads/2018/10/Incomm-US-CHA-Generic-25_09_18.pdf [https://perma.cc/5JWK-WCC3]; *see also Branch Terms of Service*, *supra* note 50 ("If the payroll deduction is not able to be made due to employee termination, Branch may pull the amount of the [earned wage advance] and any associated expedited delivery fee from the debit card on file for you or an ACH transfer from your bank account.").

[56] FlexWage Interview, *supra* note 35.

[57] *See generally* Jim Hawkins, *Law's Remarkable Failure to Protect Mistakenly Overpaid Employees*, 99 MINN. L. REV. 89 (2014) [hereinafter Hawkins, *Law's Remarkable Failure*].

to advertise that employees pay a $5 fee to access their earned wages.[58] Instant Financial also used to require a monthly fee, but the employer, not the employee, paid the fee.[59] Proponents make several arguments for this transaction-fee approach: it ensures that people only pay a fee if they actually use the service, prevents the earned wage access company from having to limit the number of times an employee accesses wages (because each time is expensive for the company), and deters consumers from repeated transactions because they do not like to sign up for reoccurring fees.[60]

Second, several companies charge monthly fees for access to the app and its services. PayActiv has a monthly membership fee that employees pay "only when they access services including their earned but unpaid income."[61] Even also uses this model, and its chief executive officer argues that it is the most consumer-friendly model because it incentivizes companies to minimize the number of advances that employees take out.[62] While the consumer does not pay per use, the company does, so lower utilization rates result in higher profits for the companies.[63]

Finally, a third model involves no mandatory fees but invites users to make voluntary contributions to the company. Earnin relies on tips to sustain its business.[64] It instructs people to pay what they think is fair, structuring the "fee"

---

[58] FINFIT, WAGENOW: THE NEW WAY FOR EMPLOYEES TO GET PAID TODAY (2019), https://www.finfit.com/wp-content/uploads/2019/06/12-WageNow-Sales-Sheet.pdf [https://perma.cc/9LCW-BGGA] ("A per-transaction fee of $5 is charged if and when an employee chooses to access their earned wages prior to payday."). FinFit now charges no such fee. *Early Wage Access*, FINFIT, https://www.finfit.com/wagenow [https://perma.cc/KL8H-L2MY] (last visited Feb. 15, 2021) ("Early wage access providers typically charge employees a subscription fee, a flat rate per transaction or a percentage of the funds requested . . . . WageNow is offered at no charge to employees to help them manage their cash flow and achieve financial health. By offering free access to their earned wages, we enable employees to control their paycheck.").

[59] *See* Paul Davidson, *Pay: New Service Allows U.S. Workers to Get Paid Daily Instead of Weekly*, USA TODAY (Oct. 20, 2017, 7:05 PM), https://www.usatoday.com/story/money/2017/10/20/pay-new-service-allows-u-s-workers-get-paid-daily-instead-weekly/781706001/ [https://perma.cc/6BXL-3MW4]. Now, however, Instant Financial offers its services at no cost to both employers and employees. *Why Instant*, INSTANT, https://www.instant.co/businesses/ [https://perma.cc/4ZXE-PDRP] (last visited Feb. 15, 2021). PayActiv states that employers pay the fees 25% of the time. Penny Crosman, *Do Paycheck Advance Apps Improve Financial Health?*, AM. BANKER (Mar. 11, 2019, 2:12 PM), https://www.americanbanker.com/news/do-paycheck-advance-apps-improve-financial-health (containing interview with PayActiv CEO).

[60] Cardplatforms Interview, *supra* note 39.

[61] *PayActiv Frequently Asked Questions*, *supra* note 36 (click "What is the PayActiv membership fee?").

[62] Telephone Interview with Jon Schlossberg, Chief Executive Officer, Even Responsible Fin. (Jan. 10, 2019) [hereinafter Even Interview].

[63] *Id.*

[64] Sawers, *supra* note 46.

as a "tip" to be added for each advance.[65] Participants are encouraged to leave bigger tips when they can to cover people who cannot leave a tip.[66] Some people have raised concerns that Earnin limits future advances if users do not tip,[67] meaning that this seemingly voluntary fee is actually mandatory. However, Earnin's website states, "The amount you tip (or don't tip) doesn't directly affect your individual Cash Out Max."[68]

Regardless of a business model or fee structure, it is obvious that the earned wage access product radically differs from traditional payday lending. What is less clear, however, is what dangers lie beneath. The next Part evaluates the "promise and peril"[69] of this fintech product and argues that it has the potential to end payday lending.

II. Assessing the Benefits and Dangers of Earned Wage Access

While payday loans are relentlessly criticized for their high costs, earned wage access products are relatively inexpensive. If employees are choosing between a payday loan that will cost $45 in fees and an earned wage access product that will cost $5, it appears an easy choice. This Part makes the somewhat easy case for the superiority of earned wage access products over payday loans and assesses whether these new products will be able to topple the existing payday-lending market.

Price alone, however, is not the only metric by which regulators (and consumers) should evaluate financial products. In Section II.B, I explore some of the dangers that employees face when using earned wage advances.

A. *Earned Wage Access's Superiority to Payday Lending*

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. This Section explains how these companies can offer this product so inexpensively, and it argues that earned wage access products have a strong potential to undermine the payday-lending market.

---

[65] Earnin, *supra* note 48.

[66] *Id.*

[67] *E.g.*, Kevin Dugan, *Cash-Advance App Earnin Gets Subpoenaed by NY Regulator: Source*, N.Y. Post (Mar. 28, 2019, 4:09 PM), https://nypost.com/2019/03/28/cash-advance-app-earnin-gets-subpoenaed-by-ny-regulator-source/ [https://perma.cc/2DL3-CKK3] ("Earnin encouraged users to leave a tip of anywhere between zero and $14 on a $100 weekly loan. Users who don't leave a tip appear to have their credit restricted. Meanwhile, a $14 tip would equate to a 730-percent [annual percentage rate ("APR")] — nearly 30 times higher than New York's 25 percent cap.").

[68] *Why Does Earnin Have Maxes?*, Earnin, https://help.earnin.com/hc/en-us/articles/224455408 [https://perma.cc/49BX-8WAD] (last visited Feb. 15, 2021).

[69] This phrase is stolen unapologetically from Matthew Bruckner's fine article, Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 Chi.-Kent L. Rev. 3 (2018), and the conference at which it was presented.

1. Lower Loan Losses Because of the Collection Mechanism

One advantage that earned wage access companies have over payday lenders is their ability to get their money back. In discussing what makes earned wage access so inexpensive, Baker and Kumar point to the collection mechanism these companies use:

> The principal reason we found to explain both the lower cost and the greater inclusiveness of these products is the power of the so-called "salary link"—the ability of the FinTech provider to access an employee's salary directly to ensure repayment of advances or loans. The factors associated with the salary link lead to markedly superior loan/advance performance (with defaults currently at <20% of the rate predicted by credit scoring) which is passed through in the form of lower costs to a larger portion of the employee population than is possible with market alternatives.[70]

My interviews with companies in this market confirm that their losses from nonpayment are extremely low.[71] The primary risks of nonpayment come from employers making administrative errors about how much an employee made before the advance, employers going out of business or declaring bankruptcy, employees getting last-minute garnishments right before being paid, and employees losing their jobs and not getting paid.[72] While these risks are not trivial, they do not cause earned wage access companies serious losses.

Payday lenders, on the other hand, have serious problems with nonpayment. In the classic analysis of payday lending's profitability, Mark Flannery and Katherine Samolyk note that "loan losses are a prominent dimension of payday store costs, constituting an average of 24.8 percent of operating expenses for young stores and 21.1 percent for mature stores."[73] High losses are part of why Flannery and Samolyk conclude that the costs justify the price for payday loans.[74] The fact that earned wage access companies can significantly cut losses partially explains earned wage access's competitive advantage over payday loans.

2. Lower Transaction Costs

An even more pronounced difference between earned wage access companies and payday lenders is the cost of advancing funds. Because earned wage access

---

[70] Baker & Kumar, *supra* note 23, at 3-4.

[71] Even Interview, *supra* note 62.

[72] Cardplatforms Interview, *supra* note 39; FlexWage Interview, *supra* note 35; PayActiv Interview, *supra* note 32.

[73] Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?* 10 (FDIC Ctr. for Fin. Rsch. Working Paper, Paper No. 2005-09, 2005), https://www.fdic.gov/bank/analytical/cfr/2005/wp2005/2005-09.pdf [https://perma.cc/5MS2-YFGR].

[74] *See id.* at 19 ("Our analysis implies that payday loan APRs must be high to cover the stores' fixed operating costs and, to a lesser extent, to compensate for an unusually high rate of default losses.").

is done through apps with automatic decisions and disbursements of funds, fewer employees are needed to keep the ship running. PayActiv, for instance, only has 200 employees, despite the fact that it administers earned wage access for over 1,000 employers, including Walmart.[75]

Payday loans, on the other hand, are very expensive to originate and service. While loan losses are high, other operating costs are much higher.[76] For physical storefronts, lenders face high costs as employees work the long hours required to keep stores open late, and many stores see few customers per hour.[77] Internet lenders often must pay very high fees to "lead generators" who send them payday customers.[78]

After a payday loan is originated, the costs of servicing the loan are high. Payday lenders must contact customers who do not pay on time and receive payments in person. In a series of interviews with lenders about title loans—a similar product to payday loans in which the borrower uses a car as collateral—I learned that even the expenses lenders face collecting on loans are high.[79] Because of the innovative technology of earned wage access, these companies avoid the demands on employee time that are inevitable for payday lenders.

3. Superior Access to Information

Finally, earned wage access companies have superior access to information about employees. Under most business models, earned wage access companies partner with employers and obtain continual updates about workers' pay rates; hours worked; and benefit, tax, and garnishment deductions.[80] On the one hand, compared to credit card companies, earned wage access companies may have less information about the likelihood of default because credit card companies have credit reports. But, for companies with apps that are linked to the employee's bank accounts, the company gains valuable spending-pattern information about the employee. Also, combined with the collection mechanism, information about earned wages allows these companies to offer advances at low costs. One outlier is Earnin, which obtains information about the number of hours an employee works by tracking how many hours the employee is

[75] *Company Info*, PAYACTIV, https://www.payactiv.com/media-kit/ [https://perma.cc/N2EA-5H65] (last visited Feb. 15, 2021).

[76] *See* Flannery & Samolyk, *supra* note 73, at 10 (stating that operating costs are around half the total costs stores have).

[77] *See* Hawkins, *Credit on Wheels*, *supra* note 5, at 540 (stating that researchers spent more than fifty hours outside title lending stores waiting to survey customers but only could locate fifty-four customers to ask to fill out the survey during that time).

[78] *See* PEW CHARITABLE TRS., FRAUD AND ABUSE ONLINE: HARMFUL PRACTICES IN INTERNET PAYDAY LENDING 5 (2014), http://www.pewtrusts.org/~/media/Assets/2014/10/Payday-Lending-Report/Fraud_and_Abuse_Online_Harmful_Practices_in_Internet_Payday_Lending.pdf [https://perma.cc/NK3C-WCSW].

[79] Hawkins, *Credit on Wheels*, *supra* note 5, at 551-52.

[80] FlexWage Interview, *supra* note 35; PayActiv Interview, *supra* note 32.

physically located at work.[81] This creates lower-quality information. Payday lenders also do not use credit reports and, unlike earned wage access companies, do not have direct access to borrowers' employment records. Payday lenders must either trust the borrower's application information (along with the supporting documentation) or confirm with the borrowers' employers the number of hours and pay expected. When the CFPB was discussing an ability-to-repay rule for payday loans, lenders balked at the cost of verifying and documenting income and expense information.[82] Earned wage access companies, on the other hand, would have little cost in producing documentation about income for regulators.

4. Just Payday Lending in Disguise?

Early critics of earned wage access products have argued that these companies are "effectively acting as a payday lender – providing small short-term loans at the equivalent of a high interest rate – while avoiding conventional lending regulations designed to protect consumers from getting in over their heads."[83] Payday lenders have a long history of avoiding credit regulations through innovative transaction structures,[84] so this criticism has intuitive appeal.

The prior three Sections, however, demonstrate how this criticism is misguided. Earned wage access companies' informational advantages and superior collection mechanisms differentiate payday lending and earned wage access at a fundamental level. The earned wage access product emerged from advances in technology, not from legal maneuvering around existing laws. If companies start charging high prices for access to earned wages, then critics may

---

[81] *What Are Automagic Earnings?*, *supra* note 47.

[82] Dan Ennis, *CFPB Rolls Back 'Ability-to-Repay' Portion of Payday Lending Rule*, BANKING DIVE (July 8, 2020), https://www.bankingdive.com/news/cfpb-ability-to-repay-payday-lending-rule/581237/ [https://perma.cc/5ANU-YSGF].

