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Consumer Financial Protection Bureau Wades Into Earned Wage Access Space

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Two recent actions broadly supportive of employer-based programs, risks for certain wage deduction practices noted

On-demand pay providers have become increasingly common employer-facilitated employee benefits in recent years to help employees avoid predatory alternatives like payday loans, late fees and bank overdraft fees. If employees need cash before a pay period, on-demand pay providers transfer cash to the employee and later recoup the transferred amounts – typically plus a nominal fee – when the employee is paid on pay day. The method of recouping these transfers varies by provider and may include paycheck deductions paid directly to the on-demand pay provider, post-payment debits from employee-controlled banking accounts or other methods.

While on-demand pay providers seemingly offer a product that is a win-win for employees and employers, some conservative employers have balked at these offerings out of fear that the Consumer Financial Protection Bureau (CFPB) or related state agencies would take the position that such transfers by on-demand providers were unlawful loans, and that state Departments of Labor would take the position that the deductions to recoup such transfers were unlawful wage deductions. However, in the past two months, the CFPB issued two actions that should relieve employers considering these products from fears that the transfers are unlawful loans.

Specifically, the CFPB on November 30 issued its first advisory opinion. It was a narrow opinion that issued guidance and a seven-factor framework for looking at on-demand pay. The framework was particularly favorable to employer-based, non-recourse, low-fee platforms. While the opinion narrowly applied to programs with no fees, it suggested low-fee models (those with nominal processing fees) are likely not credit as well, and invited providers of such programs to talk to the CFPB, including applying to a program called their regulatory sandbox.

On December 30, the CFPB issued an approval order granting one on-demand pay provider access to the regulatory sandbox. The provider was concerned that certain of its services could be viewed as extensions of credit. The CFPB Order makes it clear that the model evaluated operates using an employer-facilitated payroll deduction from the employee's next paycheck. In fact, the CFPB order states that the on-demand pay provider functionally operates like an employer that pays its employees earlier than the scheduled payday and then deducts the amount paid through an employer-facilitated payroll deduction. Based on this analysis, the CFPB allowed regulatory protection against credit determination for two years to two of the on-demand pay provider's programs. It reasoned that this is money already earned by the employees in question, and as such, employer-based programs are essentially providing the employee access to his or her own money, and thus cannot be credit.

While this model serves to ensure that the services provided are not viewed as involving credit, the second fear expressed by employers – that the model might present potential issues under state law concerning wage deductions – persists. In fact, the order expressly noted that it declined to address whether wage deductions for on-demand pay "comply with state wage and hour laws." This is because states regulate which types of transactions wage deductions may be used for. For example, 47 states have statutes that proscribe the ability of employers to make deductions from employee wages. Many of these statutes set forth numerous specific procedural requirements each of which must be complied with for an employer to lawfully deduct wages from an employee.

For these reasons, the wage deduction approach continues to face legal risk even considering the CFPB's recent actions. However, employer-based providers with a "low to no" fee model (and that also avoid imposing employee recourse for nonpayment) can breathe a big sigh of relief after these two actions by the CFPB.

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