

# Treasury Department Proposes to Clarify That On-Demand Pay and Earned Wage Access Programs Are Not Loans

## WRITTEN BY

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- In its annual General Explanations of the Administration's Revenue Proposals, the U.S. Department of Treasury proposed clarifications and amendments to the Internal Revenue Code to address on-demand pay arrangements (also known as earned wage access or "EWA" programs).
- The proposals would confirm, among other things, that EWA programs are not loans.
- The proposals would also clarify the applicable payroll period for EWA wages, as well as certain tax withholding and depositing obligations.

## Why It Matters

The proposals offer insight into how the Treasury Department views EWA programs, and, if adopted, would provide needed clarity and consistency for employers and EWA providers.

Each year, the U.S. Department of Treasury issues its General Explanations of the Administration's Revenue Proposals, commonly known as the "Green Book." [The Green Book, issued in March 2022 for fiscal year 2023](#), contains several proposals of interest to employers offering or wanting to offer on-demand pay arrangements (also known as EWA programs) and EWA providers.

Specifically, the Treasury Department recommends amending the Internal Revenue Code (Code) to provide for a standard definition of on-demand pay arrangements "as an arrangement that allows employees to withdraw earned wages before their regularly scheduled pay dates." The proposals would also amend the Code to expressly clarify that on-demand pay arrangements are not loans. This is an important recommendation, because the [Consumer Financial Protection Bureau's \(CFPB\) guidance](#) isn't clear about the distinction between EWA and extensions of credit, and consumer advocates have asked the CFPB to retract its guidance. Not surprisingly, employers have increasingly sought guidance from the Treasury Department on this point.

The proposals also address the question of whether an employee is in constructive receipt of their earned wages, which can affect tax withholding and depositing obligations for employers, depending on the EWA program's design. Uncertainty regarding whether an employee was in constructive receipt of wages when participating in an EWA program also led to confusion with regard to how to properly calculate the required FICA tax and income tax withholdings when the employee elects to receive a payment of earned wages.

The proposal first confirms the Treasury Department's position that "[e]mployees with access to an on-demand pay arrangement may be in constant constructive receipt of their wages as they are earned." Moreover, the

proposal notes that “[e]mployers that offer on-demand pay arrangements should maintain either a daily or miscellaneous payroll period and should withhold and pay employment taxes on employees’ earned wages on a daily basis.” However, the proposal acknowledges that few employers follow this approach in practice because it would be a “significant financial and administrative burden.”

Thus, the proposal recommended additional changes to the Code to provide a consistent pay period for on-demand pay arrangements. The Treasury Department proposes that such arrangements should be treated as weekly payroll periods, even if employees have access to wages during the week.

These amendments, if enacted, would be effective for calendar years and quarters beginning after December 31. Thus, employers offering EWA products and EWA service providers should consider whether the Treasury Department’s position on EWA programs as explained in the proposals affects their current EWA arrangement or offering. And, of course, should the amendments become law, they should consider whether changes are needed to ensure compliance. For example, employers with biweekly or semimonthly payrolls may be required to run payroll weekly if they offer an on-demand pay arrangement to comply with the proposal that the payroll period for on-demand pay arrangements is treated as a weekly payroll period. Finally, the amendments, if enacted, may position state departments of labor as the primary regulators for EWA products rather than federal and state banking regulators.

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