January 24, 2023

To: Arizona Attorney General Kris Mayes
2005 N Central Avenue, Phoenix, AZ 85004

Re: Request to rescind Arizona Attorney General Office Opinion Letter 122-005 (R22-011) regarding Earned Wage Access Products

Dear Attorney General Mayes,

We are writing on behalf of the Center for Economic Integrity (CEI), the William E. Morris Institute for Justice, Wildfire, and the National Consumer Law Center (on behalf of its low-income clients) to urge you to rescind Opinion Letter 122-005 (R22-011) regarding Earned Wage Access Products,[1] which was adopted in Attorney General Mark Brnovich's waning days on December 18, 2022. We believe that the opinion is not legally sound and is overbroad. Additionally, it may carve a potentially large loophole in Arizona's strong anti-predatory lending laws.

Employer-based earned wage advances and 'fake earned wage advances' are all forms of payday loan.

Earned wage advances (EWA) are a form of payday loan in which funds are advanced, usually by a third-party, to a worker ahead of the payday and are repaid on payday. The amount of the advance is based on the wages that the worker has earned but are not yet due. The amount of earned wages is determined by integration with the employer's time and attendance system, and the loans are typically repaid through payroll deduction or other direct deduction from the wages on payday.

A form of 'fake earned wage advance' has also become common. It has no connection to the employer, the time and attendance system, payroll, or wages. Instead, the lender estimates the amount of wages that have been earned but are not yet due, and then repays itself by debiting the worker's bank account.

EWAs and fake EWAs lead to a cycle of borrowing, like traditional payday loans, and fees that look small add up and drain low wages.

As with traditional short-term, balloon-payment payday loans, EWAs lead to a cycle of chronic borrowing. A worker who cannot afford an expense out of this week's paycheck is likely to face a shortfall with the next week, triggering another round of borrowing. Research has shown that workers who use EWAs typically do so almost every pay period, taking from 12 to 120 advances per year.[2]

---

[1] https://www.azag.gov/opinions/i22-005-r22-011.

[2] See Testimony of Lauren Saunders Before the Task Force on Financial Technology U.S. House Committee on Financial Services On "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging

Most employer-based EWAs charge fees of $1 to $2 per advance, plus 90% or more of workers also pay a $1 to $2 "expedite" fee to receive the advances quickly.[3] Three dollars in fees on a $100 advance repaid in one week has an annual percentage rate (APR) of 156%. A worker who took three advances a week at $3 per advance would pay more than $36/month – several hours' wages – fees that only go to attempting to fill the hole from the prior EWA.

Fake EWAs can be far more expensive. Workers are steered into paying purportedly voluntary "tips" that can be 10% of the advance, plus expedite fees of $0.99 to $3.99.[4] A $10 "tip" on a $100 advance repaid in one week would have an APR of 520%. Bank account debiting when the advance is repaid can also trigger overdraft or nonsufficient funds fees.

The AG Opinion is legally unsound and reaches an overbroad conclusion.

Attorney General Brnovich's conclusion that earned wage advances are not "consumer loans" rests on two claims. First, the opinion finds that they are not loans because they are supposedly "non-recourse." That conclusion is erroneous. Second, the opinion finds that EWAs are not consumer loans because they are not subject to a finance charge. It is possible that some EWAs will fall under that exception, but the opinion ignores the limits of Arizona law and sweeps in EWAs that have fees that may well be finance charges.

Non-recourse obligations can be loans, and EWAs are not necessarily non-recourse

First, the opinion claims "an EWA product that is fully non-recourse represents a payment of wages already earned by the employees," and is therefore not a "consumer loan" under A.R.S. § 6-601(7). The analysis in the opinion relies on no relevant Arizona law on that point and misconstrues other authorities.