[83] Farivar, *supra* note 26. Nakita Cuttino makes a sustained argument that earned wage access products are payday loans 2.0. Cuttino, *supra* note 22, at 27-36. Cuttino contends that these products have the identical risks and flaws as payday loans. *Id.*; *see also* Farivar, *supra* note 26 ("'This is absolutely a new and different way to skirt the laws around payday lending,' said Jill Schupp, a Democratic state senator from Missouri who represents the St. Louis suburbs and plans to revise her pending payday-lending regulation bill to encompass Earnin. 'To use the word "tip" instead of a usury charge, an interest rate or a fee, it's just semantics,' Schupp said. 'It's the same thing at the end of the day.'" (citations omitted)); Chris Opfer, *'Early Wage' Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, BLOOMBERG L. NEWS (Aug. 1, 2019, 6:15 AM), https://news.bloomberglaw.com/daily-labor-report/early-wage-apps-aim-to-disrupt-payday-loans-two-week-cycle (noting that "some fear that early pay providers may be payday lenders in sheep's clothing").

[84] *See* Hawkins, *Credit on Wheels*, *supra* note 5, at 575 ("Lenders have avoided caps in Kansas by offering loans as open-ended credit arrangements, in Texas by operating as Credit Service Organizations, and in California by offering loans at amounts just above the amount covered by the rate cap.").

have a plausible case for subterfuge, but in the current market, this case is extremely weak.

5. Possible Limits on the Displacement of Payday Lending

Earned wage access companies' lower costs have the potential to move many employees out of the payday-loan market.[85] The product, however, is not a perfect substitute for payday lending. This Section briefly lays out several categories of payday-lending customers that earned wage access will not help. Despite these limits, however, losing so many other customers may still prevent payday lenders from continuing to operate.

a. *Demand for Higher Loan Amounts*

Some employees will need loans that reflect a higher percentage of their biweekly pay than they have earned when the need arises. Sometimes smaller advances to borrowers do not solve borrowers' problems in the same way a larger advance would do,[86] so limiting employees' access to only earned funds will leave some in need of payday loans.

Yet, while earned wage access companies may not help these customers, other fintech companies are emerging in this space with lower rates than payday lenders. While it is beyond the scope of this Article, companies like HoneyBee and FinFit leverage technology to offer loans for higher amounts at rates much lower than traditional payday lenders.[87] Thus, even for people with the need for higher loan amounts, payday lending may not remain a competitive option.

---

[85] *See* Baker, *supra* note 23, at 63 (concluding that fintech products could "eliminate the need for a low-income working family to use" high-cost, small-dollar loan products (emphasis omitted)); *id.* at 58, 64 ("If 25% of the employees of Wal-Mart, Yum! Brands, McDonald's, UPS, Kroger, Target and Home Depot were to use the services of these companies in place of [high-cost, small-dollar loans], it would remove close to 1.2 million individuals from the [high-cost, small-dollar loan] system. . . . If superior FinTech-enabled alternatives to [high-cost, small-dollar loans] were to reach only 15% of the workers employed by large companies, 8.25 million employees would be better off. If these alternatives reached 40% of those employees, the number helped could rise to 22 million." (footnote omitted)).

[86] *See* Will Dobbie & Paige Marta Skiba, *Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending*, 5 AM. ECON. J.: APPLIED ECON., no. 4, 2013, at 256, 257-58 ("[B]oth our regression discontinuity and regression kink empirical strategies suggest that relaxing these credit constraints lowers the probability that a payday borrower defaults. A $50 increase in payday loan size leads to a 4.4 to 6.4 percentage point decrease in the probability of default in our regression discontinuity strategy, a 22 to 33 percent decrease.").

[87] *E.g.*, HONEYBEE, https://meethoneybee.com/ [https://perma.cc/JTX8-T7D6] (last visited Feb. 15, 2021) (offering the example of "a $500 loan with finance charge of $0, an interest rate of 0%, repaid in 4 bi-weekly installments of $125.00," which "would have an APR of 0%").

b. *Demand by People Who Do Not Have Access to Earned Wage Access Products*

Currently, most earned wage access companies only work with employers with whom they have partnered. Payday lenders, on the other hand, provide loans to individuals on government assistance, self-employed workers, employees at very small companies,[88] and employees at companies without financial benefit programs. For all of these customers, earned wage access does not offer any assistance for liquidity problems.

While this problem is significant, many earned wage access companies do work with small employers.[89] Moreover, direct-to-consumer earned wage access companies will work with any employee, regardless of their employer's size. Finally, theoretically at least, earned wage access companies could partner with governments to offer early access to government assistance benefits.

c. *Demand by People Without Access to Technology*

Most earned wage access companies use apps on smartphones or at least websites. 81% of American adults own a smartphone,[90] so 19% of Americans might potentially access payday loans because earned wage access products are not an option for them.

d. *Despite These Limits, Payday Lenders Will Experience Significant Market Losses*

Even if earned wage advance companies do not meet all the current needs, it is possible that payday-loan use will drop sufficiently low that the market will not survive anyway. Payday-lending stores rely on a high volume of loans for profitability because they have to pay employees to run the stores for long hours.[91] Moreover, it is likely that the borrowers left behind by earned wage access will create problems for payday lenders. If the borrower base becomes people on government assistance without computers who need large loans, payday lenders may face higher losses.

Another problem that earned wage access products create for payday lenders is that many earned wage access companies obtain employees' wages directly from their paychecks, whereas payday lenders have to, at best, withdraw money from borrowers' bank accounts. Earned wage access companies get in line first,

---

[88] Hunt & Hayward, *supra* note 30, at 284 ("[B]usinesses with fewer than 20 workers comprise almost 90% of all firms in the United States, with over 50% of all U.S. workers employed by those firms.").

[89] PayActiv Interview, *supra* note 32.

[90] *Mobile Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/ [https://perma.cc/6L9L-BE5F].

[91] Flannery & Samolyk, *supra* note 73, at 17 ("Cost ratios decline with higher loan volume of a store's loan activity, particularly for young stores. Salaries, as measured by the number of [full-time] employees and their average wage, have a predictably positive effect on store operating costs.").

so payday lenders will end up having to take the risk that an employee seeking a loan from the payday lender has already used up part of their paycheck with an earned wage access product.

Thus, despite the fact that earned wage access cannot completely replicate the payday-lending market, the disruption may be so significant that it forces payday lenders to adapt or die. The next Section assesses the dangers of a world in which employees are consistently accessing earned wages before payday.

B. *The Dangers of Earned Wage Access*

This Article argues that earned wage access is superior to payday loans and may eliminate the payday-lending industry. The low cost of earned wage access is extremely attractive, but other dangers lurk within this product. Contrary to the claims of one advisor for earned wage access companies, these products are not "completely harmless."[92] It is important to understand the dangers that earned wage access poses to both fully assess the social utility of the product and to determine optimal regulatory approaches.

1. An Exceedingly Efficacious Collection Mechanism

One of the biggest dangers of earned wage access comes from the source of their greatest strengths. Earned wage access is inexpensive in part because the companies making the advances are so likely to recover the money they advance.[93] While this inexpensive access to money is beneficial at the front end of the transaction, it can be very costly on the back end because employees cannot easily strategically breach their promise to repay the loan in order to meet other needs.[94]

---

[92] Dan Quan, *Don't Sideline Earned Income Access*, AM. BANKER: BANKTHINK (June 3, 2019, 10:00 AM), https://www.americanbanker.com/opinion/dont-sideline-earned-income-access ("If for whatever reason, or for no reason at all, the customer decides not to pay back his or her earned wages, he or she is held completely harmless. There is no collection on the amount unpaid. The worst that can happen to the consumer is the loss of access to future EIA withdrawals.").

[93] PayActiv Interview, *supra* note 32; Even Interview, *supra* note 62; *cf. In re* Haraughty, 403 B.R. 607, 612 (Bankr. S.D. Ind. 2009) ("[C]reditors could be aggressive in their lending because the law did not restrict or limit one powerful tool of recovery, namely garnishment. The garnishing of wages is an effective tool for recovery because it creates leverage and imposes a great hardship on the debtor and his or her family. As a result of the hardship, a debtor who is subject to a wage garnishment has only two choices, either pay the debt or file for bankruptcy." (alteration in original) (quoting Jason C. Walker, Comment, *Wyoming's Statutory Exemption on Wage Garnishment: Should It Include Deposited Wages?*, 6 WYO. L. REV. 53, 60 (2006))).

[94] *See* Baker & Kumar, *supra* note 23, at 5 ("The salary deduction approach effectively eliminates the employee's ability to prioritize payments to [the company] against his or her other obligations.").

a. *Direct-to-Business/Wage-Deduction Models*

For the direct-to-business earned wage access products in the market today, the advanced wages are deducted from the employees' paychecks before the employees ever see the money. Thus, earned wage access companies get automatic first priority over other competing needs in the employees' lives.[95] If an employee obtains a $300 advance to pay her rent and then on payday needs the $300 for expensive medicine for her child, she might want to breach the promise to repay the advance in order to obtain the medicine. The exceedingly efficacious collection mechanism, however, eliminates this choice.

The ability to deduct from an employee's wages is particularly powerful because it does not require any action by the government—it is a self-help remedy much like a secured creditor repossessing a car. The earned wage access company does not have to prove to a jury that the employee owes it money or to a court that the law entitles it to payment—it only needs to convince the employer to act.[96] Cutting the courts out of the equation means that employees have fewer protections because they cannot invoke laws that prevent businesses from abusing the process.[97]

Promises to repay payday loans, on the other hand, are relatively easy and inexpensive to break. While payday lenders sometimes have access to the customer's bank account via an Automated Clearing House ("ACH") withdrawal, customers still have an easy time defaulting on their payday loans. For instance, Paige Skiba and Jeremy Tobacman found that "over half of payday borrowers default on a payday loan within one year of their first loans."[98] The CFPB's study found 20% of borrowers in its sample defaulted within a year.[99] Because payday lenders do not report defaults to credit bureaus, defaulting on a payday loan has little effect on borrowers' credit scores. Ronald Mann empirically evaluated the effects of defaulting on a payday loan and found that "credit score changes for borrowers who default on payday loans differ immaterially from changes for borrowers who do not default on payday

[95] *See supra* notes 32-50 and accompanying text.

[96] *See* Hawkins, *Law's Remarkable Failure*, *supra* note 57, at 114 ("While self-help remedies are extremely valuable to secured creditors, they also create 'serious social dangers.' Because creditors decide for themselves whether the debtor has defaulted on the loan agreement, self-help repossessions provide debtors no due process rights before the creditor seizes the property." (footnote omitted) (quoting Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 844 n.207 (2004))).

[97] *See, e.g.*, 15 U.S.C. § 1673(c) ("No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of [federal restrictions on wage garnishments].").

[98] Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* 1 (Vanderbilt Univ. L. Sch. L. & Econ., Working Paper No. 08-33, 2008).

[99] KATHLEEN BURKE, JONATHAN LANNING, JESSE LEARY & JIALAN WANG, CFPB OFF. OF RSCH., CFPB DATA POINT: PAYDAY LENDING 26 (2014), http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf [https://perma.cc/3ABX-4KGK].

loans."[100] Mann argues that payday loans are "too small to hurt,"[101] and other researchers mirror this outcome as well.[102]

Given the option, people would likely not repay the advance if other needs were more salient. In a small survey of title-lending customers (where the borrower's car is potentially at stake), the vast majority of borrowers reported that they would break the promise to repay the title loan in order to pay rent or mortgage, buy medicine, pay utility bills, and buy groceries.[103] The fact that so many payday borrowers opt to default on their payday loans indicates that customers prefer to breach the promise to pay payday lenders and use the cash to meet other needs.

Current law supports this right. 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. Federal law limits creditors to garnishing no more than 25% of an employee's disposable earnings, and only that much if the employee's "disposable earnings for that week exceed thirty times the Federal minimum hourly wage."[104] Many state laws are even stricter, sometimes preventing garnishment except for limited exceptions.[105]

The basic policy behind this law is protecting workers from their wages being reduced so low that the garnishment impedes their abilities to meet necessities.[106] The Supreme Court has recognized "the great drain on family

[100] Ronald Mann, *Do Defaults on Payday Loans Matter?* 1-2 (Columbia Univ. Ctr. for L. & Econ., Working Paper No. 509, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560005## [https://perma.cc/877P-93K2].

[101] *Id*. at 8, 22.

[102] *E.g.*, Neil Bhutta, Paige Marta Skiba & Jeremy Tobacman, *Payday Loan Choices and Consequences*, 47 J. MONEY CREDIT & BANKING 223, 257 (2015) ("Another possible explanation is simply that payday loans are small and uncollateralized, limiting their potential benefits and risks.").

[103] Hawkins, *Credit on Wheels*, *supra* note 5, at 568.

[104] 15 U.S.C. § 1673(a)(2).

[105] *E.g.*, TEX. CONST. art. XVI, § 28 (exempting wages from garnishment except for child and spousal support).

