Earned Wages Access and the End of Payday Lending

Jim Hawkins[*]

Abstract:

Fintech companies have developed a financial product that allows employees to gain access to wages that they have already earned before their scheduled payday. The fee for getting an earned wage advance 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 advance market, assesses the likelihood 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, earned wage advances do not fit neatly into existing legal categories, so policymakers need to establish legal certainty in the market to facilitate 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 Jon Schlossberg (CEO, Even Responsible Finance), Chris Suppa (Senior Vice President for Business Development, FlexWage Solutions, LLC), Ijaz Anwar (Co-Founder and Chief Operating Officer, PayActiv), Alex Bradford (Co-Founder and Chief Executive Officer, Rain Technologies Inc.), Michael Park (Chief Compliance Officer & General Counsel, Cardplatforms, LLC), Abigail Wald (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 Flemming, David Kwok, Nathalie Martin, Ronald Mann, Steve Willborn, Rory Van Loo, state regulators, and participants at the Berkeley Consumer Law Scholars Conference 2019 and a workshop as well as a colloquium at the University of Houston Law Center. For truly excellent assistance, I thank Taylor Hood.

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INTRODUCTION

The iniquities of payday lenders have been well documented.[1] Opponents contend that payday loans are debt-traps,[2] that lenders exploit consumers' cognitive biases,[3] and that 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 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 6 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.

States have had various degrees of success eliminating payday loans, but even success in that context may really be failure.[6] The empirical research is unclear about the net welfare effects of eliminating access to short-term, small-dollar loans—even those at very high price

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[1] For a very small sample of the extensive literature from the past two decades, see Rebecca Schonberg, *Introducing "Abusive": A New and Improved Standard for Consumer Protection*, 100 CAL. L. REV. 1401 (2012); Nathalie Martin, *1,000% Interest-Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 563 (2010); 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 (2005); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1 (2002).

[2] Ryan Baasch, *Taming Title Loans*, 101 VA. L. REV. 1753, 1755 (2015); Richard J. Thomas, *Rolling over Borrowers: Preventing Excessive Refinancing and Other Necessary Changes in the Payday Loan Industry*, 48 WM. & MARY L. REV. 2401, 2409 (2007); Michael A. Stegman, *Payday Lending*, 21 J. ECON. PERSP. 169 (2007).

[3] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV 1, 44–45 (2008); 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; Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 615 (2010) ("[T]he underestimation bias may explain the frequency of payday-loan rollovers . . . ."); Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 J. FIN. 1865, 1889 (2011). *But see* Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105 (2013).

[4] Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* (Vanderbilt Univ. Law and Econ. Research, Paper No. 11-13, 2011).

[5] *Cf.* Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 592 (2012) ("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 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] Most states set usury caps so low that payday lenders cannot operate. *See, e.g.*, N.Y. PENAL LAW § 190.40 (McKinney 2019) (setting the usury cap at 25% per annum or the equivalent rate for a longer or shorter period); N.Y. BANKING LAW § 14-a (McKinney 2019) (16%); N.H. REV. STAT. ANN. 399-A:16(I) (2018) (36%).

points.[7] At the federal level, the Consumer Financial Protection Bureau (CFPB) promulgated regulations aimed at maintaining the payday loan product while curbing abusive practices,[8] but a new administration is now rewriting that rule to reduce its restrictions on payday lenders.[9] 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 advance" or an "earned wage access product." Earned wage advance companies work with employers to learn information about employees' wages and to gain access to employees' paychecks. These companies give those employees the wages that the employees have already earned but have not 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. All of this service is generally done at very low cost to the employee, meaning these Fintech companies solve payday lending's biggest problem—price.

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[7] *See generally* Adair Morse, *Payday Lenders: Heroes or Villains?*, 102 J. FIN. ECON. 28 (2011) (concluding that access to payday loans mitigates foreclosures and larcenies following a natural disaster); Brian T. Melzer, *The Real Costs of Credit Access: Evidence From the Payday Lending Market*, 126 Q.J. ECON. 517 (2011) (finding that payday loan "access leads to increased difficulty paying mortgage, rent and utilities bills"); Neil Bhutta et. al., *Consumer Borrowing After Payday Loan Bans*, 59 J.L. & ECON. 225, 225 (2016) (finding that although restrictive state laws "are effective at reducing payday lending, consumers respond by shifting to other forms of high-interest credit (for example, pawnshop loans) rather than traditional credit instruments (for example, credit cards)" meaning that "policies that target payday lending in isolation may be ineffective at reducing consumers' reliance on high-interest credit"); Richard Hynes, *Payday Lending, Bankruptcy, and Insolvency*, 69 WASH. & LEE L. REV. 607, 607 (2012) ("Bankruptcy filings do not increase after states legalize payday lending, and filings tend to fall in counties with large military communities. This result supports the beneficial view of payday lending, but it may be due to states' incentives in enacting laws. This Article tests the effect of a change in federal law that should have had a disparate impact according to the prior choice of state law. This second test does not offer clear support for either the beneficial or detrimental view of payday lending."); Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap*, 34 J. BANKING & FIN. 546 (2010) (finding that "restricting access [to payday loans] caused deterioration in the overall financial condition of the Oregon households"). 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 (Philip N. Jefferson ed., 2012).

[8] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17 2017) (codified at 12 C.F.R. pt. 1041 (2019)). For a summary of the provisions, see Recent Regulation, *Consumer 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.-Payday, Vehicle Title, and Certain High-Cost*, 131 HARV. L. REV. 1852 (2018).

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

While the number of companies currently offering earned wage advances is low, the market is exploding and has tremendous growth potential. Earned wage advance companies have partnered with major employers, including market giants like Wal-Mart, McDonald's, Wendy's, and Taco Bell.[10] 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.[11] Businesses offer these Fintech products as part of financial wellness benefit packages, and the number of businesses offering such packages is increasing every year.[12]

Earned wage advance companies have raised substantial capital and are experiencing growth due to high demand for the product. Even Responsible Finance ("Even") launched in December 2017 and has partnered with Wal-Mart to offer services to Wal-Mart employees. In 2018, Even had raised more than $52 million in capital, generated $20 million in revenue, had 400,000 active members, including around 100,000 Wal-Mart employees who used the app for some reason every day.[13] Another company, FinFit, provides its "financial wellness benefit platform" to 125,000 employers[14] and over one million employees.[15] Over ten million users have downloaded Earnin's earned wages app, and the company is likely already worth more than

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[10] David S. Reidy et al., *Time For Regulators To Embrace Earned Wage Access*, LAW360, (Oct. 24, 2018, 12:26 PM EDT), https://www.law360.com/articles/1094136/time-for-regulators-to-embrace-earned-wage-access.

[11] 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/.

[12] John Adams, *Prepaid Finds a Role as an Employee Perk*, PAYMENTSSOURCE, (Jan. 7, 2019, 12:01 AM EST), https://www.paymentssource.com/news/prepaid-finds-a-role-as-an-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; *Need a loan? Forget the corner payday lender—your boss has you covered*, L.A. TIMES (Aug. 5, 2018), 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.").

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

[14] *FinFit Announces Partnership with Pilgrim's Pride Corporation*, FINFIT, (Dec. 7, 2018), https://www.finfit.com/2018/12/07/pilgrims-pride-partnership/.

[15] 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.

a billion dollars.[16] 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 up for Instant Pay with the Uber Debit Card from GoBank."[17] Within months, hundreds of thousands of drivers had signed up, and Instant Pay paid "$1.3 billion dollars in cash-outs by drivers in its first year alone."[18]

Despite these products existing for more than five years (decades, as measured in Fintech time), very little research exists about earned wage advances. Legal academics have noted their promise in passing, but there are few independent, sustained analyses of the legal status of these products.[19] Todd Baker and Snigdha Kumar have done excellent work evaluating the relative cost of earned wage advances and payday loans, but they only compare the two products on that single metric.[20] A critical analysis is needed, given the history of employer loans trapping

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[16] 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/.

[17] *Instant Pay: Your Money, When You Want It*, UBER NEWSROOM (Aug. 16, 2016) https://www.uber.com/newsroom/instant-pay/.

[18] Darrell Etherington, *Uber's Instant Pay Has Cashed Out $1.3B to Drivers in Just One Year*, TECHCRUNCH (Apr. 5, 2017, 8:00 AM CDT), https://techcrunch.com/2017/04/05/ubers-instant-pay-has-cashed-out-1-3b-to-drivers-in-just-one-year/.

[19] Nakita Q. Cuttino's new article, *The Rise of "Fringetech": Regulatory Risks in Early Wage Access*, presents a detailed legal and policy analysis of the earned wage access product. Nakita Q. Cuttino, *The Rise of "Fringetech": Regulatory Risks in Early Wage Access*, 115 NW. U. L. REV. (forthcoming). Other authors mention earned wage access companies in passing. 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 2019), https://ssrn.com/abstract=3235810; Eliza Platts-Mills & Justin Chung, *Challenging Payday Lenders by Opening Up the Market for Small-Dollar Loans*, 33 BYU J. PUB. L. 101, 141 (2018). One Law360 opinion piece discusses the legal status of earned wage advances, but the authors represent a major earned wage advance companies as a client, suggesting the need for additional research. Reidy et al., *supra* note 10 ("Disclosure: PayActiv is a McGuireWoods client.").