As an initial matter, the opinion seems to define "EWA product" quite broadly to include both employer-based earned wage advances as well as fake EWAs that have no connection to employers, payroll, or wages. The opinion also does not analyze the ways in which lenders ensure that they will be repaid, take authority to debit future payrolls or re-present bounced payments repeatedly, or have clauses in their agreements with the consumer that may trigger liability. Thus, the claim that these loans are "non-recourse" is doubtful.

Critically, the analysis cites no Arizona law to support the supposition that non-recourse loans are not loans under Arizona law. The opinion cites Black Law Dictionary's definition of loan as "a grant of something for temporary use," and a separate Arizona statute defining "loan" as

---

Fintech Cash Flow Products" at 11 (Nov. 21, 2022) (calculations from Aite report), https://www.nclc.org/wp-content/uploads/2022/10/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf (hereinafter "Saunders Testimony").

[3] See id. at 9 n.35.

[4] See Comments of NCLC et al. to CFPB re Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services at 44-59 (May 2, 2022), https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22-1.pdf; Earnin, "Why is there now a fee for Lightning Speed?," https://help.earnin.com/hc/en-us/articles/4407090975635-Why-is-there-now-a-fee-for-Lightning-Speed-.

"an advance or commitment of certain funds pursuant to a repayment agreement." But EWAs fit both of these definitions – they are a temporary advance of future pay pursuant to an agreement to repay the advance on payday.

The opinion cites a Consumer Financial Protection Bureau (CFPB) advisory opinion adopted under former CFPB Director Kathy Kraninger finding that a limited category of EWA products are not "credit" under the federal Truth in Lending Act. But the AG opinion ignores the explicit limitations in that CFPB opinion to EWAs that are completely free and are made through employers. Reacting to a similar misuse of the CFPB opinion in New Jersey, current CFPB General Counsel Seth Frotman sent a letter emphasizing: "Products that include the payment of any fee, voluntary or not, are excluded from the scope of the advisory opinion and may well be TILA [Truth in Lending Act] credit."[5]

The AG opinion cites 1981 comments by the Federal Reserve Board finding that loans against the accrued value of an insurance policy or pension account are not "credit" under TILA if the consumer is not contractually obligated to repay. However, those 1981 TILA exemptions are limited to the specific situations addressed, rest on facts that may make them unique, and have proved very problematic.[6] TILA regulations do not create any general rule that non-recourse loans are not credit, and in fact several types of non-recourse loans, including reverse mortgages and pawn loans, are credit under TILA.[7] Many other legal authorities support the view that non-recourse obligations are debt and thus the right to incur debt and repay it later is credit.[8] In any event, the definition of credit under federal law for purposes of TILA, which is primarily a disclosure statute and does not even purport to regulate the cost of credit, is irrelevant to interpretation of Arizona's licensing and interest rate law.

The AG opinion also cites an opinion by the California Department of Financial Protection and Innovation (DFPI) finding that an earned wage provider with a unique business model, FlexWage, did not offer "loans" under California law. However, DFPI noted that "essential" to the finding was that, in FlexWage's model, the funds were paid directly by the employer, not advanced by a third party.[9] "A third-party with no financial obligation to the employee could not rely upon this reasoning, because the funds provided would be for the recipient's temporary use, and the third-party would presumably arrange to recoup the amounts it

---

[5] Letter from then-Acting CFPB General Counsel Seth Frotman to Beverly Brown Ruggia, et al. (Jan. 18, 2022), https://www.nclc.org/wp-content/uploads/2022/10/Letter-from-S.-Frotman-to-B.-Ruggia-et-al-re-EWA-AO-1.18.22-1.pdf. Mr. Frotman also indicated that he intended to recommend to the Director that he provide greater clarity on these issues.

[6] See National Consumer Law Center, Truth in Lending § 2.2.4.1a.6 (2023 online update), library.nclc.org.

[7] Id. § 2.2.4.1a.5.

[8] Id.