[106] *See* Faith Mullen, *Another Day Older and Deeper in Debt: Mitigating the Deleterious Effect of Wage Garnishments on Appalachia's Low-Wage Workers*, 120 W. VA. L. REV. 973, 979 (2018) ("Although that reduction of income would be disruptive to someone who earns the median income, the effect of wage garnishment on a worker who earns minimum wage is potentially catastrophic. A worker in Kentucky who earns minimum wage would have an annual after-tax income of approximately $15,800 (based on 2017 tax rates). The allowable weekly wage garnishment would be $76, leaving an annual income of approximately $11,900. Wage garnishment would cause this worker's income to drop below the federal poverty level." (footnotes omitted)); G. Wogan Bernard, Comment, *Garnishing the Congressional Intent: Protecting Debtor Wages in Bank Accounts Under the Federal and Louisiana Wage Garnishment Exemption Statutes*, 66 LA. L. REV. 233, 235 (2005) ("The protection of wages first developed in state statutes to allow debtors to protect portions of their wages from

income" that unfettered garnishments produce and the potential for garnishments to drive the employee "below the poverty level."[107] Some legal scholarship goes so far as to say that garnishments are a modern form of peonage.[108] It is clear that garnishments are disfavored by solutions aimed at protecting individuals. For instance, when Sara Sternberg Green suggested parameters for consumer-friendly loans for lower-income individuals, she specifically stipulated that the borrowers need to be protected from all wage garnishments.[109] Given this hostility to unrestricted garnishments, policy makers must ensure that earned wage access does not violate the policies behind restrictions on wage garnishments.[110]

---

garnishment. These state statutes differed from one another, and many statutes led to devastating results for a debtor and his family as states allowed for the garnishment of a high percentage of wages." (footnote omitted)).

[107] Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 340 (1969) (quoting 114 CONG. REC. 1,832 (1968) (statement of Rep. Henry S. Reuss)).

[108] For particularly graphic analogies, see Joseph C. Sweeney, *Abolition of Wage Garnishment*, 38 FORDHAM L. REV. 197, 197 (1969) (comparing wage garnishments to other extreme creditor remedies such as selling debtors as slaves, cutting up debtors, and debtor's prisons). *See also* Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167-68 (1990) ("Requiring a debtor to work to repay his creditors to obtain a discharge is strikingly close to the condition of peonage, a form of involuntary servitude violative of the thirteenth amendment. Peonage is the prohibited condition in which individuals are forced to work to repay their creditors."); Ian Liberty, Note, *From Debt Collection to Debt Slavery: How the Modern Practice of Debt Collection Is a Violation of the 13th Amendment's Prohibition on Involuntary Servitude*, 15 RUTGERS RACE & L. REV. 281, 281 (2014) ("To recover on these judgments, debt collectors utilize the government tool of wage garnishment to force low-income people of color into this modern form of peonage. Despite the lower courts' limited application of the Thirteenth Amendment, a much broader scope is imaginable.").

[109] Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 304-05 (2017) (proposing small-dollar loan solution and specifying that such product "would not be subject to garnishment through taxes or wages").

[110] Other rationales justifying limits on wage garnishments are inapplicable in the current market. For instance, part of the motivation for such limits was to prevent employers from firing employees subject to garnishment. *See* 15 U.S.C. § 1671(a)(2) ("The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce."). Since employers are partnering with earned wage advance companies and offering the programs as a benefit, it is unlikely that they will take adverse employment actions based on the programs. Also, companies often state that the employer does not know of the employee's activity. *E.g.*, *Instant Customer Help Center: US Cardholder FAQ*, INSTANT, https://instant.zendesk.com/hc/en-us (last visited Feb. 15, 2021) (responding that "Your data is completely secure. Anything you do, be it transfers or purchases has nothing to do with your employer. Your employer does not have access to your funds or account activity" to the question "Can my employer view my purchases & transfers?").

One important mitigating factor to these concerns is that some earned wage access companies report that employees can instruct their employers not to deduct the advance from the employees' paychecks and that employees would face no personal liability for this choice.[111] Moreover, these businesses report that they will offer customers extra time to repay the advances in certain circumstances.[112] Thus, some of the concerns raised by the collection mechanism are less cogent. However, it is unlikely that employees understand their right to default on the agreement to repay the advance. Indeed, one company reported that in the entire history of the business, no employee has ever opted to instruct the employer not to repay the advance.[113] Thus, even if the collection mechanism is less effective in theory, in practice it is extremely effective.

Moreover, even if the current market participants are socially minded, companies may enter this space with less altruistic motives. The powerful collection mechanism afforded to earned wage access companies could give rise to abusive loans, just like wage garnishments did before the protections created in the 1970s.[114]

b. *Direct-to-Consumer/Bank-Account-Deduction Models*

The fintech companies that deduct money from employees' bank accounts have a less effective collection mechanism than those that collect directly from employees' paychecks. Between the time when the employee is paid and when the earned wage access company attempts to withdraw funds, the employee can theoretically at least withdraw the money, preventing collection.

While employees have greater access to their wages under this model, withdrawing money from employees' bank accounts may be more dangerous to employees because of fees associated with failed attempts to withdraw funds. If an earned wage access company attempts to debit employees' checking accounts but there are insufficient funds, the employees' banks will charge their accounts either an insufficient funds charge or an overdraft charge; both often cost $35.[115]

---

[111] Even Interview, *supra* note 62.

[112] *Id.*

[113] PayActiv Interview, *supra* note 32.

[114] *See* 15 U.S.C. § 1671(a)(1) ("The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.").

[115] Renata Sago, *CFPB Is Taking a Fresh Look at Bank Overdraft Fee Rule*, MARKETPLACE (July 2, 2019), https://www.marketplace.org/2019/07/02/cfpb-is-taking-a-fresh-look-at-bank-overdraft-fee-rule/ [https://perma.cc/KM2K-4WZK]; Rebecca May, *How Much Bank of America ATM Fees Can Cost You*, YAHOO! FIN. (Jan. 6, 2018), https://finance.yahoo.com/news/much-bank-america-atm-fees-160023931.html [https://perma.cc/L6YJ-JMYT].

Suddenly, transactions that were relatively inexpensive become very cumbersome to employees.

The CFPB recognized the risk of overdraft fees in its payday loan rule. The rule specifically limits lenders to two unsuccessful debit attempts; after that, the lender must obtain a new authorization from the debtor before attempting another debit.[116] Earned wage access customers, on the other hand, do not have this protection, and companies therefore have a powerful stick to incentivize repayment.

2. Onerous Contract Terms

A second danger relates to the contracts between earned wage access companies and employees/users. While the companies that currently offer earned wage access are concerned with their social impact and the welfare of their customers, it was still their lawyers who wrote their contracts. The terms are surprisingly unfriendly to consumers given the companies' social missions. I evaluated five contracts between users and earned wage access companies found on these companies websites—DailyPay, Earnin, Even, Instant Financial, and PayActiv. I only obtained one contract between employees and earned wage access companies; in the other cases, those contracts are not publicly available, and they are different from the contract online, which often was the terms of use for people using the companies' websites or apps.[117] Thus, I used contracts on companies' websites relating to the use of the website. Each of these companies promote themselves as social impact organizations with a mission of solving real problems; their advisors stress that they are not predatory lenders.[118] Yet, each of the contracts between these companies and their consumers contains terms that consumer advocates should find problematic.[119]

a. *Agreement Without Actual Consent*

Before reaching the contract terms themselves, many consumer law scholars would object to the manner in which these companies form contracts with users

[116] Press Release, Consumer Fin. Prot. Bureau, CFPB Finalizes Rule to Stop Payday Debt Traps (Oct. 5, 2017) [hereinafter CFPB Press Release], https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/ [https://perma.cc/V84Q-73CS].

[117] Even Interview, *supra* note 62.

[118] Quan, *supra* note 92 ("Unfortunately, some people are misleadingly equating EIA — especially those programs that are directly marketed to consumers — to predatory lending. Opposition to EIA based on misinformation or mischaracterization is not only stifling innovation, it also ultimately harms low-income workers who stand the most to benefit from this innovation.").

[119] PayActiv reconciles its social mission and its arbitration agreement by focusing on price. The paramount goal in this space, according to PayActiv's Chief Operating Officer, is low price points for employees, so arbitration clauses are important because they limit frivolous suits. PayActiv Interview, *supra* note 32. At such a low price, companies cannot afford to take on litigation risks.

of their websites and applications. Instead of seeking active consent—for instance, requiring users to click "I agree" after viewing the contract terms—many websites assert that the user has agreed to the company's terms merely by visiting the website.

As one example, one website's terms of service explain, "By signing up for Even, using the Even application or *visiting the Even website* . . . you are representing that . . . you understand and agree to Terms and Conditions explained in this document."[120] Other companies take the same approach,[121] sometimes more explicitly making the point that the deal is take it or leave it: "BY ACCESSING OR USING THE SITE OR THE SERVICES YOU AGREE TO BE BOUND BY THE TERMS OF SERVICE. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS OF SERVICE, YOU MAY NOT ACCESS OR USE THE SITE OR THE SERVICES."[122]

For some consumer law scholars, terms of use that are merely posted on a website likely do not actually notify the user that they are agreeing to the extremely disadvantageous terms.[123] While some courts enforce agreements obtained through these "browsewrap" contracts, others refuse to do so on the theory that merely visiting a website does not communicate assent to terms posted inconspicuously on that website.[124] Thus, from the outset, the manner in

---

[120] *Even Terms and Conditions*, EVEN, https://www.even.com/legal/basic [https://perma.cc/2AGH-WREA] (last visited Feb. 15, 2021) (emphasis added).

[121] *E.g.*, *Terms of Use*, PAYACTIV [hereinafter *PayActiv Terms of Use*], https://www.payactiv.com/terms-of-use/ [https://perma.cc/RV3R-CCLV] (last visited Feb. 15, 2021) ("By continuing to use the Site, you agree to the Terms of Use."); *Site Terms*, DAILYPAY, https://www.dailypay.com/legal/#site-terms [https://perma.cc/2QZU-QAQG] (making various provisions of the terms enforceable against the user based on their "use of the Site") (last updated Dec. 16, 2020).

[122] *Terms and Privacy: Terms of Service*, EARNIN [hereinafter *Earnin Terms of Service*], https://www.earnin.com/privacyandterms [https://perma.cc/YV83-4SHL] (last updated Nov. 4, 2020).

[123] *See* Emily Canis, *One "Like" Away: Mandatory Arbitration for Consumers*, 26 GEO. MASON U. C.R.L.J. 127, 129 (2015) ("[I]n a new wave of online Terms of Services, users rarely ever have to click an 'I agree' button, and sometimes the only place they can find out that the Terms of Service have changed is through a press release. Consumers may only encounter Terms of Service agreements in areas of the website they might not think to check. These sites are arguably hiding the most important Terms of Service from their users." (footnotes omitted)); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts*,*"* 78 U. CHI. L. REV. 165, 165-66 (2011) (noting that some commentators "are concerned that transferors' widespread use of shrinkwraps, licenses that can be seen only after a user purchases the product, or browsewraps, licenses presented via hyperlinks at the bottom of transferors' web sites, may not effectively put transferees on notice of the terms").

[124] *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29-30 (2d Cir. 2002) ("[A] consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms."); Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367

which earned wage access companies obtain consent to the terms of use on their websites is potentially problematic.

b. *Mandatory, Predispute Arbitration Clauses with Class Action Waivers*

The clause in these contracts that is most objectionable to many consumer law scholars is the clause waiving the user's rights to go to court and to proceed in a class action. Four of the five contracts I reviewed contained clauses that required consumers to give up their rights to trial by jury.[125] The other contract requires that consumers sue exclusively in "the small-claims court of the Superior Court of California within the county of Santa Clara, California," regardless of where the consumer lives or the transaction occurred.[126]

More importantly, every contract required consumers to give up the right to sue as part of a class action. For example, PayActiv's agreement's states,

> To the fullest extent permissible under applicable law, all Disputes shall be resolved by confidential binding arbitration on an individual basis. You expressly agree that no other Disputes shall be consolidated or joined with your Dispute, whether through class arbitration proceedings or otherwise ("Class Arbitration"). You further acknowledge and agree that any arbitrator assigned to a Dispute lacks the authority to conduct Class Arbitration and that such arbitrator shall only hear individual Disputes. By using the Site and the Service, you acknowledge that you are voluntarily and knowingly waiving any right to participate as a representative or member of any class of claimants pertaining to any Dispute subject to arbitration under [these Terms of Use], such that you shall not be entitled to arbitrate any Dispute as a representative, a class action or in a private attorney general capacity.[127]

The other contracts are similar.[128]

(E.D.N.Y. 2009) (finding browsewrap agreement unenforceable because "Plaintiff had no actual [or constructive] notice of the [browsewrap agreement]"), *aff'd*, 380 F. App'x 22 (2d Cir. 2010).