[20] *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. M-RCBG Assoc., Working Paper No. 88, 2018), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/88_final.pdf ("We sought to answer this question 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 the Law360 article, Kumar also has a link to PayActiv. *Id.* 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. Todd H. Baker, *FinTech Alternatives to Short-Term Small Dollar Credit: Helping Low-Income Working Families Escape the High-Cost Lending Trap* (Harvard Kennedy Sch. M-RCBG Assoc., Working Paper No. 75, 2017), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/75_final.pdf.

workers in debt.[21] Are earned wage advances 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 but other bills and enforcement actions pushing back against it. California's General Assembly is poised to pass a bill to enable market participants,[22] but a Missouri Congresswoman is proposing a law that is likely aimed at stifling the industry.[23] Regulators in eleven states are investigating potential wrongdoing by the earned wage advance company Earnin.[24]

This Article is the first sustained legal and empirical analysis of this market. Drawing from a series of interviews with earned wage advance companies, existing empirical data on the market, and the wealth of data on payday lending, the Article argues that earned wage advances have 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 advances from credit regulations and to establish safeguards to protect employees using this product.

The Article proceeds as follows: Part I describes the business models in the earned wage advance market and the fee structures that companies use. Part II weighs the upside and dangers of earned wage advances, especially in comparison to payday loans, and it makes the case that earned wage access products will eliminate payday lending. Part III describes the regulatory uncertainty that currently surrounds this product because the product does not clearly fall within or outside federal and state laws governing credit products. It suggests regulations aimed at eliminating legal uncertainty and ensuring that growth in the market protects the employees who use the product.

I. THE EARNED WAGE ADVANCE MARKET

Fintech companies that work with employers to advance earned wages have adopted a variety of business models and a variety of fee structures. The market is dynamic with

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[21] Steven L. Willborn, *Indirect Threats to the Wages of Low-Income Workers: Garnishment and Payday Loans*, 45 STETSON L. REV. 35, 40 (2015) ("An interesting aspect of the payday-loan problem for low-wage workers is that it is a problem that was addressed by most states a century ago. Then, states were worried about employers that took improper deductions from worker wages or forced them to borrow from employers, and so on. That resulted in a wave of wage-payment laws in the first quarter of the twentieth century . . . .").

[22] Kevin Wack, *As California Mulls Rules for Payday Loan Alternative, Rifts Emerge*, AM. BANKER (June 24, 2019, 12:50 PM EDT), https://www.americanbanker.com/news/as-california-mulls-rules-for-payday-loan-alternative-rifts-emerge.

[23] Cyrus Farivar, *Millions Use Earnin to Get Cash Before Payday. Critics Say the App Is Taking Advantage of Them*, NBC NEWS (July 26, 2019, 3:41 AM CDT), https://www.nbcnews.com/tech/internet/millions-use-earnin-get-cash-payday-critics-say-app-taking-n1034071.

[24] 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/.

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 Advance 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.[25] The wages are transferred to the driver's personal debit card for a $.50 fee or to an Uber Debit Card from GoBank for no fee.[26] In a more conventional context, many smaller employers offer loans/advances to their employees off-the-books and without the involvement of any other company.[27]

The focus of this Article, however, is third-party companies that offer wage advances by partnering with employers. Each company offering earned wage advances has a slightly different business model, but they fall within two major categories. 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.[28]

1. Direct to Business Models

The first business model involves earned wage advance 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 to hire the company to facilitate the wage access.[29]

One way that some companies operate under the direct to business umbrella is for the earned wage access company to provide the technological platform and support that allow employees to get advances on wages they have already earned directly from the employer's treasury. The employer then deducts any advances made from the employee's next paycheck.

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[25] Uber, *Make Any Day Payday*, https://www.uber.com/info/instant-pay/ (last visited Jan. 18, 2019).

[26] *Id*.

[27] 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 OTB loans, 17 issued only formal loans, and 39 issued both kinds of loans").

[28] *See infra* Figure 2.

[29] Telephone Interview with Ijaz Anwar, Co-Founder and Chief Operating Officer, PayActiv, Inc. (Jan. 9, 2019) [hereinafter PayActiv Interview].

FlexWage describes how its product, On Demand Pay, uses FlexWage technology but employers' funds for advances:

> On Demand Pay was developed and patented in 2010, and remains the only non-loan cash flow acceleration solution. On Demand Pay is delivered as an employer sponsored financial wellness benefit. On Demand Pay interfaces with employer HR and payroll systems to provide employees with managed access to accrued wages within the pay cycle, helping American households avoid the debt trap associated with using high-cost lending alternatives. Funds accessed are deducted from the associated payroll, no interest, no loan, and no stress. . . . By combining the FlexWage payroll card with our proprietary On Demand Pay technology, we eliminate workers reliance on the entire range of expensive financial products.[30]

Similarly, Instant Financial facilitates employees getting advances directly from their employers' payrolls; the advances are put on a prepaid credit card.[31]

But sometimes employers do not want to be involved in the earned wage access product at all because they do not want to navigate payroll laws by offering access to wages themselves. Smaller employers also sometimes do not want to use their funds to advance wages.[32] 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 and then the employer deducts the advance from the employee's next pay check to repay the advance to the wage advance company. PayActiv is one example of this model. In marketing to employers, PayActiv makes clear that its app does not change the employer's cash flow process because "we front the money."[33] PayActiv is repaid when the employer deducts the money from the employee's next paycheck.[34] Even also follows this model in some transactions,[35] and InstantWage, a product created by Cardplatforms, also

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[30] *About FlexWage*, FLEXWAGE, https://flexwage.com/about/ (last visited Jan. 18, 2019).

[31] *Employee Onboarding FAQs*, INSTANT, https://www.instant.co/faq/ (last visited Jan. 18, 2019) ("Only your employer can add funds to your Instant account. These funds are added through payroll, tips, and other transfers from your employer. . . . Your Instant card is a prepaid MasterCard® card.").

[32] Telephone Interview with Chris Suppa, Senior Vice President for Business Development, FlexWage Solutions, LLC (Jan. 21, 2019) [hereinafter FlexWage Interview].

[33] *Home Page*, PAYACTIV, https://www.payactiv.com/ (last visited Jan. 8, 2019).

[34] *The PayActiv Platform*, PAYACTIV,https://www.payactiv.com/holistic-financial-wellness-platform/ (last visited Jan. 8, 2019) ("The money taken using PayActiv is deducted from upcoming paychecks when payroll is processed.").

[35] *FAQs*, EVEN, https://www.even.com/faq (last visited Jan. 5, 2019) ("After you receive an Instapay, one of two things will happen: either a deduction will come out of your next paycheck for the amount of the Instapay OR your connected bank account will be debited for that amount on your next payday. Deductions from bank accounts only occur when an Instapay request is made too close to a payday to be processed directly through your paycheck."). Similarly, it appears DailyPay uses its own funds for advances because it expressly takes on the risk

funds advances upfront (delivering them to a prepaid card) and then deducts payments directly from the paycheck.[36]

The exact legal structure for the transaction used in this second business model is not clear from the companies' public information. In one contract, the earned wage advance 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 Earnings; any such liabilities and obligations will remain solely with Seller.[37]

Other contracts are similar.[38]

This arrangement is similar 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.[39] 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.[40]

An alternative structure would be for the earned wage advance 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

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that the employer may not repay DailyPay after an advance in its contract with employees. *Terms of Use*, DAILYPAY, https://www.dailypay.com/legal/#terms-of-use (last visited Jan. 21, 2019).

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

[37] *See Terms of Use*, *supra* note 35.

[38] *Terms of Service*, BRANCH, https://branchapp.com/terms (last visited Aug. 14, 2019) ("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 wages] advance and any associated delivery fee.").

[39] 24A FLA. JUR. 2d *Factors and Commission Merchants* § 3 (2019).

[40] Citigroup Inc., SEC Docket (CCH) 4005974.

advance company have raised the possibility that the Truth-in-Lending Act 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.[41] 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 are involved in direct to consumer transactions. In this business model, the earned wage advance company pays the advance to the employee and then deducts the advance after payday from the employee's bank account. Earnin, a company backed by more than $200 million in private investment, relies on users providing Earnin access to their bank accounts and providing employment information.[42] 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.[43] Then, when the employee requests the wages, Earnin deposits money in the employee's account. On payday, Earnin withdraws money directly from the account.[44] Earnin is not the only direct to consumer company. As just one example, Dave offers "0% Interest Cash Advance" for people a few days from payday, up to $100 for people who bank with Dave.[45] Some companies, like Branch, operate under both direct to business and direct to consumer models.[46]

3. Distinctive Features in this Market

Two other features are distinctive about this market. First, remarkably, earned wage advance 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 which employees to advances wages to.[47] Thus, even for the consumers with thin

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[41] Reidy et al., *supra* note 10.

[42] 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/.

[43] *Earnin*, https://www.earnin.com/ (last visited Jan 19, 2019) ("Earnin uses your location to note how long you're at work.").

[44] *Id.*

[45] *Dave*, https://www.dave.com (last visited Aug. 14, 2019).

[46] *Terms of Service*, *supra* note 38. ("The Services are offered through two different methods. Through the Enterprise Method, the employer subscribes to all or some of the Services with Branch and those Services are available to the employer's employees. . . . Through the Organic Method, individuals sign up with Branch (rather than the employer subscribing) for the Services.").

[47] Baker & Kumar, *supra* note 20, at 10–11.

credit files or poor credit—the core of the payday lending market[48]—earned wage advances offer access to funds before payday.

Second, some of the companies make advances that are nonrecourse while others give the earned wage advance company the right to pursue money from the employee. DailyPay, for instance, does not collect repayment for advances from employees beyond the payroll deduction.[49] PayActiv even indemnifies the employer for losses: "What happens if an employee accesses funds and their employment discontinues? This is at Zero Risk to the employer. PayActiv indemnifies the employer against financial loss associated with the PayActiv service."[50]

For other businesses, however, the business 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.[51]

FlexWage, which using its technology to advance funds from the employer's treasury, does not ever collect money from employees, but employers themselves can recoup any overpayments that mistakes or employment changes cause.[52] Given the fact that employers have remarkable power to correct overpayments, this issue is a significant problem for employees who may

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[48] Michael Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 ECON. DEV. Q. 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.").

