

Alert | Financial Regulatory & Compliance



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Maryland Office of Financial Regulation Provides Guidance on Earned Wage Access Products

Go-To Guide:

- The Maryland Office of Financial Regulation (OFR) provided guidance on when Earned Wage Access (EWA) products may be considered loans and whether fees and “tips” are permissible.
- Employer-facilitated EWA is the OFR’s preference moving forward.
- EWA providers should consult with counsel to evaluate whether their product offering is employer-facilitated or whether they should register as a lender in Maryland.

On Aug. 1, 2023, the Maryland Office of Financial Regulation (OFR) published **new guidance** on Earned Wage Access (EWA) products, intending to provide clarity on how EWA products are viewed under Maryland law and requirements those offering EWA products should follow.

What is EWA?

EWA products allow consumers to access a portion of their wages they have earned but have not yet been paid via the normal payroll process. In its guidance, the OFR broadly discusses two categories of EWA—“products employers offer as an employee benefit or products independent third parties offer consumers”—and notes that these categories are just two ends of the spectrum on how consumers obtain EWA products.

Importantly, EWA products involve advancing (small) amounts of money, usually ranging from \$40 to \$100, to be repaid later, and often for compensation in the form of a fee or an optional “tip.” Because of this, two key compliance questions EWA providers face are: (1) whether EWA products are considered loans and (2) whether they can make money from these products, via fees, tips, or otherwise. We explain below how the OFR’s guidance addresses these key questions.

Is an EWA Payment a Loan in Maryland?

It depends.

In its guidance, the OFR states that Maryland’s law on loans under \$25,000 does not apply to EWA payments provided by an employer directly to an employee, and the EWA payment is not a loan at all if the payment is based on how much the employee has earned to date since the employer “owes” that money to the employee.

If, however, a Maryland consumer receives EWA payments from an independent third-party EWA provider, the OFR states that “the arrangement’s facts and circumstances must be analyzed to determine if those providers are to be deemed lenders and whether they would require a license.”

What About Employer-Connected EWA Providers?

The OFR recognizes that purely employer-provided EWA and EWA offered by an independent third-party are just two ends of the spectrum on how consumers obtain EWA products and noted that consumers often receive EWA payments via their employer but through a connected third-party EWA provider. Despite noting this, the OFR’s guidance essentially provides instructions on how it may categorize a connected third-party EWA provider as fitting into one of the two ends of the spectrum.

Indeed, the OFR’s position is that Maryland law requires a case-by-case analysis to determine whether the EWA provider is truly a service provider to the employer providing the EWA payment (and, therefore, not a lender) or the party providing the EWA payment (and, therefore, a lender).

To determine whether the employer-connected EWA provider will be considered a service provider or a lender subject to lender licensing rules, the OFR will look at three criteria:

- **Economic risk if consumer defaults:** If the employer-connected EWA provider bears the loss when a consumer fails to repay an EWA payment, the employer-connected EWA provider is more likely to be viewed as a lender than a service provider;
- **Level of contact with consumer:** The more contact the employer-connected EWA provider has with a consumer, the more likely they will be viewed as a lender;
- **Benefits from fees and/or tips paid by consumer:** If the employer-connected EWA provider receives most of the economic benefit from offering the EWA product, especially if the provider receives tips and/or fees, the employer-connected EWA provider is more likely to be viewed as a lender.

So, under the OFR’s guidance, an employer-connected EWA provider that (1) bears the risk of loss of a failed repayment by a consumer, (2) has direct contact with a consumer, and (3) receives an economic benefit from the consumer by providing an EWA payment, particularly in the form of fees or tips paid, would presumably be viewed as a lender by the OFR.

Since, however, the OFR only places these criteria on a gradient of more or less likely to determine the outcome of a case-by-case analysis, it is unclear which criteria take precedence and whether meeting only some of the factors leads to a determination that a particular employer-connected EWA provider is a lender.

Are Fees and Tips for EWA Allowed in Maryland?

Again, it depends.

Looking to Maryland's Commercial Law, the OFR states that fees and tips would be classified as interest in a loan transaction and, therefore, subject to applicable usury caps. Based on this premise, the OFR seems to conclude the fees or tips paid to employers for purely employer-provided EWA are not problematic because those transactions are not loans in the first place.

Conversely, for any non-purely employer-provided EWA—*i.e.*, EWA offered by an independent third-party and EWA offered by an employer but through a connected third-party EWA provider that fails the above factor test—the OFR takes the position that a third party is providing the EWA product, which in turn makes EWA transactions and associated fees or tips subject to state usury limits.

Our Take

The OFR's guidance may be confusing, because it discusses purely employer-facilitated payments to employees as EWA, when the term typically denotes at least some involvement by a third-party EWA provider, whether by assisting the employer in offering EWA or by offering it directly to consumers.

As it relates to EWA providers, the OFR's guidance means one thing: either you are the employer's service provider helping offer an employee benefit (and not a lender), or you are not (and, therefore, are a lender).

Thus, it appears the OFR prefers EWA offered by an employer as an employee benefit as the path forward.

Why? Because the OFR:

- Prefers that the employer bear the risk of any loss of advancing an employee funds;
- Prefers that the third-party EWA provider have no contact with the employee; and
- Prefers that any compensation for an EWA service, if any, be paid to the employer (likely with the employer compensating any EWA provider separately).

Moving forward, EWA providers doing business in Maryland should note that the OFR will be monitoring EWA products in Maryland, paying particular attention to fees charged to consumers in connection with the products. Accordingly, EWA Providers should consult with counsel to evaluate whether they are service providers to their employer-partners or whether they should register as a lender in Maryland.

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