[125] *See* INSTANT TERMS & CONDITIONS, *supra* note 55, at 13-14 (containing 405-word arbitration agreement); *Even Terms and Conditions*, *supra* note 120 (containing 830-word arbitration agreement); *DailyPay Terms and Privacy*, *supra* note 38 (containing 370-word arbitration agreement); *PayActiv Terms of Use*, *supra* note 121 (containing 364-word arbitration agreement).

[126] *See Earnin Terms of Service*, *supra* note 122.

[127] *PayActiv Terms of Use*, *supra* note 121.

[128] INSTANT TERMS & CONDITIONS, *supra* note 55, at 14 ("NO CLASS ACTION, OR OTHER REPRESENTATIVE ACTION, OR PRIVATE ATTORNEY GENERAL ACTION, OR JOINDER OR CONSOLIDATION OF ANY CLAIM WITH A CLAIM OF ANOTHER PERSON SHALL BE ALLOWABLE IN ARBITRATION."); *Even Terms and Conditions*, *supra* note 120 ("YOU AND EVEN EACH AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND

From a consumer-protection standpoint, arbitration clauses, especially those with class action waivers, are generally considered abusive because they prevent consumers from enforcing their rights.[129] Because many (if not all) claims that may arise in the context of earned wage access involve small amounts of damages, consumers' exclusive means of potential relief is binding together with other consumers.[130] By requiring that users waive the right to seek relief, socially minded earned wage access companies are creating a mechanism to abuse consumers without recourse.

Remarkably, in credit card agreements and payday-lending agreements, mandatory arbitration clauses are less common than they are among the companies I reviewed, although of course my sample was not necessarily representative of the market.[131] Even those in payday-lending contracts were more favorable for consumers—a majority allowed consumers to opt out of

---

NOT IN A CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION. . . . IF FOR ANY REASON A CLAIM PROCEEDS IN COURT RATHER THAN IN ARBITRATION, WE EACH WAIVE ANY RIGHT TO A JURY TRIAL AND AGREE TO PROCEED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS, CONSOLIDATED, OR REPRESENTATIVE ACTION."); *Earnin Terms of Service*, *supra* note 122 ("YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT INVOLVING ANY SUCH DISPUTE."); *DailyPay Prior Terms of Use*, *supra* note 40 (stating, on an older version of their website, that "ANY ARBITRATION UNDER THESE TERMS WILL TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED, AND YOU ARE AGREEING TO GIVE UP THE ABILITY TO PARTICIPATE IN A CLASS ACTION.").

[129] The literature criticizing mandatory arbitration is too vast to recount here. As one court recently stated, "Much has been written about the palpable injustices wrought by corporations on their customers through mandatory consumer arbitration." 16th St. Invs., LLC v. KTJ 216, LLC, No. 3:17-cv-00174, 2018 WL 1612189, at *1 (D.N.D. Apr. 3, 2018).

[130] *See* Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 812 (2015).

[131] *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY §§ 1.4.1, 2.3 (2015) [hereinafter CFPB STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/2LZN-HCBF] ("[W]hile less than 16% of issuers include such clauses in their consumer credit card contracts, just over 50% of credit card loans outstanding are subject to them. . . . For storefront payday loan agreements, 83.7% of lenders covering 98.5% of storefronts in our sample used arbitration clauses in their agreements from 2013 and 2014 . . . ."); CAL. DEP'T OF BUS. OVERSIGHT, ANNUAL REPORT OF PAYDAY LENDING ACTIVITY UNDER THE CALIFORNIA DEFERRED DEPOSIT TRANSACTION LAW 2, 32 (2019), https://dfpi.ca.gov/wp-content/uploads/sites/337/2020/08/Annual-Report-CDDTL-Aggregated.pdf [https://perma.cc/2BFF-F7ED] ("45.3 percent of respondent licensees have clauses in their written agreements that require arbitration, and 31.5 percent have arbitration clauses that prohibit customers from joining class actions.").

arbitration,[132] the vast majority exempted small-dollar claims from the clause,[133] and a smaller but substantial number permitted class actions.[134] The inability of consumers to seek meaningful redress for earned wage access companies' illicit behavior represents a serious danger to consumers using earned wage access products.

c. *Disclaimers of Express Warranties*

All five contracts I reviewed involved the companies explicitly waiving or disclaiming any express warranties that the companies make in their promotional material. Instant Financial's disclaimer is typical: "EXCEPT AS EXPRESSLY OTHERWISE PROVIDED IN THIS AGREEMENT, WE MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND TO YOU, AND HEREBY EXPRESSLY DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED . . . ."[135] In addition, integration clauses in these contracts state that express warranties made outside of the written contract are ineffective in binding the companies.[136]

---

[132] CFPB STUDY, *supra* note 131, § 2.5.1 ("A higher percentage of storefront payday loan arbitration clauses (50.7% of clauses, covering 83.6% of arbitration-subject storefronts) and private student loan arbitration clauses (83.3% of clauses) included opt-outs.").

[133] *Id.* § 2.5.2 ("Small claims carve-outs were most common in storefront payday loan clauses, with 93.0% of clauses in our sample (covering 99.0% of arbitration-subject storefronts) including such a provision.").

[134] *Id.* § 2.5.5 tbl.7 (noting that "88.7% of the storefront payday loan arbitration clauses" permitted class actions, representing 98.2% of storefronts).

[135] INSTANT TERMS & CONDITIONS, *supra* note 55, at 3; *see also Earnin Terms of Service*, *supra* note 122 ("EARNIN AND ITS AFFILIATES, LICENSORS AND SUPPLIERS . . . MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE CONTENT OR OPERATION OF THE SITES OR SERVICES . . . . YOU EXPRESSLY AGREE THAT YOUR USE OF THE SITES AND SERVICES . . . IS AT YOUR SOLE RISK."); *PayActiv Terms of Use*, *supra* note 121 ("WE EXPRESSLY DISCLAIM ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, AS TO THE OPERATION OF THE SERVICE OR THE INFORMATION, CONTENT, SERVICES OR PRODUCTS INCLUDED OR OFFERED ON OR THROUGH THE SERVICE, INCLUDING, BUT NOT LIMITED TO THE IMPLIED WARRANTIES . . . . NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM US OR FROM OR THROUGH THE SERVICE SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THESE TERMS OF SERVICE."); *Even Terms and Conditions*, *supra* note 120 ("THE SERVICES AND CONTENT ARE PROVIDED 'AS IS,' 'AS AVAILABLE' AND WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED . . . ."); *DailyPay Prior Terms of Use*, *supra* note 40 (stating, on an older version of their website, that "[a]ll other warranties, express or implied, including any warranties of merchantability, fitness for any particular purpose, and non-infringement of intellectual property, are specifically excluded and disclaimed").

[136] *See, e.g.*, *Even Terms and Conditions*, *supra* note 120 ("[T]hese Even Terms represent the entire agreement between you and Even with respect to Even Services. They supersede

The problem with waivers of express warranties is that they attempt to allow companies to make representations on which the company hopes consumers will rely and then say to consumers that the company made no representations. An earned wage access company could, for instance, promise in its promotional material that wages will be paid within one hour but then disclaim this express warranty in the contract that the employee agrees to by using the app. For this reason, many courts refuse to enforce waivers of express warranties.[137] But even if a court would later disregard the disclaimer of express warranties in favor of the employee, the fact that the contracts contain the clause at all presents danger because consumers may never challenge the clause or realize that it could be unenforceable.

d. *Unilateral Contract Amendments*

The earned wage access companies I studied all asserted a right to unilaterally modify the contract with the employee/user, sometimes without even giving notice to the other party to the agreement. For example, PayActiv notes,

> We may, in our sole discretion, modify these [Terms of Use] with or without notice to you. . . .
>
> . . . .
>
> We reserve the right at any time and from time to time to modify or discontinue, temporarily or permanently, the Service (or any part thereof) with or without notice. You agree that we shall not be liable to you or to any third party for any modification, suspension or discontinuance of the Service.
>
> . . . .
>
> We reserve the right, in our sole discretion, immediately and without notice to suspend or terminate these [Terms of Use], your account (if you have registered) and/or your ability to access the Site, for any reason including any breach by you of these [Terms of Use] or conduct by you that we determine to be inappropriate.[138]

The other clauses use different language and set out different conditions, but they also assert the right to change the terms without active consent from the employee.[139]

---

any other communications you have with us regarding the Even Service, such as by email or phone.").

[137] For cases under the Uniform Commercial Code, see WILLIAM D. HAWKLAND, LINDA J. RUSCH & LARRY T. GARVIN, HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES § 2-316:2 n.3 (Carl S. Bjerre ed., 2020).

[138] *PayActiv Terms of Use*, *supra* note 121.

[139] *See* INSTANT TERMS & CONDITIONS, *supra* note 55, at 11 ("We may amend or change the terms and conditions of this Agreement at any time by posting the amended Agreement on our website at www.instant.co, and any such amendment shall be effective upon such posting to that website and your continued use of the card."); *Even Terms and Conditions*,

Consumer advocates and scholars have become increasingly alarmed by companies reserving the right to unilaterally change a contract.[140] Oren Bar-Gill and Kevin Davis explain the economic problems associated with allowing companies to unilaterally alter contracts.

> The root of the problem is that when sellers impose modifications unilaterally there is no guarantee that the modifications will be mutually beneficial; sellers are likely to propose unilateral modifications that serve their own interests, but not necessarily those of consumers. This reality raises three main concerns. First, many consumers will fail to appreciate the risk that sellers will impose self-serving modifications. Thus, consumers may enter into welfare-reducing contracts (that is to say, contracts that leave them worse off than if they had not contracted at all). Second, even if the contracts they sign are not welfare reducing (that is, contracting is still better for the consumer than not contracting), consumers in many cases would be better off if sellers offered contracts that set some constraints on unilateral modification. Third, sellers' unchecked power to modify contracts prevents the efficient operation of markets for consumer

supra note 120 ("Finally – sometimes we may need to change these Even Terms. As an example, we might need to make changes if we add a new feature to Even. We will notify you by changing the revision date at the top of this page, and in some cases, we will notify you directly, by email or by in-app notification. Your continued use of Even Services after a modification signifies your agreement to the modification. We encourage you to frequently review these Even Terms to ensure that you understand the terms and conditions that apply to your use of Even Services. We will always be happy to answer any questions about these changes . . . ."); *Earnin Terms of Service*, *supra* note 122 ("We may revise these Terms of Service and any of the policies listed above (together, the 'Policies') from time to time. The revised version will be effective at the time we post it, unless otherwise noted. If our changes materially reduce your rights or increase your responsibilities, we will provide notice to you via in-app notification and/or email at least ten (10) days prior to implementing the changes to the Policies. By continuing to use our Services after any changes to the Policies become effective, you agree to abide and be bound by those changes. If you do not agree with any changes to the Policies, you may close your account and terminate your Services with Earnin." (emphasis omitted)); *DailyPay Prior Terms of Use*, *supra* note 40 (stating, on an older version of their website, that "DailyPay reserves the right, at any time and without prior notice, to modify, alter, or update this Agreement. The date of the most recent revision will appear at the end of this Agreement. Your continued access to the Site and use of the Services by you will constitute your acceptance of any revisions to this Agreement. Accordingly, you should review the then-current version of this Agreement from time to time, because it is binding on you.").

[140] *See, e.g.*, Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1100-01 (2010); Justin P. Green, *The Consumer-Redistributive Stance: A Perspective on Restoring Balance to Transactions Involving Consumer Standard-Form Contracts*, 46 AKRON L. REV. 551, 566 (2013); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 649 (2010).

products. Comparison shopping becomes meaningless when the product or contract can be changed easily soon after the purchase is complete.[141]

*****

The companies I interviewed were focused on helping people. However, even if current companies in this market will protect consumers, there is no guarantee that future companies will as well.

Combined with the other problematic clauses in these contracts, the basic terms of use that earned wage access companies offer to consumers could lead to amazing abuses of power. Examples from other financial instruments abound.[142] For instance, an earned wage access company could tell employees in its promotional material that advances cost $2 per advance, and the written contract may specify this amount. The consumer could "assent" to $2 on the app or website. Then, after a month of the employee using the product, the company could switch the contract on the website to say $7 while leaving all the promotional material the same.

A consumer who realizes that she paid extra could not sue because no lawyer would take a case for $5, and she cannot join with other people who paid the extra $5 because of the ban on class actions in the contract. Even if a friend took the case for her, the employee might lose in court because the contract allows the earned wage access company to unilaterally amend the price to $7 and excludes the express warranty that the cost would be $2 through the integration clause. In summary, because of their overreaching terms, earned wage access companies could engage in a variety of abusive practices with little threat of effective recourse against them. These contract terms are a danger lurking beneath the surface of these companies' products.

3. Potentially High Fees

In addition to its collection mechanisms and abusive contract terms, another danger in the earned wage access market is high fees. Measured as an annual percentage rate, the costs could be high. For instance, someone making $10 for eight hours one day makes $80, ignoring taxes and other deductions. If that employee takes out half of their daily pay ($40) at the end of the day and is

[141] Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 6 (2010).