[49] *See Terms of Use*, *supra* note 35 ("For the avoidance of doubt, if we receive from your employer an amount that is less than the Purchased Unpaid Earnings because your employer's business has slowed down, has ceased operations in the ordinary course of business, or for certain other reasons, and if you have not in any way otherwise breached this Agreement, you might not be in breach of this Agreement. DailyPay purchases the Purchased Unpaid Earnings knowing the risks associated with such a purchase and assumes such risks based on Seller's representations, warranties, and covenants in this Agreement, which the Seller and DailyPay agree are designed to give DailyPay a reasonable and fair opportunity to receive the benefit of the bargain.").

[50] *Frequently Asked Questions*, PAYACTIV, https://www.payactiv.com/faq/ (last visited Jan. 8, 2019).

[51] Instant Financial Prepaid Visa® Card, INSTANT FINANCIAL, https://www.instant.co/wp-content/uploads/2018/10/Incomm-US-CHA-Generic-25_09_18.pdf (last visited Jan. 18, 2019). *See Terms of Service*, *supra* note 38 ("If an employer deduction is not made due to employee termination timing, Branch will pull from the debit card on file for you or an ACH transfer from your bank account.").

[52] FlexWage Interview, *supra* note 32.

contest the mistake or may not be able to absorb a sudden loss of income on a future paycheck.[53] Thus, depending on the specific company, an employee may be personally liable for money owed to the earned wage advance company.

B. Earned Wage Advance Fee Structures

In addition to having various business models, earned wage advance 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, advertises that employees pay a $5 to access their earned wages.[54] Instant Financial also appears to require a payment for each wage advance, but the employer, not the employee, pays the fee.[55] Several arguments are made for this transaction fee approach: it ensures that people only pay a fee if they actually use the service, it 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 consumers do not like to sign up for reoccurring fees.[56]

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."[57] Even also has this model, and its CEO argues that it is the most consumer-friendly model because it incentivizes companies to minimize the number of earned wage advances that employees take out. While the consumer does not pay per use, the company does, so lower utilization rates result in higher profits for the companies.[58]

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.[59] It instructs people to pay what they think is fair, structuring the "fee" as a "tip" to be added for each advance.[60]

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

[54] FinFit, Introducing WageNow, https://www.finfit.com/wagenow (last visited Jan. 18, 2019) ("A per-transaction fee of $5 is charged if and when an employee chooses to access their earned wages prior to payday. There are no other fees to your organization or your employees; WageNow is fully funded and managed by an affiliate of FinFit.").

[55] *See* Instant, Companies that Value Employee Success Pay with Instant, https://www.instant.co/businesses/ (last visited Jan. 18, 2018) (comparing Instant Financial's cost with "Competitors" based on the assumption that employees take out 7 advances a year). 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.

[56] Cardplatforms Interview, *supra* note 36.

[57] *Frequently Asked Questions*, *supra* note 50.

[58] Even Interview, *supra* note xx.

[59] Sawers, *supra* note 42.

[60] *Earnin*, *supra* note 43.

Participants are encouraged to leave bigger tips when they can to cover people who cannot leave a tip.[61] Some people have raised concerns that Earnin limits future advances if users do not tip,[62] 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."[63]

Regardless of a business model or fee structure, it is obvious that the earned wage advance 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" of this Fintech product[64] and argues that it has the potential to end payday lending.

II. Assessing the Benefits and Dangers of Earned Wage Advances

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

Price alone, however, is not the only metric on 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 Advances' Superiority to Payday Lending

Based purely on cost, earned wage advances, for the most part, are a radical step forward for consumers needing access to money before payday. This Section explains how these companies can offer this product so inexpensively, and it argues that earned wage advances have a strong potential to undermine the payday lending market.

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[61] *Id.*

[62] 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/ ("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 APR — nearly 30 times higher than New York's 25 percent cap.").

[63] *Why Does Earnin Have Maxes?*, EARNIN, https://help.earnin.com/hc/en-us/articles/224455408 (last visited Feb. 4, 2020).

[64] 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 in which it was presented.

1. Lower Loan Losses Because of Collection Mechanism

One advantage that earned wage advance companies have over payday lenders is their ability to get their money back. In discussing what makes earned wage advances 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.[65]

My interviews with companies in this market confirm that their losses from nonpayment are extremely low.[66] 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.[67] While these risks are not trivial, they do not cause earned wage advance 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."[68] High losses are part of why Flannery and Samolyk conclude that "the costs justify the price" for payday loans.[69] The fact that earned wage access companies can significantly cut losses partially explains its competitive advantage over payday loans.

2. Lower Transaction Costs

An even more pronounced difference between earned income advance companies and payday lenders is the cost of advancing funds. Because earned wage advances are done through

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[65] Baker & Kumar, *supra* note 20, at 3–4.

[66] Even Interview, *supra* note xx.

[67] PayActiv Interview, *supra* note 29.; FlexWage Interview, *supra* note 32; Cardplatforms Interview, *supra* note 36.

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

[69] *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.").

apps with automatic decisions and disbursements of funds, fewer employees are needed to keep the ship running. PayActiv, for instance, only has 50 employees, despite the fact that it administers earned wage advances for over 100 employers, including Wal-Mart.[70]

Payday loans, on the other hand, are very expensive to originate and service. While loan losses are high, other operating costs are much higher.[71] For physical storefronts, lenders face high costs for employees to work the long hours required to keep stores open late, and many stores see few customers per hour.[72] Internet lenders often must pay very high fees to "lead generators" who send them payday customers.[73]

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.[74] Because of the innovative technology of earned wage advances, these companies avoid the demands on employee time that are inevitable for payday lenders.

3. Superior Access to Information

Finally, earned wage advance companies have superior access to information about employees. Under most business models, earned wage advance companies partner with employers and obtain continual updates about workers' pay rate, hours worked, and benefit, tax, and garnishment deductions. On the one hand, compared to credit card companies, earned wage advance 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 gives these companies sufficient information 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 physically located at work. This creates lower quality information.

Payday lenders also do not use credit reports, but unlike earned wage advance companies, payday lenders do not have direct access to borrowers' employment records. Payday lenders

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[70] *Media Kit*, PAYACTIV, https://www.payactiv.com/media-kit/ (last visited Jan. 21, 2019).

[71] Flannery & Samolyk, *supra* note 68, at 10 (stating operating costs are around half the total costs stores have).

[72] Hawkins, *Credit on Wheels*, *supra* note 5, at 540 (stating that researchers spent more than 50 hours outside title lending stores waiting to survey customers but only could locate 54 customers to ask to fill out the survey during that time).

[73] THE PEW CHARTIABLE 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.

[74] Hawkins, *Credit on Wheels*, *supra* note 5, at 551–52.

must either trust the borrower's application information (along with the supporting documentation) or confirm with borrower's employer 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. Earned wage advance 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."[75] Payday lenders have a long history of avoiding credit regulations through innovative transaction structures,[76] so this criticism has intuitive appeal.

The prior three Sections, however, show how this criticism is misguided. Earned wage access companies' informational advantage and superior collection mechanisms differentiate payday lending and earned wage advances at a fundamental level. The earned wage 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 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 advance companies' lower costs have the potential to move many employees out of the payday loan market.[77] The product, however, is not a perfect substitute for

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[75] Nakita Cuttino makes a sustained argument that earned wage access products are payday loans 2.0. Cuttino, supra note xx, at 27-36. Cuttino contends that these products have the identical risks and flaws as payday loans. *Id.* Farivar, *supra* note 23 ("'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.'"); Chris Opfer, '*Early Wage*' *Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, BLOOMBERG L. (Aug. 1, 2019, 5:15 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"); Laura Alix, *Payday Loan Alternative Moves Forward in California*, AM. BANKER (July 10, 2019) ("The National Consumer Law Center did not send a representative to speak at Monday's committee meeting, but did write a letter objecting to the bill in its latest form. Broadly, the group said the bill as it stands today could give traditional payday lenders a backdoor into the field.").

[76] *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.").

[77] Baker, *supra* note 20, at 3 (concluding that FinTech products could "eliminate the need for a low-income working family to use" high-cost, small-dollar loan products); *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 STSDC, it would remove close to 1.2 million individuals from the [high-cost, small-dollar loan]

payday lending. This section briefly lays out several categories of payday lending customers that earned wage advances 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 loans 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,[78] so limiting employee's access to only earned funds will leave some in need of payday loans.

Yet, while earned wage advances may not help these customers, other Fintech companies are emerging for this space with lower rates than payday lenders. While it is beyond the scope of this paper, companies like HoneyBee and FinFit leverage technology to offer loans for higher amounts at rates much lower than traditional payday lenders.[79] Thus, even for people with the need for higher loan amounts, payday lending may not remain a competitive option.

b) Demand by people who do not have access to earned wage advances

Currently, most earned wage advance 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,[80] and employees at companies without financial benefit programs. For all of these customers, earned wage advances do not offer any assistance for liquidity problems.

While this problem is significant, many earned wage advance companies do work with small employers.[81] Moreover, direct to consumer companies will work with any employees, 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.

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system. . . . If superior FinTech-enabled alternatives to STSDC 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.").

[78] *See* Will Dobbie & Paige Marta Skiba, *Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending* 2 (Vanderbilt Univ. Sch. of Law & Econ., Working Paper No. 11-05, 2011) ("Our regression discontinuity estimates suggest that a $100 increase in loan size decreases the probability that a borrower defaults by 2.8 to 3.8 percentage points. This is a 22 to 35 percent decrease from the mean default rate.").

[79] *E.g.*, *HoneyBee*, https://meethoneybee.com/ (last visited Aug. 14, 2019) (offering the example of "a 4-month $500 loan from us with a stated interest rate of 0% and a loan origination fee of $25 would require 7 scheduled semi-monthly payments of $75 for an effective Annual Percentage Rate ("APR") of 29.64%").

