



Department of Financial Protection and Innovation

Attention: Araceli Dyson

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May 3, 2023

Submitted via E-Mail to: regulations@dfpi.ca.gov, Peggy.Fairman@dfpi.ca.gov

Re: Notice of Proposed Rulemaking [PRO 01-21]

To Commissioner Clothilde V. Hewlett,

In response to the Notice of Proposed Rulemaking issued by the DFPI in March 2023, we respectfully submit this letter and recommendation to the California Department of Financial Protection and Innovation (**DFPI**).

First, we would like to thank the department for its in-depth investigation of the Earned Wage Access (EWA) industry before proposing any regulations. The MOU findings,¹ as well as the GAO study,² reaffirm what you have outlined in the proposed regulations and in the Opinion issued to FlexWage on 2/11/2022³.

As you have outlined in the proposed regulations, it is vital to review EWA providers not simply as direct-to-consumer (D2C) or employer-based but by their methods of operation. The essential elements in determining EWA licensing include:

1. Accuracy of the data and wage calculation

¹ *2021 Earned Wage Access Data Findings*. (2023, March). California Department of Financial Protection and Innovation. <https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?emrc=08148f>

² *Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed*. (n.d.). U.S. GAO. <https://www.gao.gov/products/gao-23-105536>.

³ Carriere, C. (2022, February 11). *Re: Request for Interpretive Opinion - FlexWage*. State of California Department of Financial Protections and Innovation. <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf>

2. Transparent and capped fees
3. Funding source

Accuracy of the Data and Wage Calculation

Also laid out in the Opinion issued to FlexWage, and defined in the CFPB Advisory Opinion,⁴ data accuracy is critical in determining earned wages. If a provider is not collecting payroll and time data at the individual employee level, the available earned wage is inconsistent with the employee's actual wages.

As stated in the CFPB Advisory Opinion:

The “accrued cash value of the wages” are wages that the employee is entitled to receive under State law in the event of separation from the employer for work performed for the employer, but for which the employee has yet to be paid.

This “accrued cash value of the wages” cannot be accurately calculated from historical bank deposits, algorithms, time at work, or prior payroll.

Consequently, the data inaccuracy leads to the following:

- Overpayments of earned wages
- An inability to collect those overpayments
- Consumer suspension from accessing their earned wages

Through no fault of their own, consumers face denial of service and additional deductions from their pay or bank accounts, creating more fees and financial stress. This is especially true in models where access to employee checking accounts is used to recoup advances.

Transparent and Capped Fees

Transparent and capped fees are critical for a safe, responsible true EWA solution. The measurement of fees must include the total cost to the consumer to receive the EWA transfers to their bank account of choice.

Subscription fees, tips, and free-to-a-provider-card (or accounts or wallets) all create a convoluted process and mask the total cost to the consumer.

⁴ CFPB Advisory Opinion: https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf

EWA solutions that offer unfettered access and uncapped fees result in similar outcomes to that of a predatory lending product. Additionally, over-tipping or unused subscription services resemble predatory practices.

As noted in the Opinion issued to FlexWage, the capped fees per pay cycle and month provide a transparent, easily understood, and responsible solution at a cost well below the threshold required for licensing under the state's regulations.

Funding Source

The EWA funding source is a key determinant in whether a lending license is required. As noted in the Opinion issued to FlexWage:

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 advanced. (Id.; Black's Law Dictionary (11th ed. 2019).) An employer that advances amounts exceeding the amounts owed to an employee could not rely upon this reasoning, because the employer's payments could not be said to be satisfying an existing obligation to the employee. Such advances would create new financial obligations for the employee that the employee would agree to satisfy. (Civil Code § 1912, Milana v. Credit Discount Co. (1945) 27 Cal.2d 335, 339.)

Additionally, the Opinion went on to state:

That the employers provide the funds and the amount provided is limited to wages earned also suggests that a FlexWage EWA is not a wage assignment under Section 22335. Section 22335 protects workers from devices that allow the employer or a third party to capture a worker's wages.

As a continuation of the employer funding element, we recommend the following:

Whether an employer uses their funds or funds are provided by a licensed financial institution, if the employer remains an intermediary to the EWA provider and their employees, the same exemption should apply as outlined in the Opinion issued to FlexWage.

Regulatory Exemptions

In conclusion, as we understand the proposed regulations, the FlexWage solution and any licensed provider of funds to an employer-funded EWA solution would be exempt from EWA licensing as they exist under the proposed regulations.

We respectfully request clarification of this in the new regulations.

Thank you again for your thoughtful and thorough analysis of the EWA industry, existing applicable laws, and proper consumer protections.

Sincerely,

Frank Dombroski
CEO/Founder
FlexWage Solutions LLC

CC: Carl Morris, FlexWage Compliance