[142] Examples include credit card fees, mortgage origination fees, and cellular telephone contracts. *See* Alces & Greenfield, *supra* note 140, at 1102 (finding unilateral change-of-terms provisions in telephone service contracts); Angela Brown, *Mortgage Origination Fees: What Are They and How to Avoid Them*, FOX BUS. (July 13, 2020), https://www.foxbusiness.com/money/mortgage-origination-fees-what-are-how-to-avoid [https://perma.cc/E87W-5SKN] (describing mortgage origination fees); *Can My Credit Card Company Change the Terms of My Account?*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ask-cfpb/can-my-credit-card-company-change-the-terms-of-my-account-en-70/ [https://perma.cc/XS6D-X36A] (last updated July 10, 2017) (noting that credit card companies can change terms, including fees).

charged a $3 fee to get that earned wage seven days early, the effective interest rate would be close to 390%, the same annual percentage rate ("APR") as many payday loans.[143] Many people take out wages just days in advance,[144] making those small fees extraordinarily high if expressed as an interest rate.

Even if the fee for the earned wage access product is a monthly or biweekly fee, the effective interest rate could still be high if an employee is limited in how often they can access wages during a period. Some earned wage access companies or the employers with whom they work limit the number of times an employee can access wages in advance of payday.[145] In the example of the $40 advance above, a $3 monthly fee with a limit of one advance per month would produce the same high APR.

The direct-to-consumer model has been criticized for its high fees. Earnin sets a default "tip" at 10% of the cash the employee accessed.[146] If a worker accesses $100 three days before payday and tips $10, the APR would be over 1,200%. While this high fee is voluntary, the fact that people pay it makes the service costly. Thus, even though the appeal of earned wage access is that it is lower in cost than payday loans, the costs still have the potential to be high.

4. Unknown Dangers of Access to Wages

The idea of being paid on a weekly or biweekly basis is deeply ingrained in American culture. Because this paradigm has dominated compensation for so long, it is unclear what effects being paid more regularly might have on employees' abilities to budget, save, and otherwise manage their finances. Right now, bimonthly paychecks serve as an important budgeting tool for many people.[147] For instance, economist Mary Zaki studied the effect on consumption of access to wages through payday loans. On one hand, she finds that access to wages earlier through payday loans did not increase food consumption but

---

143 The annual interest rate can be found by dividing the finance charge by the advance amount, multiplying the number of days in the year, and then dividing the result by the number of days of the loan. Finally, the result is multiplied by 100. For this example, *($3/$40) * 365/7 * 100 = 391%*.

144 Cardplatforms Interview, *supra* note 39.

145 FlexWage Interview, *supra* note 35.

146 Farivar, *supra* note 26 ("Before the money is paid directly to their bank account, users are asked to add an optional tip, which defaults to about 10 percent of the amount borrowed but can be dialed down to zero.").

147 Crosman, *supra* note 59 ("'The every-other-week paycheck is one of the few normal structures we have for people around planning, budgeting and managing their money,' [John Thompson, chief program officer at Center for Financial Services Innovation,] said. Without that structure, which is a form of savings, 'we're going to have to work hard to make sure we don't just turn people loose on their own with even less structure or guidance or advice on their financial life.' Another common concern about payday advance tools is that if you give people access to their money ahead of time, they'll just spend it, and then when their paycheck arrives, they will come up short.").

allowed borrowers to smooth consumption over time.[148] This finding supports access to wage advances. But on the other hand, she finds that access to payday loans increased consumption of alcohol and electronics, suggesting that early access to wages may lead to temptation purchases.[149] Other economic research confirms these two divergent consumer-welfare impacts: instant access to wages smooths consumption better than biweekly paychecks, but biweekly pay periods help employees self-regulate against self-control problems.[150] More research is needed to understand the net welfare effects of earlier access to a paycheck, so regulators should proceed with caution.

The benefits and risks of earned wage access reveal the need for state and federal lawmakers to seriously assess the best ways to advance this product while shaping it into a consumer-friendly alternative to high-cost, small-dollar loans. The next Part offers a path forward to retain earned wage access's advantages over payday loans but also mitigate the greatest risks they pose.

III. FACILITATING FINTECH'S DISRUPTION OF PAYDAY LENDING

This Part offers one approach for policy makers to consider as they attempt to regulate the earned wage access. Currently, no states specifically regulate these transactions, so regulatory attention to this area is essential. In February 2019, California became the first state to consider specific regulations aimed at earned wage access companies.[151] The bill already passed California's Senate and is currently being debated in other committees.[152]

Section III.A argues that this product does not fit neatly into existing legal categories, putting companies using it at risk of an adverse court decision.

---

[148] Mary Zaki, *Access to Short-Term Credit and Consumption Smoothing Within the Paycycle* 1, 23 (Fondazione Eni Enrico Mattei, Working Paper No. 7.2016, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741001 [https://perma.cc/7MC4-36J5].

[149] *Id.* at 3-4, 23-24 (finding that military personnel with access to payday loans purchase more alcohol and electronics).

[150] *See, e.g.*, Christopher A. Parsons & Edward D. Van Wesep, *The Timing of Pay*, 109 J. FIN. ECON. 373, 375 (2013) ("[A] worker with self-control problems will always want to 'sell' the firm her future wages, even at a large discount, because of her high short-run discount rate."). PayActiv's Chief Operating Officer also observed that people are using PayActiv access to pay for basic human needs—groceries, utility bills, and rent or mortgage. PayActiv Interview, *supra* note 32. Still, the company limits the amount that employees can obtain from their paycheck because employees behaviorally are not yet ready to be paid every day. *Id.*

[151] *See* S.B. 472, 2019-2020 Leg., Reg. Sess. (Cal. 2019).

[152] *See* Stephen T. Middlebrook & Tom Kierner, *What Employers Need to Know About Advance Wage Payment Products*, NAT'L L. REV. (Aug. 8, 2019), https://www.natlawreview.com/article/what-employers-need-to-know-about-advance-wage-payment-products ("California SB 472 would authorize wage advances made by qualified providers who meet certain requirements. . . . While the bill is moving forward in the legislature, its fate is unclear.").

Section III.B suggests ways for policy makers to alleviate that uncertainty while also setting perimeters around the product.

A. *The Uncertain Status of Earned Wage Access*

Earned wage access products are difficult to categorize with certainty under current law and practice.[153] This uncertainty is certainly not unique. Commercial and consumer law are replete with examples of courts and academics debating whether a transaction is a loan. For instance, in the early years of rent-to-own transactions, intellectual combatants waged war over rent-to-own's status as a lease or a loan.[154] Proponents of the lease view saw rent-to-own customers' right to walk away without continuing liability as conclusive proof of their position, while the proponents of the loan view peeled back the form of the transaction to reveal the substance: people obtaining durable goods by making payments over time.[155] Similar debates have come and gone about the payday loans.[156] The goal of this Section is not to argue whether employee advances are loans but instead to illustrate the uncertainty. Reasonable courts or regulators could easily conclude that employee advances are loans.[157] Uncertainty on this point inhibits the beneficial development of this product.

The dispute is significant because if courts or regulators decide that employee advances are loans, then the companies offering them must become licensed lenders in many states,[158] comply with state and federal laws regulating loans,[159]

---

[153] As this Section will illustrate, Baker and Kumar's argument that "deployment of employer-sponsored FinTech benefits does not require changes in law or government intervention to be successful" is likely overstated. *See* Baker & Kumar, *supra* note 23, at 2. For one analysis of earned wage access companies' status under federal law, see Adam Levitin, *What Is "Credit"? AfterPay, Earnin', and ISAs*, CREDIT SLIPS (July 16, 2019, 1:31 PM), https://www.creditslips.org/creditslips/2019/07/what-is-credit-afterpay-earnin-and-isas.html [https://perma.cc/6GLD-22CH].

[154] *See* Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041, 2048 (2008) [hereinafter Hawkins, *Renting the Good Life*].

[155] *See id.* at 2050, 2095 (discussing reasons for characterizing rent-to-own transactions as leases or credit sales).

[156] *See* Francis, *supra* note 3, at 625 ("[P]ayday lenders initially contended that they were not subject to TILA because they were not extending consumer credit . . . .").

[157] In *Perez v. Rent-A-Center, Inc.*, 892 A.2d 1255 (N.J. 2006), *superseded by statute*, Retail Installment Sales Act, N.J. STAT. ANN. § 17:16C-1 (West 2020), the New Jersey Supreme Court held that rent-to-own contracts were loans under relevant state law and thus rent-to-own transactions were subject to that law. *Id.* at 1257.

[158] *See, e.g.*, CAL. FIN. CODE § 22100 (West 2020) (requiring licensing of lenders in California).

[159] *See, e.g.*, 15 U.S.C. § 1672(c) ("The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."); *id.* § 1673(a) (restricting garnishments on wages as so defined); 12 C.F.R. § 1002.1 (2020) (implementing the Equal Credit Opportunity Act in Regulation B); *id.* § 1026.1 (implementing TILA in Regulation Z). Some courts have stated that under the Fair

obey restrictions on wage assignments,[160] and comply with state usury limits,[161] in addition to complying with other laws. Moreover, if courts held that earned wage access products are loans after businesses have operated assuming they were not loans, the businesses would suffer serious consequences.[162]

The CFPB issued guidance in the final months of President Trump's term concerning some earned wage access products. For a very limited type of earned wage access products, the CFPB concluded that earned wage access is not credit under TILA and the regulation that implements it, Regulation Z.[163] Specifically,

---

Labor Standards Act, employer loans may not be deducted from employee paychecks. *See, e.g.*, Morrison v. Exec. Aircraft Refinishing, Inc., 434 F. Supp. 2d 1314, 1322 (S.D. Fla. 2005) ("Notwithstanding the foregoing, there are several types of payments that cannot be applied to offset unpaid wages, including . . . amounts loaned by an employer to an employee."). Even if they are merely "advances," some state laws may prevent employers from charging some fees for the advances. *See, e.g.*, LA. STAT. ANN. § 23:691 (2020) ("No person shall, whether for his own account or for that of any other person, advance money to any one of his employees at a greater rate of interest than eight percent per annum. . . . Whoever violates the provisions of this Section shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned for not more than three months, or both.").

160 The FTC defines the following as unfair practices: extending credit that

> [c]onstitutes or contains an assignment of wages or other earnings unless:
>
> (i) [t]he assignment by its terms is revocable at the will of the debtor, or
>
> (ii) [t]he assignment is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment, or
>
> (iii) [t]he assignment applies only to wages or other earnings already earned at the time of the assignment.

16 C.F.R. § 444.2(3) (2020).

161 For example, in Texas, "[a] creditor may contract for, charge, and receive from an obligor interest or time price differential." TEX. FIN. CODE ANN. § 302.001(a) (West 2019).

> The maximum rate or amount of interest is 10 percent a year except as otherwise provided by law. A greater rate of interest than 10 percent a year is usurious unless otherwise provided by law. All contracts for usurious interest are contrary to public policy and subject to the appropriate penalty . . . .

Id. § 302.001(b).

162 For instance, when Minnesota and Wisconsin courts held that rent-to-own transactions were loans and thus subject to APR disclosure requirements, the industry largely vacated these two states. *See* Miller v. Colortyme, Inc., 518 N.W.2d 544, 547 (Minn. 1994); Rent-A-Ctr., Inc. v. Hall, 510 N.W.2d 789, 795 (Wis. Ct. App. 1993); *see also* Hawkins, *Renting the Good Life*, *supra* note 154, at 2051 (pointing to evidence that only seven rent-to-own stores operated in Minnesota at the time and that Wisconsin's APR law meant that the state only had fifty such stores instead of the 150 to 300 it otherwise would have had); Kavita Kumar, *Best Buy Expands Lease-to-Own Program, Joining Growing Number of Retailers*, STAR TRIB. (Sept. 23, 2019, 10:31 AM), https://www.startribune.com/best-buy-expands-lease-to-own-program-but-not-in-minnesota/561076172/ [https://perma.cc/34H9-JAT7] (noting that Best Buy's lease-to-own program would not be offered in Minnesota or Wisconsin).

163 Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79,404, 79,405 (Dec. 10, 2020) (codified at 12 C.F.R. pt. 1026).

the CFPB only stated this opinion concerning products that, among other things, (1) involve a direct contract between the earned wage access company and an employer, (2) do not charge the employee anything, (3) are repaid exclusively by an employer-facilitated deduction from the employee's paycheck, (4) are nonrecourse, and (5) do not involve assessing the employee's creditworthiness.[164]

But, this advisory opinion does not establish significant certainty for this market. First, the CFPB changed leadership soon after President Biden took office.[165] Because consumer lending issues sometimes evoke conflicting responses, there is no reason to believe that a Biden-influenced CFPB will come to the same conclusions as a Trump-influenced CFPB. Second, the advisory opinion only applied to a small part of the current earned wage access market because many products fall outside of the perimeters described in the CFPB's opinion.[166] Finally, state courts interpreting state laws are not bound by the CFPBs opinion about what constitutes credit, so the applicability of state law provisions remains unaffected by the advisory opinion.[167] Thus, for the market as a whole, regulatory uncertainty about whether earned wage access is credit remains.