[80] Hunt & Hayward, *supra* note 27 ("[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.").

[81] PayActiv Interview, *supra* note 29.

c) Demand by people without access to technology

Most earned wage companies use apps on smart phones or at least websites. 81% of American adults own a smartphone,[82] so 19% of Americans might potentially access payday loans because earned wage access products were 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 store for long hours.[83] Moreover, it is likely that the borrowers left behind by earned wage advances 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, do withdrawals from borrowers' bank accounts. Earned wage access companies get in line first, 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 advance.

Thus, despite the fact earned wage advances 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 were consistently accessing earned wages before payday.

B. The Dangers of Earned Wage Advances

This Article argues that earned wage advances are superior to payday loans and may eliminate the payday lending industry. The low cost of earned wage advances 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."[84] It is important to

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[82] *Mobile Fact Sheet*, PEW RES. CTR., (JUNE 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/.

[83] Flannery & Samolyk, *supra* note 68, 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 FTE employees and their average wage, have a predictably positive effect on store operating costs.").

[84] Dan Quan, *Don't Sideline Earned Income Access*, AM. BANKER (June 3, 2019) ("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.").

understand these dangers earned wage advances pose both in order to fully assess the social utility of the product and to determine optimal regulatory approaches.

1. An Exceeding Efficacious Collection Mechanism

One of the biggest dangers of earned wage advances comes from the source of their greatest strengths. Earned wage advances are inexpensive in part because the companies making the advances are so likely to recover the money advanced.[85] 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.[86]

a) Direct to Business/Wage Deduction Business Models

For the direct to business earned wage advance products in the market today, the advanced wages are deducted from the employees' paychecks before the employee ever sees the money. Thus, earned wage advance companies get automatic first priority over other competing needs in the employees' lives.[87] 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 advance 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.[88] Cutting the courts out of the equation means employees have

[85] PayActiv Interview, *supra* note 29.; Even Interview, *supra* note xx. *Cf. In re Haraughty*, 403 B.R. 607, 612–13 (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.'") (quoting Jason C. Walker, *Wyoming's Statutory Exemption on Wage Garnishment: Should it Include Deposited Wages?*, 6 WYO. L. REV. 53, 59 (2006)).

[86] *See* Baker & Kumar, *supra* note 20, at 5 ("The salary deduction approach effectively eliminates the employee's ability to prioritize payments to [the company] against his or her other obligations.").

[87] *See supra* notes xx – xx and accompanying text.

[88] *See* Hawkins, *Law's Remarkable Failure*, *supra* note 53, at 114 (internal citations omitted) ("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.").

fewer protections because employees cannot invoke laws that prevent businesses from abusing the process.[89]

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 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."[90] The CFPB's study found 20% of borrowers in its sample defaulted within a year.[91] 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 loans."[92] Mann argues that payday loans are "too small to hurt,"[93] and other researchers mirror this outcome as well.[94]

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/mortgage, buy medicine, pay utility bills, and buy groceries.[95] The fact 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 not 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."[96]

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[89] As one example, see 15 U.S.C.A. § 1673(c) (West) ("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].").

[90] Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default*, (Vanderbilt Law & Econ., Research Paper No. 08-33, 2008).

[91] Kathleen Burke et al., CFPB Data Point: Payday Lending at 26, CFPB Office of Research (Mar. 2014),http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf.

[92] Ronald J. Mann, *Do Defaults on Payday Loans Matter?*, (Columbia Law & Econ., Working Paper No. 509, 2014), at 1-2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560005##.

[93] *Id.* at 8.

[94] Neil Bhutta, et al., *Payday Loan Choices and Consequences*, 47 J. OF MONEY, CREDIT AND BANKING 223 (2015) ("Another possible explanation is that because payday loans are small, uncollateralized loans, their potential benefits and risks are limited.").

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

[96] TEX. CONST. ART. XVI, § 28 (exempting wages from garnishment except for child and spousal support).

Many state laws are even stricter, sometimes preventing garnishment except for limited exceptions.[97]

The basic policy behind this laws is protecting workers from their wages being reduced so low that the garnishment impedes their abilities to meet necessities.[98] The Supreme Court has recognized "the great drain on family income" that unfettered garnishments produce and the potential for garnishments to drive the employee "'below the poverty level.'"[99] Some legal scholarship goes so far as to say that garnishments are a modern form of peonage.[100] 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.[101] Given this hostility to unrestricted garnishments, policymakers must ensure that earned wage advances do not violate the policies behind restrictions on wage garnishments.[102]

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[97] 15 U.S.C. § 1673(a) (2012).

[98] 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."); G. Wogan Bernard, *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 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.").

[99] Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 340 (1969) (quoting Congressman Reuss).

[100] 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 prison). *See also* Ian Liberty, *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 (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."); 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.").

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

[102] Other rationales justifying limits on wage garnishments are inapplicable in the current market. For instance, part of the motivation for restrictions was to prevent employers from firing employees subject to garnishment. 5 U.S.C.A. § 1671. Since employers are partnering with wage advance companies and offering the programs as a benefit, it is unlikely they will take adverse employment actions based on the programs. Also,

One important mitigating factor to these concerns is that some earned wage advance 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.[103] Moreover, these business report that they will offer customers extra time to repay the advances in certain circumstances.[104] Thus, some of the concerns raised by the collection mechanism are less cogent. However, it is unlikely 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. 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 earned wage advance companies could give rise to abusive loans, just like wage garnishments did before the protections created in the 1970s.[105]

b) Direct to Consumer/Bank Account Deduction Business 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 that the employee is paid and the earned wage access company attempts to withdraw funds, the employee can theoretically at least withdraw the money, preventing collecting,

While employees have greater access to their wages under this model, withdrawing money from an employee's bank account may be more dangerous to employees because of fees associated with failed attempts to withdraw funds. If an earned wage advance 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.[106] Suddenly, transactions that were relatively inexpensive become very cumbersome to employees.

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companies state that the employer does not know of the employee's activity. Instant Financial, FAQ, https://www.instant.co/faq/ (last visited Jan. 18, 2019) ("Your data is completely secure. Anything you do, be it transfers or purchases, has nothing to do with your employer. They do not have access to your funds once you have taken them.").

[103] Even Interview, *supra* note xx.

[104] Even Interview, *supra* note xx.

[105] 15 U.S.C. § 1671(a)(1) (2018) ("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.").

[106] 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/; Rebecca May,

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.[107] Earned wage access customers, on the other hand, do not have this protection, and companies therefore have a powerful stick to incentivize repayment—overdraft fees.

2. Onerous Contract Terms

A second danger relates the contracts between earned wage companies and employees and users. While the companies that currently offer earned wage advances are concerned with their social impact and the welfare of their customers, their lawyers still wrote their contracts. The terms are surprisingly unfriendly to consumers given the companies' social mission. I evaluated five contracts between users and earned wage advance companies found on these companies websites—Even, DailyPay, PayActiv, Earnin, and Instant Financial. 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.[108] 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.[109] Yet, each of the contracts between these companies and those consumers contain terms that consumer advocates find problematic.[110]

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

How Much Bank of America ATM Fees Can Cost You, GOBANKINGRATES (Jan. 6, 2018), https://finance.yahoo.com/news/much-bank-america-atm-fees-160023931.html.

[107] Press Release, Consumer Financial Prot. Bur., CFPB Finalizes Rule To Stop Payday Debt Traps, (Oct. 5, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/

[108] Even Interview, *supra* note xx.

[109] Quan, *supra* note 84 ("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.")

[110] PayActiv reconciles its social mission and its arbitration agreement by focusing on price. The paramount goal in this space, according to PayActiv's COO, is low price points for employees, so arbitration clauses are important because they limit frivolous suits. At such a low price, companies cannot afford to take on litigation risks. PayActiv Interview, *supra* note 29.

As one example, one website's Terms of Service explains, "By signing up for Even, using the Even application or ***visiting the Even website*** (www.even.com), you are saying you understand and agree to the things we've explained in this document."[111] Other companies take the same approach,[112] 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."[113]

For some consumer laws scholars, terms of use that are merely posted on a website do not likely actually notify the user that the user is agreeing to extremely disadvantageous terms.[114] 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.[115] Thus, from the outset, the manner in which earned

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[111] *Even Terms and Conditions*, EVEN, https://www.even.com/legal/basic (last visited Jan. 5, 2019) (emphasis added).

[112] *Terms of Use*, PAYACTIV, https://www.payactiv.com/terms-of-use/ (last visited Jan. 8, 2019) ("By continuing to use the Site, you agree to the Terms of Use."); *Terms of Use*, *supra* note 35 ("Your use of the Site and/or any of the Services constitutes your agreement to comply with the terms of this Agreement. If you cannot agree to or comply with this Agreement, you are expressly prohibited from use of the Site and/or the Services and must exit the Site.").

[113] *Terms of Service*, EARNIN https://www.earnin.com/privacyandterms (last visited Jan. 19, 2019).

[114] *See* 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"); Emily Canis, *One "Like" Away: Mandatory Arbitration for Consumers*, 26 GEO. MASON U. CIV. RTS. 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.").

[115] 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 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010) (internal citations omitted) ("In the instant case, it is clear that Plaintiff had no actual notice of the Terms and Conditions of Use. Defendant has also failed to show that Plaintiff had constructive notice. The Hawkins Affidavit, upon which Defendant relies, conclusory states that by accessing Overstock's website, an individual accepts Overstock's Terms and Conditions—but, crucially, does not explain how a site—user such as Plaintiff is made aware of the Terms and Conditions. Despite Defendant's assertion that "all customers to Overstock's website are *advised* of the company's terms and conditions prior to their entry onto the site," neither the Hawkins Affidavit nor any other evidence submitted by Defendant refute Plaintiff's sworn statement that she was never advised of the Terms and Conditions and could not even see the link to them without scrolling down to the bottom of the screen—an action that was not required to effectuate her purchase.").