[9] Calif. DFPI, Fil No: OP 8206, Letter from Charles Carriere to Carl Morris re Request for Interpretive Opinion – FlexWage at 5 (Feb. 11, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf (hereinafter "DFPI FlexWage Opinion"). Similarly, the offhand dicta in the discussion of the CFPB's 2017 Payday Lending Rule mentioned an "employer" that allows an employee to draw wages early, not a third party that advances those wages and is repaid later.

advanced" (citing the same Black Law Dictionary definition).[10] DFPI also relied on the fact that the program did not suggest evasion of California lending laws because the fees charged were lower than could be charged by finance lenders.[11]

The DFPI opinion also goes to great lengths to emphasize, more generally, that California's finance law "should be interpreted broadly to cover any transaction where a worker grants someone an interest, or otherwise agrees to allow a someone else to receive, their earned or unearned wages."[12]

Thus, there is no basis in Arizona law or elsewhere to claim that EWAs or fake EWAs are not "loans" because they purport to be "non-recourse." Indeed, EWA providers have a strong repayment mechanism – the right to take a deduction from payroll or to debit the consumer's bank account, repeatedly. The fact that they may have chosen to forgo other debt collection tactics does not mean they are not loans.

EWAs are subject to a finance charge.

The second rationale that the AG opinion rests on is the claim that EWAs do not charge a "finance charge" as defined under A.R.S. § 6-601(11), and that a loan must be subject to a finance charge to be a "consumer loan" under A.R.S. § 6-601(7), even if it charges other non-finance charge fees specified in A.R.S. § 6-635.

The opinion acknowledges that some EWA products charge fees, but it does not fully analyze those fees and whether they are finance charges under Arizona law. Some may well be finance charges.

One fee that most EWA and fake EWA providers charge is an "expedite" or "instant access" fee, which can range from $1 to $4 per advance. We understand that upwards of 90% of workers' pay those fees.[13] The actual cost of sending funds instantly is closer to 4.5 cents[14] –and thus the fees may be 20 to 100 times the cost. A fee with such a dramatic markup should be considered a finance charge under Arizona law, as it far exceeds "the actual costs of charges that are paid

---

[10] Id. at 4.

[11] Id. at 5-6.

[12] Id. at 4. The DFPI opinion also discusses how the Uniform Small Loan Law of the early 20th century, on which most states' small loan laws are based, was intended to capture advances of wages both earned and to be earned. See id. at 3. Arizona law, too, has roots in the Uniform Small Loan Law. *See* Bryce G, Carruthers et al., Yale University Economic Growth Center Discussion Paper No. 971, Bringing 'honest capital' to poor borrowers: The passage of the uniform small loan law, 1907-1930, Appendix A at 29 (May 2009), https://www.econstor.eu/bitstream/10419/59150/1/601165527.pdf.

[13] See Saunders Testimony at 9 n.35.

[14] See The ClearingHouse, "Simple, Transparent, Uniform Pricing for All Financial Institutions" (showing cost of RTP instant credit transfer at $0.045), https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/rtp_-pricing_02-07-2019.pdf

to a third party"[15] and does not fit into any of the categories of other allowable fees in A.R.S. § 6-635.

EWA providers also collect other fees that may be finance charges if they exceed the limits permitted for other allowable fees. The fees of $1 to $2 per advance that many employer-based EWAs charge, as well as the purportedly voluntary "tips" that direct-to-consumer fake EWAs collect, could arguably be a "loan origination fee" under A.R.S. § 6-635(A)(4). However, to be allowable origination fees, they must not exceed 5 percent of the loan, and the fees may not be charged for refinancing if the fee was collected within one year. We understand that fake EWAs may include a default "tip" of 10% of the loan, which would thus not be allowable. And even a $2 fee on an employer-based EWA would be allowable as an origination fee only if the advance was $40 or more.