Earned wage access companies have clearly taken the position that these products are not loans.[168] On an intuitive level, the idea of employees getting wages that they have already earned seems to plainly not be a loan. Even succinctly makes the point: "Instapay allows you access to wages you've already earned, so you're not borrowing."[169] However, consider the following example

---

[164] *Id*. at 79,405-06.

[165] *See* Kelsey Ramírez, *Meet Biden's New CFPB Acting Director Dave Uejio*, HousingWire (Jan. 21, 2021, 1:17 PM), https://www.housingwire.com/articles/meet-bidens-new-cfpb-acting-director-dave-uejio/ [https://perma.cc/2TMP-FRPD].

[166] Truth in Lending (Regulation Z), 85 Fed. Reg. at 79,408.

[167] In concluding that PayActiv's earned wage access does not involve credit under TILA, the CFPB was explicit in stating that its opinion had no relevance to state law: "This Approval Order expresses no view on . . . [w]hether Payactiv [earned wage access] Transactions comply with state wage and hour laws." THOMAS PAHL, CONSUMER FIN. PROT. BUREAU, APPROVAL ORDER 8 (2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf [https://perma.cc/C6NQ-EXP8].

[168] *See, e.g.*, *PayActiv Frequently Asked Questions*, *supra* note 36 (answering no to question of "Is PayActiv a consumer loan provider?"); Baker, *supra* note 23, at 58 ("Regulatory issues were not generally viewed as a significant concern at the present time, as the companies had generally structured their solutions in a manner which, in the companies' view, do not require state licensing as lenders or loan brokers despite some 'loan-like' aspects of their customer interactions.").

[169] *Even FAQs*, *supra* note 38 (click "Are there any fees, taxes, or interests?"); *see also* Jed Kim, *How to Access Your Hard-Earned Money Before Payday*, MARKETPLACE (July 6, 2016), https://www.marketplace.org/2016/07/05/world/how-access-your-hard-earned-money-payday [https://perma.cc/QND9-R2H2] (quoting Safwan Shah, founder and Chief Executive

of a transaction that plainly is a loan under current law: Imagine a plumber who has an extremely well-established business. She could take out a loan from a bank that is secured at half the value of the money her customers owe her for work she has already completed and billed them for—what the Uniform Commercial Code calls accounts.[170] Loans like hers, secured by the accounts, can be nonrecourse.[171] If the plumber agrees, the bank could write to the people who owe the plumber money and tell those people to pay the bank 50% of the money they owe the plumber instead of paying the plumber that money.[172]

Other than the presence of an explicit charge for interest, the situation with the plumber almost exactly mirrors an employee who gets an earned wage advance. The plumber has already earned the money from the accounts, just like the employees have already earned their wages, and the loan is nonrecourse, just like earned wage access products. Yet, there is no doubt that the plumber transaction is governed by Article 9 of the Uniform Commercial Code ("Article 9") and that the bank would have to file a financing statement to protect its interest in the accounts.[173] If the bank had made the loan to build its business with the plumber and did not charge her interest, it is unlikely that a court would find the transaction is not governed by Article 9. So, a court or regulator considering earned wage access a loan is consistent with current law and business practice. Figure 1 illustrates this analogy.

Officer of PayActiv: "This is neither a loan nor an advance. It's already earned. It's just a technology solution. We change the frequency or velocity of money").

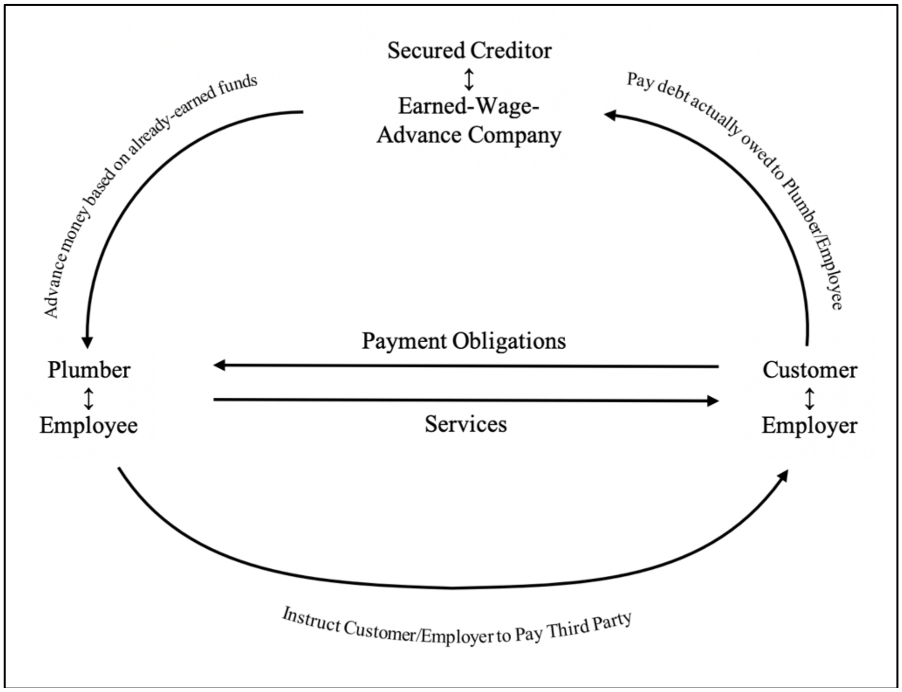
[170] U.C.C. § 9-102(a)(2) (AM. L. INST. & UNIF. L. COMM'N 2018).

[171] *See* Massimo Capretta, David Ciancuillo & Richard Ziegler, *6 Things Every Accounts Receivable Buyer Should Know*, LAW360, (June 16, 2017, 1:24 PM), https://www.law360.com/articles/935602/6-things-every-accounts-receivable-buyer-should-know ("Over the past several years, nonrecourse receivables financing has been embraced by many major financial institutions and nonbank investors in the U.S. market.").

[172] *See* U.C.C. § 9-607(a)(1) ("If so agreed, and in any event after default, a secured party . . . may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party . . . .").

[173] *Id.* § 9-310(a).

Figure 1. Loans Secured by Accounts versus Earned Wage Access.



Article 9 would still govern the transaction between the plumber and the secured creditor if the deal was structured as the sale of the plumber's accounts. Section 9-109(a) explains, "[T]his article applies to . . . a sale of accounts . . . ."[174] The reason for ignoring the distinction between sales and grants of security interests in accounts is that "[i]n many commercial financing transactions the distinction is blurred."[175] State law determines whether a sale of an account is a true sale or a disguised loan, but regardless, Article 9 governs it. Thus, even if an earned wage access company structures the transaction as purchasing workers' rights to payment from the employees,[176] it is not clear that courts or regulators will follow the earned wage access company's lead.

Different state and federal laws contain different definitions of credit. This Section analyzes the definitions in TILA and Regulation Z, because TILA is arguably the most important federal law governing credit.[177] TILA defines credit

[174] *Id.* § 9-109(a)(3).

[175] *Id.* § 9-109 cmt. 4. Article 9 does not govern assignment of wages. *See id.* § 9-109(d)(3).

[176] *See, e.g.*, *DailyPay Prior Terms of Use*, *supra* note 40 (defining "[u]npaid [e]arnings" as "the right to payment" owed by the employer).

[177] Francis, *supra* note 3, at 625.

as "the right to defer payment of debt or to incur debt and defer its payment."[178] Debt is never defined in TILA, but other federal laws such as the Bankruptcy Code[179] and the Fair Debt Collection Practices Act[180] define debt extremely broadly. Based just on the definition of credit in TILA, earned wage access could qualify as credit because the employee owes money to the party advancing the employee's wages until the time that those wages are paid. Moreover, earned wage access products are not one of the many products that are exempt from Regulation Z.[181]

Companies that offer employee advances and their lawyers, however, make three primary arguments for why earned wage access products are not loans and why these companies are not lenders. Each argument, however, has serious problems.

1. Customers Do Not Pay Interest

Earned wage access companies argue that their products are not loans because customers do not pay interest.[182] TILA's definition of a creditor opens the door to this argument because a creditor is defined as a person who is either an installment lender or a party "who regularly extends consumer credit that is subject to a finance charge."[183] Arguably, the monthly subscription cost does not meet the definition of a finance charge because the monthly subscription fee is not "an incident to or a condition of the extension of credit."[184] Instead,

[178] 12 C.F.R. § 1026.2(a)(14) (2020). The Electronic Funds Transfer Act has a similar definition: "[T]he right granted by a financial institution to a consumer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor." *Id*. § 205.2(f).

[179] *See* 11 U.S.C. § 101(12) ("The term 'debt' means liability on a claim."); *see also id*. § 101(5)(A) (defining claim broadly to include "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

[180] 15 U.S.C. § 1692a(5) ("The term 'debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.").

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

[182] *E.g.*, Even Interview, *supra* note 62; PayActiv Interview, *supra* note 32; *see also* Tucker Jones, Note, *Enforcing Vermont's Consumer Lending Laws: A Needed Model for Other States*, 41 VT. L. REV. 663, 682 (2017) ("[E]mployee wage advances received directly from employers are not considered loans under Vermont law, as long as employers do not charge interest."); Reidy et al., *supra* note 12 ("In general, [earned wage access] products are distinct from loan products as they generally do not advance future wages or charge interest, but rather provide access to wages already accrued usually for a flat fee of a few dollars per pay period or transaction.").

[183] 12 C.F.R. § 1026.2(a)(17)(i).

[184] *Id*. § 1026.4(a).

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.[185]

Moreover, Regulation Z specifically excludes "participation fees," which might include the monthly subscription fees that employees pay some companies.[186]

There are three primary problems with this view. First, at least some earned wage access companies charge per transaction or charge only if wages are advanced, suggesting that the fees are a direct condition of the extension of credit. PayActiv, for instance, only charges its monthly fee if an employee uses the earned wage access feature.[187]

Second, although the economics are a little murky because earned wage access companies are not public yet, it is possible that a court would find the monthly subscription fees are a "charge payable . . . indirectly by the consumer and imposed . . . indirectly by the creditor" because of the wage advance.[188] Thus, a finance charge under Regulation Z does not need to be obviously linked to the extension of credit—it can be indirectly linked. If earned wage access products primarily feature the wage advance and not other parts of the product, a court could find that monthly subscription fees are finance charges. Moreover, participation fees anticipate participation in a program in which the borrower can pay for other credit. The fact that there are no other credit fees might suggest that the monthly subscription fee is the finance charge here. At the very least, the fact-intensive inquiry should give us pause in concluding that monthly subscription fees are definitely not finance charges.[189] Third, earned wage access companies may find little comfort in the exclusion of "participation fees" from the definition of finance charge because courts almost never reference this portion of Regulation Z. As of this writing, the phrase "charged for participation in a credit plan" has only come up seven times in opinions on Westlaw,[190] and the only case actually applying the provision (as opposed to merely listing it or applying state law) is an unpublished opinion from the Ninth Circuit Court of

[185] *Id.*

[186] *Id.* § 1026.4(c)(4) (excluding from the definition of finance charge fees "charged for participation in a credit plan, whether assessed on an annual or other periodic basis").

[187] *See supra* note 61 and accompanying text.

[188] *See* 12 C.F.R. § 1026.4(a).

[189] *See* McAnaney v. Astoria Fin. Corp., 665 F. Supp. 2d 132, 147 (E.D.N.Y. 2009) ("[T]he determination of whether charges are incident to the extension of credit and therefore included within the definition of the finance charge is 'extremely fact-intensive' and '[t]he critical inquiry is whether the creditor only would have provided the loan with a guarantee that the mortgagor would pay the fee.'" (second alteration in original) (quoting McAnaney v. Astoria Fin. Corp., 357 F. Supp. 2d 578, 584 (E.D.N.Y. 2005))).

[190] On November 6, 2020, I searched "charged for participation in a credit plan" in the "All State and Federal" Westlaw database.

Appeals.[191] Moreover, even if federal law does not consider participation fees to be finance charges, state law might define such fees as finance charges, making earned wage access companies lenders under state law.[192]

Thus, while earned wage access companies can certainly argue that the absence of an explicit interest charge prevents these transactions from being loans, this conclusion relies on dubious footing.

2. Advances Are Nonrecourse

As their second argument that their products are not loans, earned wage access companies point to the fact that their provided advances are nonrecourse and therefore are not credit.[193] The fact that advances are nonrecourse is certainly a consumer-friendly feature of this product, as it places the risk of the employer not paying the earned wage access company on the company and not on the consumer. The CFPB excluded some earned wage access products in drafting its payday-lending rule, emphasizing that the nonrecourse nature of the transaction may make the transaction not "credit."