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

b) Mandatory, pre-dispute 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.[116] 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.[117]

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 this TOU, such that you shall not be entitled to arbitrate any Dispute as a representative, a class action or in a private attorney general capacity.[118]

The other contracts are similar.[119]

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[116] *See Even Terms and Conditions*, *supra* note 111 (including a 830 word arbitration clause); Instant Financial, Instant Financial Prepaid Visa® Card, https://www.instant.co/wp-content/uploads/2018/10/Incomm-US-CHA-Generic-25_09_18.pdf (last visited Jan. 18, 2019) (containing a 405 word arbitration clause on pages 13 and 14 of the agreement); *Terms of Use*, *supra* note 112 (including a 364 word arbitration agreement); *Terms of Use*, *supra* note 35 (containing a 370 word arbitration agreement).

[117] *See Terms of Service*, *supra* note 113 ("Any dispute with Activehours, or its officers, directors, employees, agents or affiliates, arising under or in relation to these Terms of Service shall be resolved exclusively through the small-claims court of the Superior Court of California within the county of Santa Clara, California, except with respect to imminent harm requiring temporary or preliminary injunctive relief in which case Activehours may seek such relief in any court with jurisdiction over the parties.").

[118] *Terms of Use*, *supra* note 112.

[119] Instant Financial, Instant Financial Prepaid Visa® Card, https://www.instant.co/wp-content/uploads/2018/10/Incomm-US-CHA-Generic-25_09_18.pdf (last visited Jan. 18, 2019) ("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

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.[120] Because many (if not all) claims that may arise in the context of earned wage advances involve small amounts of damages, consumers' exclusive means of potential relief is binding together with other consumers.[121] By requiring that users waive the right to seek relief, socially minded earned wage 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.[122] Even those in payday lending contracts were more favorable for consumers—a majority allowed consumers to opt out of arbitration,[123] the vast majority exempted small-dollar claims from the clause,[124] and a smaller

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ALLOWABLE IN ARBITRATION."); *Terms of Service*, *supra* note 113 ("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."); *Even Terms and Conditions*, *supra* note 111 ("You and Even each agree that any dispute resolution proceedings will be conducted only on an individual basis and 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."); *Terms of Use*, *supra* note 35 ("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.").

[120] 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. CV31700174WGYARS, 2018 WL 1612189, at *1 (D.N.D. Apr. 3, 2018).

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

[122] *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT §1028(a), at 9, 7 (2015) ("[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."); http://www.dbo.ca.gov/Licensees/Payday_Lenders/pdfs/Annual%20Report%20CDDTL%202017%20Final.pdf page 40 (30% of payday loan agreements had arbitration agreements).

[123] *Id.* at 31 ("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.").

[124] *Id.* at 33 ("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.").

but substantial number permitted class actions.[125] The inability of consumers to seek meaningful redress for companies' illicit behavior represents a serious danger to consumers using these 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 . . . ."[126] In addition, integration clauses in these contracts state that express warranties made outside of the written contract are ineffective in binding the companies.[127]

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 advance company could, for instance, promise in its promotional material that wages will be paid within 1 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.[128] But, even if a court would later disregard the disclaimer of express warranties in favor of the employee, the fact that

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[125] *Id.* at 44 (noting that "88.7% of the storefront payday loan arbitration clauses" permitted class actions, representing 98.2% of storefronts).

[126] Instant Financial, Instant Financial Prepaid Visa® Card, https://www.instant.co/wp-content/uploads/2018/10/Incomm-US-CHA-Generic-25_09_18.pdf (last visited Jan. 18, 2019). *See also Terms of Service*, *supra* note 113 ("Activehours MAKES 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."); *Terms of Use*, *supra* note 112 ("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 111 ("THE SERVICES AND CONTENT ARE PROVIDED "AS IS," "AS AVAILABLE" AND WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED . . . ."); *Terms of Use*, *supra* note 35 ("All 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.").

[127] *See, e.g.*, *Even Terms and Conditions*, *supra* note 111 ("These Basic Terms represent the entire agreement between you and Even with respect to Even Basic. They supersede any other communications you have with us regarding the Even Basic, such as by email or phone.").

[128] For cases under the Uniform Commercial Code, see § 2-316:2 Disclaiming express warranties, 1 Hawkland UCC Series § 2-316:2 n.3 (collecting cases).

the contracts contain the clause at all presents danger because consumers may never challenge the clause or realize it could be unenforceable.

d) Unilateral contract amendments

The earned wage advance 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:

> We may, in our sole discretion, modify these TOU 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 TOU, your account (if you have registered) and/or your ability to access the Site, for any reason including any breach by you of these TOU or conduct by you that we determine to be inappropriate."[129]

The other clauses use different language and set out different conditions, but they also assert the right to change the terms without active consent form the employee.[130]

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[129] *Terms of Use*, *supra* note 112.

[130] See Instant Financial, Instant Financial Prepaid Visa® Card, https://www.instant.co/wp-content/uploads/2018/10/Incomm-US-CHA-Generic-25_09_18.pdf (last visited Jan. 18, 2019) ("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*, *supra* note 111 ("Finally – sometimes we may need to change these Basic 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 Basic after a modification signifies your agreement to the modification. We encourage you to frequently review these Basic Terms to ensure that you understand the terms and conditions that apply to your use of Even Basic. We will always be happy to answer any questions about these changes, and you can get in touch at support@even.com."); *Terms of Service*, *supra* note 113 ("Activehours may modify this Terms of Service from time to time. Any and all changes to these Terms of Service will be posted on the Activehours.com site. The Terms of Service will always indicate the date it was last revised. In addition, we will send you an email informing you of any changes in the Terms of Service prior to posting those changes. When you use the Service after those changes are posted, you are deemed to have accepted the new Terms of Service and agree to be bound by any changes to the Terms of Service."); *Terms of Use*, *supra* note 35 ("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.").

Consumer advocates and scholars have become increasingly alarmed by companies reserving the right to unilaterally change a contract.[131] Oren Bar-Gill and Kevin Davis explain the economic problems associated with allowing companies to alter contracts unilaterally:

> 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 products. Comparison shopping becomes meaningless when the product or contract can be changed easily soon after the purchase is complete.[132]

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While the companies I interviewed were focused on helping people, even if current companies in this market will protect consumers, there is no guarantee future companies would do so.

Combined with the other problematic clauses in these contracts, the basic terms of use earned wage advance companies offer to consumers could lead to amazing abuses of power. Examples from other financial instruments abound.[133] For instance, an earned wage advance company could tell employees in its promotional material that advances cost $2 per advance, and the written contract could also specify this amount. By using the app or website, the consumer could "assent" to $2. Then, a month into 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 was paying 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 advance company's unilateral

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[131] *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 (2010); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 649 (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).

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

[133] [credit card fees; mortgage origination fees, cellular telephone contracts]

amendment of 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. These contract terms are a danger lurking beneath the surface of this product.

3. Potentially High Fees

In addition to their collection mechanisms and abusive contract terms, another danger in the earned wage advance market is high fees. As measured as an annual percentage rate, the costs could be high. For instance, someone making $10 for 8 hours one day makes $80 (ignoring taxes and other deductions). If that employee takes out $40 (half the daily pay) at the end of the day and is charged a $3 fee to get that earned wage 7 days early, the effective interest rate would be close to 390%, the same APR as many payday loans.[134] Many people take out wages just days in advance,[135] making that 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 the employee 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.[136] In the example above of the $40 advance, 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 high fees. Earnin sets the default "tip" as 10% of the cash the employee accessed.[137] If a worker accesses $100 three days before payday and tips $10, the APR would be over 1200%. While this high fee is voluntary, the fact people pay it using the service makes the service costly. Thus, even though the appeal of earned wage advances is that they are lower cost than payday loans, the costs have the potential to be high.

4. Unknown Dangers of Access to Wages

The idea of being 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.[138] For instance, economist Mary Zaki studied the effect on consumption of access to

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[134] 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%.

[135] Cardplatforms Interview, *supra* note 36.

[136] FlexWage Interview, *supra* note 32.

[137] Farivar, *supra* note 23.

[138] Crosman, *supra* note 55 ("'The every-other-week paycheck is one of the few normal structures we have for people around planning, budgeting and managing their money," [Aaron Klein, a fellow at the Brookings

wages through payday loans. On the one hand, she finds that access to wages earlier through payday loans did not increase food consumption but did allow borrowers to smooth consumption over time.[139] This finding supports access to wage advances. But, on the other hand, she finds that access to payday loans did increase consumption of alcohol and electronics, suggesting that early access to wages may lead to temptation purchases.[140] 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.[141] 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 advances 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 earn wage advances' 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 policymakers to consider as they consider the earned wage advance space. Currently, no states specifically regulate these transactions, so regulatory attention to this area is essential.[142] In February 2019, California became the first state to

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Institution] 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.").

[139] Mary Zaki, *Access to Short-Term Credit and Consumption Smoothing within the Paycycle* 1, (FEEM, Working Paper No. 007.2016, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741001.

[140] *Id.* at 3–4.

[141] *See, e.g.*, Christopher A. Parsons & Edward D. Van Wesep, *The Timing of Pay*, 109 J. FIN. ECON. 373 (2013) ("When workers have self-control problems, they under-save and experience volatile consumption between paychecks. Thus, pay whose delivery matches the timing of workers' consumption needs will reduce wage costs. The model also explains why pay timing should be regulated (as it is in practice): although the worker benefits from a timing profile that smoothes her consumption, her lack of self-control induces her to attempt to undo the arrangement, either by renegotiating with her employer or by taking out payday loans."). PayActiv's COO also observed that people are using PayActiv access to pay for basic human needs—groceries, utility bills, and rent/mortgage. Still, the company limits the amount employees can obtain from their paycheck because employees behaviorally are not yet ready to be paid everyday. PayActiv Interview, *supra* note 29.

