



## Arizona State Legislature

1700 W. Washington Street  
Phoenix, AZ 85007-2890

October 8, 2024

*Sent via Email*

The Honorable Kris Mayes  
Attorney General  
Arizona Attorney General's Office  
2005 North Central Avenue  
Phoenix, AZ 85004

*Re: Request for an Attorney General Opinion*

Dear Attorney General Mayes:

I am writing to request an Attorney General Opinion regarding the earned wage access loans currently on the market in Arizona. The number of companies providing this product has expanded dramatically, and their use by consumers and employees is increasing. Therefore, I would like to request an answer to this question: Does an earned wage access ("EWA") product qualify as a "consumer loan" subject to the requirements and limitations of the Consumer Lenders Act ("CLA"), A.R.S. §§ 6-601 to 6-615, and A.R.S. §§ 6-631 to 6-639?

***The Issue:***

EWAs allow consumers and employees to access their earned income in advance of their regular paycheck. This is usually done through a short-term loan that is then repaid by the consumer out of their next paycheck, either directly from the consumer's bank account or the employee's check as a payroll deduction. These EWAs are offered directly to the consumer, but they are also offered to employees by employers who have developed relationships with EWA companies as a benefit or a perk.<sup>i</sup>

Most of these EWA loans are being offered by nonbank financial technology companies, otherwise known as "fintechs." Across the country, EWAs are often regulated by the state, as no federal legislation has passed to specifically regulate these products.<sup>ii</sup> There are fees associated with these short-term loans, which include transaction fees, expedite fees, a subscription for the service, or what the fintech often describes to the consumer as a "tip" for allowing access to the earned wage. Fees on these small advances, whether voluntary or not, are high, with annual percentage rates (APRs) averaging 334% for tip companies and 331% for the non-tip companies.<sup>iii</sup> Consumers who frequently use these EWAs often find themselves in a vicious cycle when, upon payday, their wages are used to

repay the outstanding debt, leaving the consumer yet again short on funds and having to initiate a new transaction.<sup>iv</sup> A recent study found that consumers take out advances repeatedly, with 75% taking out at least one advance on the same day or the day after making the repayment.<sup>v</sup>

In December of 2022, former Attorney General Mark Brnovich issued [Attorney General Opinion No. 122-005](#). His opinion found that an EWA would have to be licensed as a "consumer loan" (see the definition below) if it satisfied each of the following requirements: (1) it is a direct closed end loan of money, (2) in the principal amount of \$10,000 or less, and (3) is subject to a finance charge." Brnovich's opinion determined that these loans did not satisfy either prong (1) or (3), therefore, he did not qualify the products as a "consumer loans."

To provide some additional detail, Brnovich's opinion found that because an EWA is "not a loan of money" and it does not qualify as a "consumer loan" under A.R.S. § 6-601. He based his determination on the finding that they are "non-recourse" loans. A "non-recourse" loan is not defined in state statute, but to qualify as a non-recourse loan, Brnovich's opinion explained that the EWA provider must not do any of the following—retain any legal or contractual right to repayment against the consumer, engage in debt collection activities, sell an unpaid balance to a third party, or report their nonpayment to a consumer reporting agency.

But this product involves the lending of money, which is the definition of a loan. See LOAN, Black's Law Dictionary (12th ed. 2024). A "non-recourse" loan, which is a subcategory of the larger loan classification is defined in Black's Law Dictionary as, "a secured loan that allows the lender to attach only the collateral, not the borrower's personal assets, if the loan is not repaid."<sup>vi</sup> See LOAN, non-recourse, Black's Law Dictionary (12th ed. 2024). For EWAs, the collateral for the dollars loaned to the consumer or the employee is the individual's paycheck. The dollars advanced by the EWA company are done so temporarily and the consumer cannot avoid the obligation to repay the non-recourse loan with the money due to the consumer as part of their earned pay. The providers of these loans they are peddling a product, and just like any other business, they are not giving away these funds as a gift. No, they expect to be repaid and made whole.

In his finding, Brnovich partially relied on a [previous advisory opinion](#) from the Consumer Financial Protection Bureau ("CFPB"), which he said provided "persuasive guidance" on his office's determination that EWA products do not constitute a "loan." At the time, the CFPB was attempting to answer the question of whether an EWA product *without* an associated fee, provided *through* an employer, constituted "credit" under the Truth in Lending Act. The CFPB's opinion defined a "Covered EWA Program" as including all the following characteristics 1) the Provider contracts with an employer to provide the EWA transaction, 2) the amount of the transaction does not exceed the cash value of the accrued wages earned, 3) the employee makes no payment, voluntary or otherwise, to access the EWA funds and the Provider does not solicit or accept tips, 4) the Provider covers the amount of the transaction through payroll deduction, 5) the Provider retains no legal or contractual claim against the employee, 6) the Provider clearly explains that the contract between it and the employer will not require the employee to pay fees, that the Provider has no legal or contractual claim against the employee, and that it will not engage in debt collection, and 7) that the Provider will not access the credit risk of the employee. With these many limiting factors in place, the CFPB concluded that EWA products did not constitute "credit" under the Act.