> The Bureau notes that some efforts to give consumers access to accrued wages may not be credit at all. For instance, when an employer allows an employee to draw accrued wages ahead of a scheduled payday and then later reduces the employee's paycheck by the amount drawn, there is a quite plausible argument that the transaction does not involve "credit" because the employee may not be incurring a debt at all. This is especially likely where the employer does not reserve any recourse upon the payment made to the employee other than the corresponding reduction in the employee's paycheck.[194]

---

[191] *See* Collins v. Bankfirst, N.A., No. 97-15732, 1998 WL 709414, at *1 (9th Cir. Sept. 30, 1998) (noting that type of "other charge" that requires disclosure is "membership or participation fee for a package of services that includes an open-ended credit feature" (quoting 12 C.F.R. § 1026.6(a)(2) cmt. 1(v))).

[192] *See, e.g.*, UTAH CODE ANN. § 70C-1-106 (West 2020) ("For purposes of determining the interest rate allowed by the laws of this state . . . , all finance charges, all fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis, all transaction fees, all delinquency and deferral fees, all fees charged for exceeding a designated credit limit, all fees charged for each return of a dishonored check or negotiable order of withdrawal or draft, all fees charged for stopping payment, and all other charges permitted under Section 70C-2-101 are considered to be interest under the laws of the state of Utah.").

[193] Even Interview, *supra* note 62; PayActiv Interview, *supra* note 32; *see also* Jon Hill, *Earnin Flouts Lending Laws with 'Linguistic Trick,' Suit Says*, LAW360 (Nov. 18, 2019, 9:29 PM), https://www.law360.com/articles/1220735/earnin-flouts-lending-laws-with-linguistic-trick-suit-says (discussing class action lawsuit against Earnin wherein Earnin argued that their wage advances are nonrecourse).

[194] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,547 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041); *see also* CFPB Press Release, *supra* note 116 (noting that the rule applies to loans that require consumers, rather than employers, to pay back all of the loan at once).

The fact that the CFPB uses the advance's nonrecourse feature to potentially exclude it from the definition of credit bolsters the companies' views.[195] At least one court has concluded that nonrecourse loans are excluded from TILA.[196]

Yet, the circumstances described by the CFPB and the current market for earned wage access do not match, and the differences are critical. The CFPB envisions an employer paying an employee earlier than scheduled—not a third party paying an employee and then being repaid by the employer at a later time.[197] The employer owes a debt to the employee after the employee works and before the employer pays, so the employer satisfying that debt earlier than expected does not constitute credit. But, the presence of the third party does change things because, during the time between when the third party advances money to the employee and the employer pays the third party, the employee is in debt to the third party. So, the CFPB's commentary only covers the transactions where earned wage access companies are pulling from employer's funds to pay wages in advance, significantly weakening this argument. And the CFPB does not even think the scenario it presents is a clear case. The language tentatively states that the transaction "may not be credit" and that the argument it is not credit is "quite plausible."[198]

Moreover, the fact that virtually all earned wage access products are repaid indicates that they are not, in fact, nonrecourse under the law. David Horton and Andrea Cann Chandrasekher analyzed probate loans and found that most were repaid. They conclude that "no matter what these contracts say about being contingent on the outcome of the probate matter, they involve no authentic risk for lenders, and thus create 'debt.'"[199] Beyond this legal argument, some earned wage access products plainly identify themselves as recourse obligations.[200]

Even if all earned wage access products were nonrecourse, many loans are nonrecourse but are still considered loans. For instance, some mortgages in

[195] Carter v. Four Seasons Funding Corp., 97 S.W.3d 387, 397 (Ark. 2003) ("The existence of recourse against Commerce Alliance is claimed by the appellants as perhaps the single most important factor in determining whether the transaction was a legitimate factoring arrangement or a loan.").

[196] Reed v. Val-Chris Invs., Inc., No. 11-cv-00371, 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011) ("[T]he transaction between Plaintiff and AI was not a loan because Plaintiff had no obligation to pay AI anything if the Estate did not satisfy the amount Plaintiff assigned to AI.").

[197] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,547; *see also* CFPB Press Release, *supra* note 116 (noting that lenders will attempt to collect from the employees' bank accounts directly).

[198] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,547; *see also* CFPB Press Release, *supra* note 116 (clarifying that the rule requirements are for lenders who regularly extend credit).

[199] David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 148 (2016).

[200] *See supra* Section I.A.3.

states like Arizona and California are nonrecourse,[201] as are pawn loans[202] and some auto title loans.[203] Despite being nonrecourse, they are still loans under relevant state and federal laws. Thus, being nonrecourse does not automatically exclude earned wage access products from being loans.

3. Little Risk of Nonpayment

Finally, earned wage access companies suggest that the fact that employees have already earned the wage and present little risk of nonpayment demonstrates that the advances are not credit.[204] The CFPB's choice to exclude these products from the payday-loan rule relied in part on the belief that "the kinds of risks and harms that the Bureau has identified with making covered loans, which are often unaffordable as a result of the identified unfair and abusive practice, may not be present where these types of innovative financial products are subject to appropriate safeguards."[205]

The fact that the advances are low risk to the business and the employee, however, does not mean the advances are not loans. The CFPB's statement does not say the low-risk nature makes advances not loans; it merely asserts that the loans are likely good for consumers. The low-risk argument seems the weakest legally because the fact that an employer owes an employee money does not somehow mean that the employee does not owe advanced wages to the third-party earned wage access company. Even if the debt will almost certainly be repaid, it is still a debt. Moreover, there are legitimate risks that earned wage access companies may face nonpayment. An employer could go bankrupt before

201 *See* Okla. P.A.C. First Ltd. P'ship v. Metro. Mortg. & Sec. Co. (*In re* Okla. P.A.C. First Ltd. P'ship), 168 B.R. 212, 222 (Bankr. D. Ariz. 1993) (discussing Arizona and California's antideficiency statutes), *aff'd*, No. 93-01921, 1994 WL 527102, at *1 (B.A.P. 9th Cir. May 12, 1994).

202 *See* Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361, 1388 (2011) [hereinafter Hawkins, *Regulating on the Fringe*].

203 *See, e.g.*, DEL. CODE ANN. tit. 5, § 2260 (2020) ("Notwithstanding any other provision of law, the proceeds of a licensee's sale of a motor vehicle that is used as security for a title loan shall satisfy all outstanding and unpaid indebtedness under that loan, and the borrower on that loan shall not be liable for any deficiency resulting from that sale.").

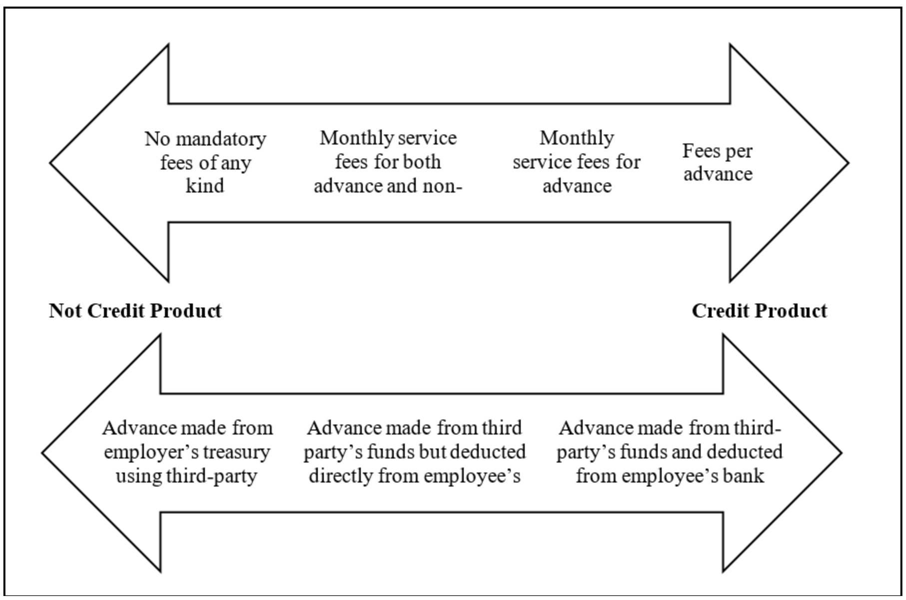
204 Even Interview, *supra* note 62; *see also* Michael Corkery, *Walmart Will Offer Paychecks in Advance*, N.Y. TIMES, Dec. 14, 2017, at B1 ("Workers can take out only a portion of wages that they have already earned during the two-week pay cycle – so technically, Even says, these are not loans."); Reidy et al., *supra* note 12 ("Although wage assignment laws may be a concern for some regulators, [earned wage access] programs arguably avoid the speculative risks associated with assigning future potential earnings . . . .").

205 Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,547 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041 (2020)); *see also* CFPB Press Release, *supra* note 116 (finding that harms of covered loans include defaulting, reborrowing, or skipping other financial obligations).

paying the employees their earned wages,[206] the employer could make an administrative error in producing the paycheck, doing the deduction, or communicating the number of hours the employee worked, the employee could instruct the employer not to deduct the loan from the employee's paycheck, the employer could terminate the employee before the regular paycheck, or the employees' paychecks could be subject to garnishments that take priority over the deduction to the earned wage access company.[207] Thus, while perhaps the low risk of advances makes them consumer friendly, it does not conclusively make them not loans.

Figure 2 summarizes this discussion of the best legal arguments in favor of earned wage access.

Figure 2. Earned Wage Access Products and Credit.



In sum, it is possible that courts or regulators will find earned wage access products to be credit products, depending on how the companies structure their business models and fees. It is not that all of these products are necessarily loans; it is enough that they *might* be loans. The next Section suggests that policy makers eliminate this uncertainty and establish market-specific rules to pave the way for earned wage access to grow.

[206] For some employers, bankruptcy may be an extremely small risk. Even Interview, *supra* note 62 (stating that bankruptcy of the employers that Even works with is not a realistic risk).

[207] *See id.*; FlexWage Interview, *supra* note 35.

B. *Steps for Policy Makers to Foster Earned Wage Access*

To facilitate the consumer-friendly expansion of earned wage access, policy makers should consider the following steps.

1. Eliminate Regulatory Uncertainty

As demonstrated in Section III.A, significant uncertainty exists regarding the status of the earned wage access. Even lawyers who represent earned wage access companies recognize this uncertainty.[208]

It is axiomatic that businesses seek clear legal rules under which to operate. In the context of other small-dollar loan products, legal uncertainty essentially prohibited some businesses from operating in certain states and drove down the price of public companies' stock.[209] The rent-to-own industry has repeatedly proposed a federal law that offers consumer protections in order to settle state controversies over whether the product is a loan or a lease.[210] Baker interviewed a variety of fintech companies potentially offering alternatives to payday loans, and almost all reported compliance concerns.[211] The earned wage access companies I interviewed also stated that complying with relevant laws was very important and that regulatory uncertainty was a serious problem.[212] Employers considering plans also value legal certainty, so regulations clarifying the legal

[208] Reidy et al., *supra* note 12 ("While regulators have taken notice, they have yet to clarify existing rules or explicitly endorse [earned wage access] programs. . . . Other state and federal regulators have yet to specifically address [earned wage access] programs. Several states have 'anti-evasion' laws on their books, however, which describe in broad strokes certain nonlending financial activities requiring a license. In the absence of any guidance to the contrary, these statutes may provide cover to state regulators seeking to bring [earned wage access] companies within their purview. Still, the regulatory landscape remains unsettled." (footnote omitted)).

[209] Hawkins, *Credit on Wheels*, *supra* note 5, at 593-94 ("[U]ntil Virginia recently specifically authorized title lending (after years of lending by title lenders through an open-ended credit statute), TitleMax refused to operate in the state. When the law changed, TitleMax began offering loans in Virginia. . . . Stock prices can reflect the deleterious effect of uncertainty on alternative financial service providers. . . . 'Advance America had earned $30 million in profits in the second half of 2008, and then booked another $26 million in profits in the first quarter of 2009, yet its stock was down by more than 75 percent from its high because of uncertainty about the payday loan.'" (quoting GARY RIVLIN, BROKE, USA: FROM PAWNSHOPS TO POVERTY, INC.—HOW THE WORKING POOR BECAME BIG BUSINESS 313-14 (2010))).

[210] *See* Consumer Rental Purchase Agreement Act, H.R 1588, 112th Cong. (2011).

[211] Baker, *supra* note 23, at 71 ("Regulatory complexity and compliance costs were a concern for almost all companies. In particular, companies noted the costs associated with running national digital businesses while complying with widely varying state law mandates.").

[212] *E.g.*, PayActiv Interview, *supra* note 32; *see also* Wack, *supra* note 25 (quoting FlexWage Solutions Chief Executive Officer as stating, "In the lack of regulation, there's just a lot of uncertainty and concern. . . .").

status of earned wage access products could encourage more employers to offer them as a benefit.[213]

The CFPB has stated that it "has consistently expressed interest in encouraging more experimentation" in the small-dollar-loan space.[214] However, for companies to experiment with earned wage access products, they need clear rules about how existing laws affect their transactions.