[142] Alix, *supra* note 75.

consider specific regulations aimed at earned wage advance companies,[143] and the bill has already passed California's Senate and is currently being debated in other committees.[144]

Part 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. Part III.B suggests ways for policymakers to alleviate that uncertainty while also setting perimeters around the product.

A. The Uncertain Status of Earned Wage Advances

Earned wage advances are difficult to categorize with certainty under current law and practice.[145] 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. In the early years of rent-to-own transactions, for instance, intellectual combatants waged war over rent-to-own's status as a lease or a loan.[146] 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 loan camp pealed back the form of the transaction to reveal the substance—people obtaining durable goods by making payments over time.[147] Similar debates have come and gone about the payday loans.[148] The goal of this Section is not to argue that employee advances are necessarily loans or not but instead to illustrate the uncertainty. Reasonable courts or regulators could easily conclude employee advances are loans, [149] and that uncertainty 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,[150]

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[143] S.B. 472, 2019-2020 Reg. Sess. (Cal. 2019), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB472.

[144] Stephen T. Middlebrook & Tom Kierner, W*hat 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.

[145] As this Part 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. Baker & Kumar, *supra* note 20, 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,https://www.creditslips.org/creditslips/2019/07/what-is-credit-afterpay-earnin-and-isas.html.

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

[147] *Id.*

[148] *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 . . . .").

[149] In Perez v. Rent-A-Ctr., Inc., the New Jersey Supreme Court held that rent-to-own contracts were loans under relevant state laws and thus rent-to-own transactions were subject to those laws. 186 N.J. 188, 193, 892 A.2d 1255, 1257, *clarified on denial of reconsideration*, 188 N.J. 215, 902 A.2d 1232 (2006).

[150] *See, e.g.*, CAL. FIN. CODE § 22000 *et seq* (year) (requiring licensing of lenders in California).

must comply with state and federal laws aimed at loans,[151] must obey restrictions on wage assignments,[152] and must comply with state usury limits,[153] among other laws. Moreover, if courts hold that earned wage advances are loans after businesses have operated assuming they were not loans, the businesses would suffer serious consequences.[154]

Earned wage advance companies have clearly taken the position that these products are not loans.[155] On an intuitive level, the idea of employees getting wages that they have already earned seems plainly not to be a loan. Even succinctly makes the point: "It's not borrowing; it's your money."[156] However, consider the following example of a transaction that plainly is a loan

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[151] *See, e.g.*, 12 C.F.R. § 1002.1 (Regulation B implementing the Equal Credit Opportunity Act); 12 C.F.R. § 1026.1 (Regulation Z implementing the Truth in Lending Act); 15 U.S.C.A. § 1672(c) (restricting garnishments on wages and defining "[t]he term "garnishment" [to mean] any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."). Some courts have stated that under the Fair Labor Standards Act, employer loans may not be deducted from employee paychecks. *See* 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* LA. STAT. ANN. § 23:691 (year) ("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. This provision shall not apply to financial institutions that are subject to R.S. 6:289. 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.").

[152] The FTC defines the following as an unfair practice extending credit that . . . [c]onstitutes or contains an assignment of wages or other earnings unless: (i) The assignment by its terms is revocable at the will of the debtor, or (ii) The 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) The assignment applies only to wages or other earnings already earned at the time of the assignment." 16 C.F.R. pt. 444.2.

[153] TEX. FIN. CODE ANN. § 302.001(a)–(b) ("A creditor may contract for, charge, and receive from an obligor interest or time price differential. 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 prescribed by Chapter 305.").

[154] 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. Miller v. Colortyme, Inc., 518 N.W.2d 544, 547 (Minn. 1994); Rent-A-Center, Inc. v. Hall, 510 N.W.2d 789, 795 (Wis. Ct. App. 1993).

[155] *See, e.g.*, *Frequently Asked* Questions, *supra* note 50 ("Is PayActiv a consumer loan provider? No. PayActiv is a financial technology solutions provider. It is not a credit solution."); Baker, *supra* note 20, 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").

[156] *FAQs*, *supra* note 35; *see also* Jed Kim, *How to Access Your Hard-earned Money Before Payday*, NAT'L PUB. RADIO, July 6, 2016, https://www.marketplace.org/2016/07/05/world/how-access-your-hard-earned-money-payday (quoting Safwan Shah, founder and CEO 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.").

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.[157] Loans like her loan, secured by the accounts, can be nonrecourse.[158] 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.[159]

Other than the presence of an explicit charge for interest, the situation with the plumber almost exactly mirrors an employee who get 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 advances are nonrecourse. Yet, there is no doubt that the plumber transaction is governed by Article 9 of the Uniform Commercial Code and that the bank would have to file a financing statement to protect its interest in the accounts.[160] If the bank had made the loan to build its business with the plumber and did not charge her interest, it is unlikely a court would find the transaction is not governed by Article 9. So, the idea that a court or regulator could consider the earned wage advance a loan is consistent with current law and business practice. Figure 1 illustrates this analogy.

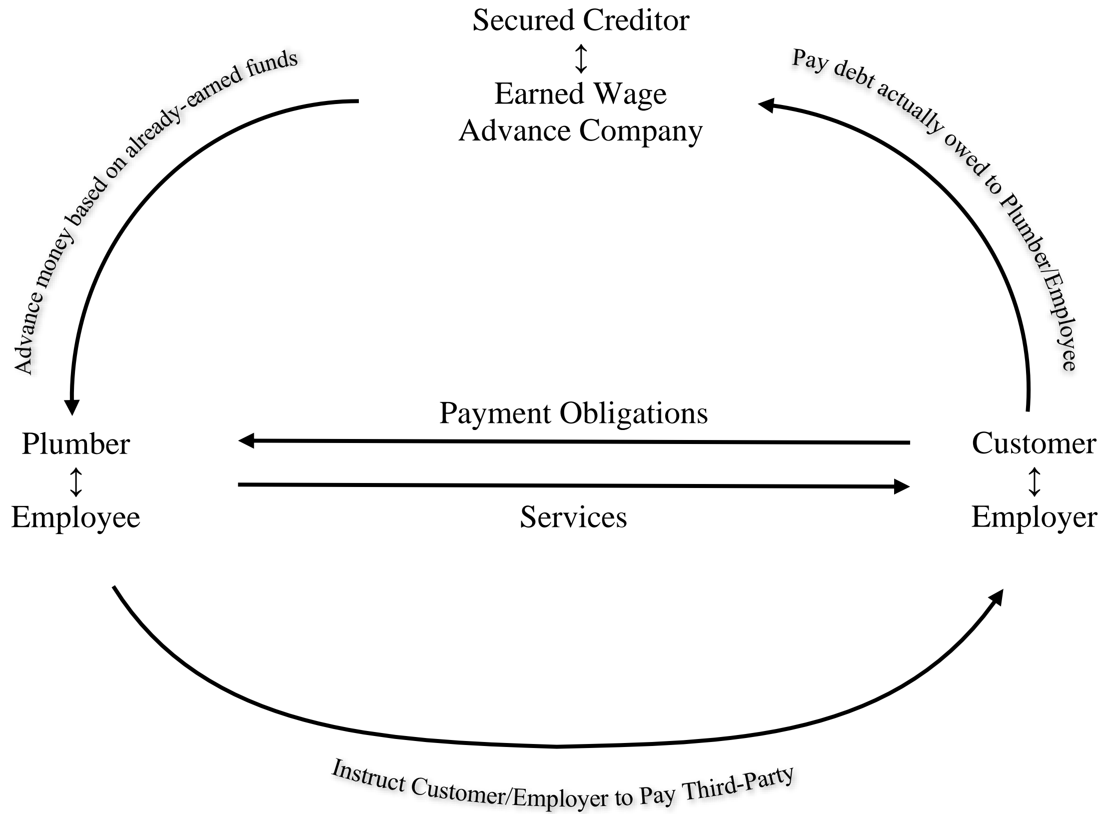
[157] UCC § 9-102(a)(2).

[158] Massimo Capretta, David Ciancuillo, & Richard Ziegler, *6 Things Every Accounts Receivable Buyer Should Know*, LAW360, June 16, 2017 ("Over the past several years, nonrecourse receivables financing has been embraced by many major financial institutions and nonbank investors in the U.S. market.").

[159] *See* UCC §9-607(a) ("If so agreed, and in any event after default, a secured party: (1) 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 . . . .").

[160] *Id.* §9-310(a).

Figure 1: Loans Secured by Accounts v. Earned Wage Advances



Article 9 would still govern the transaction between the plumber and the secured creditor if the deal is structured as the sale of the plumber's accounts. Section 9-109(a)(3) explains, "Except as otherwise provided in subsections (c) and (d), this article applies to . . . a sale of accounts."[161] 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."[162] 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 advance company structures the transaction as purchasing workers' rights to payment from the employees,[163] it is not clear that courts or regulators will follow the earned wage advance company's lead.

Different state and federal laws contain different definitions of credit. This Section analyzes the definitions in the Truth-in-Lending Act (TILA) and the regulation that implements

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[161] *Id.* §9-109(a)(3).

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

[163] *Terms of Use*, *supra* note 35.

it, Regulation Z, because TILA is arguably the most important federal law governing credit.[164] TILA defines credit to mean "the right to defer payment of debt or to incur debt and defer its payment."[165] Debt is never defined in TILA, but other federal laws such as the Bankruptcy Code[166] and the Fair Debt Collection Practices Act[167] define debt extremely broadly. Based just on the definition of credit in TILA, earned wage advances could qualify because the employ owes money to the party advancing the employee's wages until the time that those wages are paid. Moreover, earned wage advances are not one of the many products that is exempt from Regulation Z.[168]

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

1. Customers Do Not Pay Interest

Earned wage advance companies argue that their products are not loans because customers do not pay interest.[169] TILA's definition of 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 . . . ."[170] 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":

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[164] Francis, *supra* note 3, at 625 ("The Truth in Lending Act is the most important federal law currently regulating the payday-loan industry.").