Since the release of this opinion in 2020, EWAs have proliferated the market. Their providers have also expanded their market share by directly targeting consumers outside of their employers. In fact, this industry has seen such rapid growth that the CFPB estimates that the number of transactions

processed exploded by over 90% from 2021 to 2022, loaning more than 7 million workers approximately \$22 billion in 2022 alone.<sup>vii</sup>

The EWA companies that provide this direct service to consumers also often solicit "tips" and other fees and they require an expedited fee to receive the transaction within a certain period of time. And as stated above, individuals who access these EWA products do so repeatedly. In fact, 56% of those accessing these loans saw overdrafts on their checking accounts increase 56% on average, spiraling themselves into a vicious cycle of poverty and debt. A 2021 study conducted by the California Department of Financial Protection and Innovation also found that in California, \$765 million was advanced to consumers, the tips generated totaled \$17.55 million and optional fees generated another \$6.24 million while the quarterly growth rate, on average, for EWA transactions was 17%.<sup>viii</sup>

Likely for these reasons, the CFPB just recently issued a [new proposed interpretative rule](#) that argues the EWAs are, in fact, a credit product that require Truth in Lending Act disclosures. According to the CFPB, the average worker accessed approximately \$3,000 per year and they paid fees in order to get the dollars into their bank accounts.<sup>ix</sup> In fact, more than 90% of workers paid at least one fee in 2022, with most of that fee revenue being generated from expediting the transfer. And as they grow in popularity, more fintechs offer these EWA loans and consumers take advantage of what seems to them to be a relatively consumer friendly product.

The CFPB also found that consumers who use these loans often will pay the monthly subscription fee (sometimes as high as \$14.99 a month) and found that when an employer does not cover the cost of an EWA (which they estimate that employers subsidized less than 5% of the total fees paid), that the employee almost always paid the expedite fee to access their funds early. And when the employee paid the fee, it averaged out at \$3.18 per transaction and \$68.88 a year. With the amount of money these providers stand to gain, they are increasing their efforts to expand. The EWA market is expected to grow to around \$26.74 billion by 2030, a compound annual growth rate of approximately 2.18%.<sup>x</sup>

These facts make it clear that this issue needs to be reexamined. Considering how the circumstances and even the opinion of the CFPB has changed since Attorney General Brnovich issued his opinion, I would respectfully ask that your office assess the current state of EWAs on the market, how they operate, and whether they fall under Arizona's CLA.

***Relevant Legal Authority:***

A.R.S. § 6-601(5) defines "consumer lender" as "a person that advertises to make or procure, solicits or holds itself out to make or procure, or makes or procures consumer lender loans to consumers in this state."

A.R.S. § 6-601(6) provides that "consumer lender loans" means "consumer loans, consumer revolving loans and home equity revolving loans."

A.R.S. § 6-601(7) defines "consumer loan" as "the direct closed end loan of money, whether unsecured or secured by personal or real property, in an amount of \$10,000 or less that is subject to a finance charge in which only the principal amount of the loan is considered, and not any finance charges or other fees allowed pursuant to section 6-635, for the purpose of determining whether the consumer loan is \$10,000 or less."

A.R.S. § 6-601(11) provides that "finance charge" means "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 section 6-635."

A.R.S. § 603(A) states that "Unless exempt under section 6-602, a person, whether located in this state or in another state, shall not engage in the business of a consumer lender without first being licensed as a consumer lender by the deputy director."

A.R.S. § 6-632, [Finance charges](#).

A.R.S. § 6-635, [Other allowable fees; annual reporting](#).

A.R.S. § 20-1603(9) (definition for consumer credit insurance) defines "loan" as "an advance or commitment of certain funds pursuant to a repayment agreement."

***Conclusion:***

We would respectfully ask that a response be issued in time for the next legislative session so that depending on the opinion of your office, I may explore possible changes to state law. If there is any additional information needed from my office, please contact me.

Sincerely,

A handwritten signature in black ink that reads "Mitzi Epstein". The signature is written in a cursive, flowing style.

Mitzi Epstein  
State Senator  
District 12

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<sup>i</sup> [crl-not-free-hidden-costs-apr2024.pdf](#), see page 2.

<sup>ii</sup> <https://crsreports.congress.gov/product/pdf/IF/IF12727>

<sup>iii</sup> <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?emrc=08148f>, see page 1.

<sup>iv</sup> [crl-not-free-hidden-costs-apr2024.pdf](#), see page 2.

<sup>v</sup> [Id.](#), see page 7.

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<sup>vi</sup>According to the [Internal Revenue Service \(IRS\)](#), there are two different categories of debt: recourse (holds the borrower personally liable) and nonrecourse (all other debt). The real difference between the two is that recourse loans allow a lender to collect the owed debt after they've taken the promised collateral (home, credit cards). While a non-recourse loan will not allow the lender to collect anything but the promised collateral. The IRS provides the following example—if a borrower defaults on a nonrecourse home loan, the bank can only foreclose on the home. The bank generally cannot take further legal action to collect the money owed on the debt. Thus, a non-recourse loan is a loan, especially in the eyes of the IRS.

<sup>vii</sup>[CFPB Proposes Interpretive Rule to Ensure Workers Know the Costs and Fees of Paycheck Advance Products | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

<sup>viii</sup><https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?emrc=08148f>, see page 1.

<sup>ix</sup><https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/#:~:text=Earned%20wage%20product%20use%20is,wage%20product%20at%20least%20once>.

<sup>x</sup><https://www.zionmarketresearch.com/report/earned-wage-access-software-market>