Thus, policy makers should pass specific regulations to govern earned wage access that set out rules for these companies to follow and to exempt these companies from existing credit regulations. Credit is not a platonic form that we ought to use to judge the imperfect instantiations in the real world; the definition of a loan only matters because it tells regulators, courts, companies, and consumers which laws and regulations govern the transaction. Instead of letting companies' lawyers guess about which laws will regulate these products, policy makers should create clarity. Instead of using laws aimed at a different type of product, policy makers should enact rules specifically tailored to earned wage access.[215]

2. Enact Consumer Protection Policies

Clarifying the transaction's legal status will facilitate growth, but policy makers must ensure that growth does not create a monster. To mitigate the risks posed by this new product, state and federal lawmakers should adopt consumer protection laws aimed at earned wage access products.

a. *Require That All Advances Are Nonrecourse*

First, policy makers should require that all advances are nonrecourse. As discussed above, not all earned wage access products are currently nonrecourse.[216] That means that if an earned wage access company advances earned wages to an employee and then cannot deduct those wages either from the employee's paycheck or bank account, then the employee is personally liable for the outstanding amount.[217]

Errors and unforeseen events occur in this market, and employees should not bear the risk of these contingencies. Earned wage access companies are better than the individual employees at bearing the risks of the employer going out of business, the employer making an administrative error, or the employee having

[213] FlexWage Interview, *supra* note 35.

[214] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,547 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041 (2020)).

[215] California's proposed law establishes certainty by explicitly governing the product under the California Financing Law. *See* S.B. 472, 2019-2020 Leg., Reg. Sess. (Cal. 2019).

[216] *See supra* Section I.A.

[217] Todd D. Keator & Andrew Wootton, *'Bad Boy' Carve-Outs and Their Effect on Nonrecourse Debt*, 39 REAL EST. TAX'N. 4, 6 (2011) ("'[R]ecourse' debt is one 'that may be satisfied upon default by pursuing the debtor's other assets in addition to the collateral securing the note.'" (quoting *Recourse Note*, BLACK'S LAW DICTIONARY (7th ed. 1999))).

previously unknown garnishments, because earned wage access companies have more resources to deal with the shock of a default and because they can spread the risk between all users of the product.[218] Most advances in the industry today are nonrecourse, so imposing this requirement should not prevent the market's growth while at the same time protecting employees when they are most vulnerable. Thus, policy makers should require that all earned wage access products be nonrecourse.[219]

b. *Permit Employees to Disallow Deductions and Limit Number of Company Deductions from Bank Accounts*

In addition to making the advances nonrecourse, policy makers should ensure that employees have the ability to disallow earned wage access companies from deducting money from their paychecks. As argued in Section II.B.1, the policies behind restrictions on wage garnishments apply equally to this context. In order to provide employees with emergency decision-making capabilities, the law should preserve the employee's right to select whether to repay creditors.

For companies that debit employees' bank accounts instead of deducting wages from their paychecks, policy makers should limit the number of times a company can unsuccessfully debit an account. Section II.B.2 explains the high cost of unsuccessful debits for consumers. In other contexts, regulators have stepped in to prevent banks and creditors from abusing overdraft fees;[220] consumers in this market need the same protection. Policy makers could use the CFPB's payday lending rule as a model, limiting companies to two unsuccessful debit attempts.[221]

In addition to protecting employees from collection activities, giving employees the ability to choose to default on their obligations mitigates the potential risks of shifting from the standard two-week pay period to shorter pay periods.[222] If consumers, who are unfamiliar with being paid more frequently, make mistakes, allowing them to avoid collection activities offers a chance for interpersonal learning so that they can correct their behavior the next time they consider using an earned wage access product.[223]

---

[218] *See* Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181, 184 (1996).

[219] If the California bill is adopted, it would make wage-advance loans in the state nonrecourse. Cal. S.B. 472 § 1, at 48 ("Wage-based, work-based, and income-based advances shall be provided exclusively on a nonrecourse basis." (emphasis omitted)).

[220] *See, e.g.*, Overdraft Rule Review Pursuant to the Regulatory Flexibility Act, 84 Fed. Reg. 21,729, 21,730-31 (May 15, 2019).

[221] *See* CFPB Press Release, *supra* note 116 ("After two straight unsuccessful attempts, the lender cannot debit the account again unless the lender gets a new authorization from the borrower.").

[222] For a description of this risk, see *supra* Section II.B.4.

[223] *See* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 756 (2008).

At least some earned wage access companies permit employees to disallow the deduction from their paychecks without any restrictions.[224] Thus, these consumer protection measures should not inhibit the industry from growing.

An alternative approach to what this Article suggests is to cap the amount that an employee could get in advance of payday; this approach preserves a set amount of money for payday.[225] This alternative, however, is inferior because it is difficult for policy makers to know the optimal amount of an advance. Sometimes, caps on loan amounts end up harming the consumers they are attempting to help because consumers need more money at a critical time but legal restrictions prevent them from getting it.[226] The companies risking the loss, however, have greater incentives to set appropriate advance limits and have better information about the market, the risks, and the employees. By letting employees prevent wage deductions and limiting debit attempts, the law would force earned wage access companies to set the appropriate limits.

c. *Limit Abusive Contract Terms*

A third level of protection that policy makers should consider is limiting abusive contract terms in earned wage access contracts. The contracts that this Article surveyed made private policing of earned wage access products virtually impossible because of the limits on class actions.[227] Moreover, these contracts made the potential for abuses high because of the right to unilaterally amend the contracts, the flimsy notion of assent, and the disclaimer or exclusion of express warranties.[228]

It is unlikely that people using earned wage access apps will read or police the contract terms,[229] so federal policy makers should step in to prevent the abusive terms identified in Section II.B.2. Here, state lawmakers cannot prevent arbitration agreements or bans on class actions because of the Federal Arbitration Act[230] and the Supreme Court case law restricting states' actions

[224] PayActiv Interview, *supra* note 32.

[225] California's proposed law on earned wage access companies will take this approach if enacted in California Financial Code Section 22483(j)(1)(A): "[A] wage-based or work-based advance shall not exceed 50 percent of the gross amount owed by an obligor to a worker as of the date and time of the worker's request." S.B. 472, 2019-2020 State Assemb., Reg. Sess. § 1, at 48 (Cal. 2019); *see also* Even Interview, *supra* note 62.

[226] *See* Dobbie & Skiba, *supra* note 86, at 280 ("Both regression discontinuity and regression kink approaches suggest that payday loan borrowers are *less* likely to default when offered a larger loan.").

[227] *See supra* Section II.B.3.

[228] *See supra* Section II.B.3.

[229] *See generally* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (disputing informed minority hypothesis because of finding that "only one or two in 1,000 [retail software] shoppers" even viewed relevant contract in their transaction).

[230] 9 U.S.C. § 2 ("[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal

against arbitration.[231] Thus, to eliminate these restrictions on accessing justice, someone in the federal government will have to act. State governments could limit unilateral amendments and exclusions of express warranties. Regardless of which level is acting, however, consumers using these products need to be able to prevent abusive and deceptive conduct, so they need to be able to seek justice and need to have the substantive rights necessary to do so.

d. *Require Real-Time Disclosures of Effects of Advances*

The fourth policy recommendation relates to an innovative approach to disclosures. Because of the unknown dangers of advanced access to wages, policy makers could require earned wage access companies to make disclosures about the consequences of obtaining an advance at the time the employee requests an advance. Earned wage access companies often have access to all of the employee's bank records,[232] so these companies could evaluate future large expenses shown in the history of the employee's accounts and point these expenses out to an employee requesting an advance.

For instance, after receiving a request for an advance, the app might say, "If you access $200 of your wages now, on payday, you will only get approximately $452. Will you have enough to pay your rent of approximately $600 due October 1?" Regulators would have to evaluate exactly how to write this policy into a rule, but most companies are technologically capable of providing this form of disclosure.

Such disclosure would be very salient to the employee because it is personalized and made at the exact time of the transaction,[233] and salient disclosures can influence behavior.[234] Disclosures are usually acceptable to

to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

231 *See* Frank Blechschmidt, Comment, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 542, 561-77 (2012) (discussing Supreme Court precedent regarding arbitration agreements and stating that "[u]ltimately, the Court held [in *AT&T Mobility v. Concepcion*] that the Federal Arbitration Act (FAA) preempts states from invalidating class action waivers in arbitration agreements because these invalidations stand as an obstacle to the purposes behind the FAA").

232 *See supra* Section I.A.

233 *See* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 5 (2006) (arguing for disclosures at time of purchase that credit card purchases will cause purchasers to go over their credit limits); Michael A. Garemko III, Note, *Texas's New Payday Lending Regulations: Effective Debiasing Entails More than the Right Message*, 17 TEX. J.C.L. & C.R. 211, 248 (2012) (suggesting that Texas should require payday lenders to provide more information to consumers ahead of transactions).

234 In a different context, for instance, Brian Galle and David Walker found that prominent disclosures of executive pay reduce giving to nonprofits. *See* Brian Galle & David I. Walker,

businesses because they do not prevent transactions and are desirable from a policy standpoint because they are asymmetrically paternalistic, only preventing irrational uses of a product without preventing rational ones.[235] Thus, policy makers considering regulation could make substantial improvements in this market with a disclosure requirement while facing minimal industry or political resistance.

e. *Limit Fees*

The most significant concern that critics of earned wage access products have raised is that abusive lenders will use any legislation to obviate other consumer protections.[236] The chief benefit of earned wage access is the price,[237] but companies can structure the transactions so that earned wage advances are as expensive as payday loans.[238] Thus, legislation should ensure that only business models with reasonable prices obtain the benefits of any law that exempts earned wage access products from lending laws.

California's proposed law limits fees in Section 22483(e), stating,

> (1) During an applicable time period, payments, whether required by the provider or made at the worker's or consumer's option, received by a provider from a worker for wage-based or work-based advances or from a consumer for income-based advances shall meet one or both of the following criteria:
>
> (A) Payments received do not exceed the lesser of fifteen dollars ($15) per month on average or 7.5 percent of the aggregate amount advanced.
>
> (B) Payments are collected as membership or subscription fees memorialized in the contract between the provider and the worker, consumer, or obligor and do not exceed twelve dollars ($12) per month.[239]

The California bill sets permissible rates higher than many companies currently offer, and while high APRs could still exist under it, the bill limits the overall cost to employees, offering consumers protection and preventing lender subterfuge.[240]

Nonprofit Executive Pay as an Agency Problem: Evidence from U.S. Colleges and Universities, 94 B.U. L. REV. 1881, 1923 (2014).

[235] *See* Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 260 (2006) ("Whatever the target of disclosure, the advantage of this approach is that it is unlikely to impose any real costs on those who seek to borrow, while at the same time producing real benefits to those who might borrow excessively.").

[236] *See supra* Section II.A.5.

[237] *See supra* Section II.A.

[238] *See supra* Section II.B.4.

[239] S.B. 472, 2019-2020 Leg., Reg. Sess. § 1, at 46-47 (Cal. 2019) (alterations omitted) (emphasis omitted).

[240] *See supra* Section I.B.

Usually, caps on prices are objectionable because they can function as de facto bans on products[241] and because they deter sophisticated parties who understand the transaction but still want to continue.[242] In this context, however, price limits are reasonable because of the risk that abusive lenders will enter the market and use any enabling legislation as a means of obviating the law. Moreover, many earned wage access companies operate with prices much lower than California's price limit, so the industry can and will exist despite price limits.

CONCLUSION

Payday lending, even according to its strongest supporters, has been an extremely expensive solution for lower-income Americans experiencing short-term liquidity crises. For its critics, payday lending has wreaked havoc on vulnerable consumers for three decades. It is clear that employees across the economic spectrum have needs that arise outside the two-week pay period. While they may have already earned the money they need, they do not have it because payday has not come yet.

Earned wage access products have the potential to do what payday lending never could—offer workers access to money without cripplingly high costs. But in order for this market to end payday lending, policy makers must act to clarify the legal status of earned wage access. People have both argued that these products are clearly loans and that they are clearly not loans, leaving companies and their lawyers to guess about how courts will categorize them. This uncertainty limits growth and entrenches payday lending's market position.

But in exchange for certainty, companies should be willing to modify their products to protect consumers and to prevent abusive actors from entering this space. Policy makers should put limits on how earned wage access companies collect advanced wages and should ensure that consumers enter contracts with relatively fair terms. To prevent companies from using any new law to evade other lending regulations, policy makers should put price caps on earned wage access.

Technology does not always make life better for lower-income Americans, but earned wage access products are an example of how it can change markets for good. More research is needed to assess the net welfare effects of earned wage access, but in the meantime, policy makers can shape the product to allow it to grow into a consumer-friendly transaction to displace payday lending.

[241] Hawkins, *Regulating on the Fringe*, *supra* note 202, at 1406.

[242] Hawkins, *Renting the Good Life*, *supra* note 154, at 2078.