[165] 12 C.F.R. § 1026.2(14). The Electronic Funds Transfer Act has a similar definition: "Credit means the 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." 12 C.F.R. § 205.2.

[166] *See* 11 U.S.C. § 101(12) (2012) ("The term 'debt' means liability on a claim."); *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").

[167] 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.").

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

[169] Reidy et al., *supra* note 10 ("In general, EWA 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."); Even Interview, *supra* note xx; PayActiv Interview, *supra* note 29; *see also* Tucker Jones, *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.").

[170] 12 C.F.R. § 1026.2(17).

> 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.[171]

Moreover, Regulation Z specifically excludes "participation fees," which might include the monthly subscription fees employees pay some companies.[172]

There are three primary problems with this view. First, at least some earned wage advance 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 wage advance feature.

Second, although the economics are a little murky because earned wage companies are not public yet, it is possible a court would find that the monthly subscription fees are a "charge payable . . . indirectly by the consumer and imposed . . . indirectly by the creditor" because of the wage advance. [173] A finance charge under Regulation Z does not need to obviously be linked to the extension of credit—it can be indirect. If wage advance companies' products primarily feature the wage advance and not other parts of the product, a court could find 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 there are no other credit fees might suggest the monthly subscription fee is the finance charge here. At the very least, the fact-intensive inquiry should give us pause in concluding monthly subscription fees are definitely not loans.[174]

Third, earned wage advance 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. The phrase "charged for participation in a credit plan" has only come up seven times in opinions on Westlaw,[175] and the only case actually applying the provision (as opposed to merely listing it or applying state law) is an unpublished opinion from

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[171] 12 C.F.R. § 1026.4(a).

[172] 12 C.F.R. § 1026.49(c)(4) (excluding from the definition of finance change fees "charged for participation in a credit plan, whether assessed on an annual or other periodic basis").

[173] 12 C.F.R. § 1026.4(a).

[174] *See* McAnaney v. Astoria Fin. Corp., 665 F. Supp. 2d 132, 147 (E.D.N.Y. 2009) ("As noted by Judge Spatt in deciding the motion to dismiss, the 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.'") (internal citations omitted).

[175] On January 13, 2019, I searched "charged for participation in a credit plan" in the "All State and Federal" Westlaw database.

the Ninth Circuit Court of Appeals.[176] Moreover, even if federal law considers participation fees not to be finance charges, state law might define such fees as finances charges, making earned wage advance companies lenders under state law.[177]

Thus, while companies advancing earned wages 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 advance companies point to the fact that their provided advances are nonrecourse, and therefore, are not credit. [178] 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 advance company on the company and not on the consumer. The Consumer Financial Protection Bureau excluded some earned wage advances 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.[179]

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[176] Collins v. Bankfirst, N.A., 164 F.3d 629 (9th Cir. 1998).

[177] *See, e.g.*, UTAH CODE ANN. § 70C-1-106 (West) ("For purposes of determining the interest rate allowed by the laws of this state under Section 85 of the National Bank Act and Sections 521 and 522 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 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.").

[178] LAW360; Even Interview, *supra* note xx; PayActiv Interview, *supra* note 29.

[179] ¶ 30,452 FINAL PAYDAY LOAN REGULATION ADOPTED BY CFPB.—PART 1 OF 5, Consumer Cred. Guide P 30452.

The fact that the CFPB uses the advance's nonrecourse feature to potentially exclude it from the definition of credit bolsters the companies' view.[180] At least one court has concluded that nonrecourse loans are excluded from TILA.[181]

Yet, the circumstances described by the CFPB and the current market for earned wage advances 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.[182] 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 advance 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 the transaction "may not be credit" and that the argument it is not credit is "quite plausible."[183]

Moreover, the fact that virtually all earned wage advances are repaid indicates that they are not, in fact, nonrecourse under the law. David Horton and Andrea Cann Chandrasekher analyzed probate loans and found 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.'"[184] Beyond this legal argument, some earned wage access products plainly identify themselves as recourse obligations.[185]

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

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[180] Carter v. Four Seasons Funding Corp., 351 Ark. 637, 656, 97 S.W.3d 387, 397 (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.").

[181] Reed v. Val-Chris Invs., Inc., No. 11CV371 BEN WMC, 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011) (finding "that the 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").

[182] ¶ 30,452 FINAL PAYDAY LOAN REGULATION ADOPTED BY CFPB.—PART 1 OF 5, Consumer Cred. Guide P 30452

[183] ¶ 30,452 FINAL PAYDAY LOAN REGULATION ADOPTED BY CFPB.—PART 1 OF 5, Consumer Cred. Guide P 30452

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

[185] *See* Part I.A.3.

are nonrecourse,[186] as are pawn loans,[187] and some auto title loans.[188] Despite the fact these loans are nonrecourse, they are still loans under relevant state and federal laws. Thus, being nonrecourse should not automatically exclude earned wage advances from being loans.

3. Little Risk of Non-payment

Finally, earned wage advance companies suggest that the fact that employees have already earned the wage and present little risk of nonpayment demonstrates the advances are not credit.[189] 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."[190]

The fact 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 feature makes advances not loans; the CFPB merely asserts the loans are likely good for consumers. The low-risk argument seems the weakest legally because the fact that an employer owes and employee money does not mean that somehow the employee does not owe advanced wages to the third-party advanced wage company. Even if the debt will almost certainly be repaid, it is still a debt. Moreover, there are legitimate risks earned wage advance companies fact of nonpayment. An employer could go bankrupt before paying the employees their earned wages,[191] the employer could make an administrative error in producing the paycheck, doing the deduction, or communicating the number of hours the employee worked,[192] the employee could instruct the

[186] *See In re* Oklahoma P.A.C. First Ltd. P'ship, 168 B.R. 212, 222 (Bankr. D. Ariz. 1993), aff'd, 174 B.R. 350 (B.A.P. 9th Cir. 1994) (discussing Arizona and California's antideficiency statutes).

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

[188] *See, e.g.*, DEL. CODE ANN. tit. 5, § 2260 (West) ("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.").

[189] Reidy et al., *supra* note 10 ("Although wage assignment laws may be a concern for some regulators, EWA programs arguably avoid the speculative risks associated with assigning future potential earnings . . . ."); Even Interview, *supra* note xx; Michael Corkery, *Walmart Will Let Its 1.4 Million Workers Take Their Pay Before Payday*, N.Y. TIMES (Dec. 13, 2017), https://www.nytimes.com/2017/12/13/business/walmart-workers-pay-advances.html ("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.").

[190] ¶ 30,452 FINAL PAYDAY LOAN REGULATION ADOPTED BY CFPB.—PART 1 OF 5, Consumer Cred. Guide P 30452.

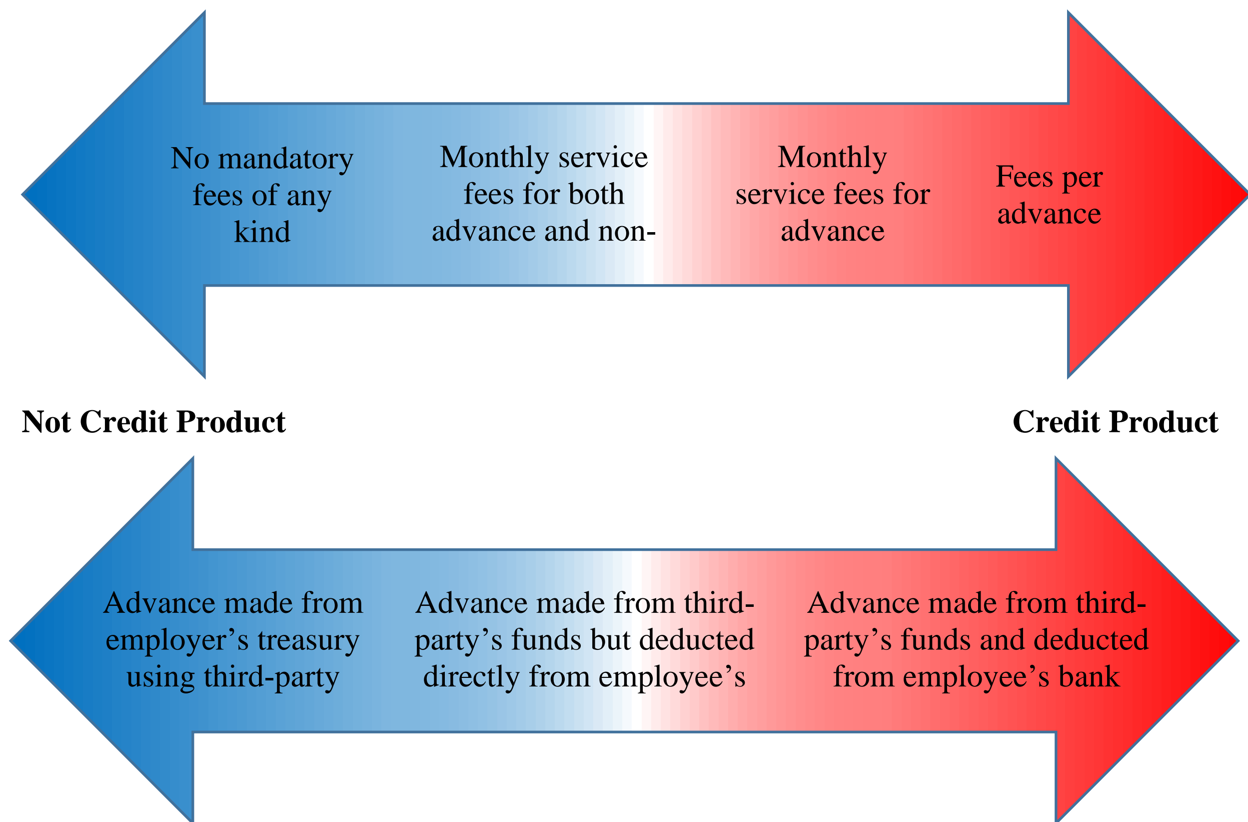
[191] For some employers, bankruptcy may be an extremely small risk. Even Interview, *supra* note xx (stating that the bankruptcy of the employers Even works with is not a realistic risk).