The AG opinion ignores these statutory limitations and appears to broadly state that a "voluntary gratuity" or "fee for an expedited transfer" is not a finance charge so long as the EWA provider does not condition the EWA on those fees or charges. Yet the opinion provides no support for that conclusory finding and in fact Arizona law indicates otherwise. The definition of "finance charge" is "the amount *payable* by a consumer *incident to or* as a condition of the extension of a consumer lender loan but does not include other fees allowed pursuant to § 6-635."[16] That is, the finance charge need not be a "condition" of credit but need only be "incident to" that credit, which EWA fees and "tips" clearly are.

Moreover, Arizona law is clear that "the lender shall not *directly or indirectly*, charge, contract for, *or receive* any further or other amount in connection with a consumer loan,"[17] and loans are voidable if the lender "receives" any amount in excess of the finance charges or fees permitted.[18] Both "gratuities" and "expedite fees" are "payable" by a consumer, received by the lender, and "incident to" the extension of a loan. Similarly, the California DFPI opinion noted that "tips" are "charges" under California law because they are "received by" the lender.[19] It is also important to note that providers have various ways of pushing people into "tipping," undermining the purported voluntariness of those payments.[20] Tips may also be included by default unless the consumer removes them. Under federal law, default provisions of contracts may be considered compulsory even if the consumer can opt out.[21]

---

[15] A.R.S. § 6-635(A)(2).

[16] A.R.S. § 6-601(11) (emphasis added).

[17] A.R.S. § 6-635(C) (emphasis added).

[18] A.R.S. §6-632(A).

[19] DFPI FlexWage Opinion at 6 n.4.

[20] See Junk Fees Comments at 47-51.

[21] See NCLC, Consumer Banking and Payments Law §§ 5.2.2.3 5.9.5.1 (discussing cases interpreting ban on compulsory use of particular accounts for wages and ban on compulsory repayment of credit by electronic fund transfer, 15 U.S.C. § 1693k).

While free EWAs and those with very low origination fees might be exempt from Arizona law, the AG opinion casts far too broad a net in implying that most are not consumer loans.

The AG opinion creates a loophole in Arizona consumer protection law that will promote evasions and predatory lending.

The broad AG opinion deprives Arizonans of the protections of Arizona law for EWA loans and also creates the potential for much broader evasions. As noted above, the opinion appears to cover loans that have no connection to employers, payroll, or wages. There are no limitations that would prevent payday lenders from claiming that their loans are also based on accrued wages, as borrowers do not usually seek out payday loans on the day they are paid, but rather after they have been working but cannot make it to payday.

In 2008, Arizonans voted by a strong 60% margin to oppose extending payday lenders' exemption from Arizona's interest rate cap.[22] Payday lenders already found one loophole to exploit by making auto title loans. The AG should not allow a similar loophole to eviscerate Arizona's laws.

The concern about evasions in the guise of earned wage advances is widespread. Similar concerns have prompted CEI and Wildfire: Igniting Community Action to End Poverty in Arizona to join 94 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics to urge the Consumer Financial Protection Bureau to treat EWAs as credit.[23] We urge Arizona to do the same.

We urge your office to rescind Opinion 122-005(22-011). Thank you for your attention to this important matter.

Yours very truly,

Mary Judge Ryan, Esq.
Board Member
Center for Economic Integrity

Maxine Becker
Attorney/Tenant Legal Advocate
Wildfire

Drew Schaffer
Director
Morris Institute for Justice

Lauren Saunders, Associate Director
National Consumer Law Center
(on behalf of its low-income clients)

---

[22] Ballotpedia, Arizona Payday Loan Reform, Proposition 200 (2008), https://ballotpedia.org/Arizona_Payday_Loan_Reform,_Proposition_200_(2008).

[23] Letter from 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academic to CFPB Director Rohit Chopra (Oct. 12, 2021), https://www.nclc.org/wp-content/uploads/2022/10/CFPB-EWA-letter-coalition-FINAL2.pdf.