[192] Even Interview, *supra* note xx.

employer not to deduct the loan from the employee's paycheck,[193] the employer could terminate the employee before the regular paycheck,[194] or the employees' paychecks could be subject to garnishments that take priority over the deduction to the earned wage advance company.[195] 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 advances.

Figure 2: Earned Wage Advance Products and Credit



In sum, it is possible that courts or regulators will find earned wage advance products to be credit products, depending on how the companies structure their business model and fees. It is not that all of these products are necessarily loans; it is enough that they *might* be loans. The

[193] Even Interview, *supra* note xx.

[194] Even Interview, *supra* note xx.

[195] FlexWage Interview, *supra* note 32.

next Section suggests that policymakers eliminate this uncertainty and establish market-specific rules to pave the way for earned wage advances to grow.

B. Steps for Policymakers to Foster Earned Wage Advances

To facilitate the consumer-friendly expansion of earned wage advances, policymakers should consider the following steps.

1. Eliminate Regulatory Uncertainty

As demonstrated in the prior subpart, significant uncertainty exists regarding the status of the earned wage advance. Even lawyers who represent earned wage advance companies recognize this uncertainty.[196]

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.[197] 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.[198] Baker interviewed a variety of Fintech companies potentially offering alternatives to payday loans, and almost all reported compliance concerns.[199] The earned wage advance companies I interviewed also stated that complying with relevant laws was very important and that regulatory uncertainty was a serious problem.[200] Employers considering plans also value legal certainty, so

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[196] Reidy et al., *supra* note 10 ("While regulators have taken notice, they have yet to clarify existing rules or explicitly endorse EWA programs. . . . Other state and federal regulators have yet to specifically address EWA 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 EWA companies within their purview. . . . Still, the regulatory landscape remains unsettled.").

[197] 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 RIVILIN, BROKE, USA: FROM PAWNSHOPS TO POVERTY, INC.—HOW THE WORKING POOR BECAME BIG BUISNESS 313–14 (2010)).

[198] *E.g.*, H.R. 1588 Consumer Rental Purchase Agreement Act (2012),https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/costestimate/hr15882.pdf.

[199] Baker, *supra* note 20, 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.").

[200] *E.g.*, PayActiv Interview, *supra* note 29. *See also* Kevin Wack, *As California Mulls Rules for Payday Loan Alternative, Rifts Emerge*, AM. BANKER (June 25, 2019) ("'In the lack of regulation, there's just a lot of uncertainty and concern. . . .'") (quoting Frank Dombroski, the CEO of FlexWage Solutions).

regulations clarifying the legal status of earned wage access products could encourage more employers to offer them as a benefit.[201]

The CFPB has stated that it "has consistently expressed interest in encouraging more experimentation" in the small-dollar loan space.[202] However, for companies to experiment with earned wage advance products, they need clear rules about how existing laws affect their transactions.

Thus, policymakers should pass specific regulations to govern earned wage advances 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 what laws and regulations govern the transaction. Instead of letting companies' lawyers guess about what laws will regulate these products, policymakers should create clarity. Instead of using laws aimed at a different type of product, policymakers should enact rules specifically tailored to earned wage advances.[203]

2. <u>Enact Consumer Protection Policies</u>

Clarifying the transaction's legal status will facilitate growth, but policymakers 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 wages access products.

a) Require that All Advances Are Nonrecourse

First, policymakers should require that all advances are nonrecourse. As discussed above, not all earned wage advance companies' products are currently nonrecourse.[204] 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.[205]

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[201] FlexWage Interview, *supra* note 32.

[202] ¶ 30,452 FINAL PAYDAY LOAN REGULATION ADOPTED BY CFPB.—PART 1 OF 5, Consumer Cred. Guide P 30452.

[203] California's proposed law establishes certainty by explicitly governing the product under the California Financing Law. *See* Assembly Floor Analysis, S.B. 472, (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB472.

[204] *See* Part I.A.

[205] '*Bad Boy*' *Carve-Outs and Their Effect on Nonrecourse Debt*, 39 REAL EST. TAX'N. 4, 6, 2011 WL 7649203, 3 ("'[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 BLACK'S LAW DICTIONARY 1086 (West, 1999)).

Errors and unforeseen events occur in this market, and employees should not bear the risk of these contingencies. Earned wage advance 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 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.[206] 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, policymakers should require that earned wage advance products are nonrecourse.[207]

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 the earned wage access company 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, policymakers 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,[208] and consumers in this market need the same protection. Policymakers could use the CFPB's payday lending rule as a model, limiting companies to two unsuccessful debit attempts.[209]

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.[210] If consumers, who are unfamiliar with being paid more frequently, make mistakes, allowing them to avoid collection activities offers a

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

[207] If the California bill is adopted, it would make wage advance loans in the state nonrecourse. CAL. FIN. CODE 22483(k) ("Wage-based, work-based, and income-based advances shall be provided exclusively on a nonrecourse basis.").

[208] CFPB Bank Overdraft Rule

[209] Press Release, Consumer Financial Prot. Bur., CFPB Finalizes Rule To Stop Payday Debt Traps, *supra* note 107.

[210] For a description of this risk, see Part II.B.4.

chance for interpersonal learning so that they can correct their behavior the next time they consider using an earned wage advance.[211]

At least some earned wage access companies permit employees to disallow the deduction from their paychecks without any restrictions.[212] 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 an employee could get in advance of payday because this approach preserves a set amount of money for payday.[213] This alternative, however, is inferior because it is difficult for policymakers 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.[214] 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 advance companies to set the appropriate limits.

c) Limit Abusive Contract Terms

A third level of protection that policymakers should consider is limiting abusive contract terms in earned wage advance contracts. The contracts that this Article surveyed made private policing of earned wage access products virtually impossible because of the limits on class actions.[215] 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.

It is unlikely that people using earned wage advance apps will read or police the contract terms,[216] so federal policymakers 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

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

[212] PayActiv Interview, *supra* note 29.

[213] California's proposed law on earned wage access companies take this approach if enacted in CAL. FIN. CODE 22483(j): "[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." *See also* Even Interview, *supra* note xx.

[214] Dobbie & Skiba, *supra* note 78, at 2.

[215] *See* Section II.B.3.

[216] *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 (2014) (disputing the informed minority hypothesis because of the finding "that only one or two of every 1,000 retail software shoppers" even viewed the relevant contract in their transaction).

because of the Federal Arbitration Act[217] and the Supreme Court case law restricting states' actions against arbitration.[218] 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.

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, policymakers 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,[219] 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 $452.00. 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 the technology exists for most companies to do this sort of disclosures.

Such a disclosure would be very salient to the employee because it is personalized and made at the exact time of the transaction,[220] and salient disclosures can influence behavior.[221] Disclosures are usually acceptable to businesses because they do not prevent transactions, and disclosures are desirable from a policy standpoint because they are asymmetrically paternalistic, only preventing irrational uses of a product without preventing rational ones.[222] Thus, policymakers considering regulation could make substantial improvements in this market with a disclosure requirement while facing minimal industry or political resistance.

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[217] 9 U.S.C. § 1 (2019).

[218] Frank Blechschmidt, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541 (2012).

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

[220] RONALD MANN, CHARGING AHEAD (2006) (arguing for disclosures at the time of purchase that credit card purchases will cause purchasers to go over their credit limits); Michael A. Garemko III, *Texas's New Payday Lending Regulations: Effective Debiasing Entails More Than the Right Message*, 17 TEX. J. C.L. & C.R. 211, 248 (2012).

[221] In an unrelated context, for instance, Galle and Walker found that prominent disclosures of executive pay reduce giving to nonprofits. Brian Galle & David I. Walker, *Nonprofit Executive Pay As an Agency Problem: Evidence from U.S. Colleges and Universities*, 94 B.U. L. REV. 1881, 1923 (2014).

[222] Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 260 (2006).

e) Limit Fees

The most significant concern that critics of earned wage advance products have raised is that abusive lenders will use any legislation to obviate other consumer protections.[223] The chief benefit of earned wage advances is the price,[224] but companies can structure the transactions so that earned wage advances are as expensive as payday loans.[225] Thus, legislation should ensure that only business models with reasonable prices obtain the benefits of any law that exempts earned wage advances from lending laws.

California's proposed law limits fees in section 22483(e):

> (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.

The California bill sets permissible rates higher than many companies currently offer,[226] and while high APRs could still exist under it, the bill limits the overall cost to employees, offering consumers protection and preventing lender subterfuge.

Usually, caps on prices are objectionable because they can function as defacto bans on products[227] and because they prevent sophisticated parties who understand the transaction but still want to continue.[228] 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 advance companies operate with prices much lower than California's price limit, so the industry can and will exist despite price limits.

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

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

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

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

[227] Hawkins, *Regulating on the Fringe*, *supra* note 187, at 1406.

[228] Hawkins, *Renting the Good Life*, *supra* note 146, at 2078.

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 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, policymakers must act to clarify the legal status of earned wage advances. 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. Policymakers 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, policymakers should put price caps on earned wage advances.

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