IN REPLY REFER TO:
FILE NO: OP 8206

THIS SPECIFIC RULING IS ISSUED BY THE COMMISSIONER OF FINANCIAL PROTECTION AND INNOVATION PURSUANT TO SECTION 22150 OF THE CALIFORNIA FINANCING LAW AND SECTION 23015 OF THE CALIFORNIA DEFERRED DEPOSIT TRANSACTION LAW. IT IS APPLICABLE ONLY TO THE SPECIFIC FACTUAL SITUATION IDENTIFIED IN THE REQUEST FOR RULING, AND MAY NOT BE RELIED UPON IN CONNECTION WITH ANY OTHER FACTUAL SITUATION.

February 11, 2022

By Email

Carl Morris
cmorris@flexwage.com

Re: Request for Interpretive Opinion – FlexWage

Dear Mr. Morris:

By letter dated September 21, 2021, supplemented by correspondence dated November 5, 2021, FlexWage requests an opinion from the Commissioner of Financial Protection and Innovation (Commissioner) that it is not subject to licensure under the California Deferred Deposit Transaction Law (CDDTL) with respect to its earned wage access (EWA) product. Although FlexWage has requested an opinion solely relating to the CDDTL, FlexWage's product also merits consideration of another California law that regulates consumer credit, the California Financing Law (CFL). The Department of Financial Protection and Innovation (DFPI or Department) interprets FlexWage's request as a request for a specific ruling under Financial Code sections 22150 and 23015. For the reasons set forth below, neither the CDDTL nor the CFL require FlexWage or its employer-partners to obtain a license from the Commissioner.

Background

FlexWage's request for an opinion describes its product as follows:

- General Description and Source of Funds. FlexWage partners with employers to assist employers in providing employees' earned but unpaid wages in advance of payday. Amounts paid to employees before payday are employer-funded; FlexWage does not

provide the advanced funds itself, nor does it assist employers in securing financing for those advances.

- Data Integration and Risk of Overpayment. FlexWage integrates with employers' payroll and time/labor systems and may integrate with additional systems. FlexWage's data integrations allow it to calculate an accurate net earned wage. FlexWage has represented that this practically eliminates the risk that amounts paid to workers before payday exceed amounts otherwise due from the employer.[1] Amounts paid and FlexWage's fees are deducted from employees' pay and appear on their wage statement as an itemized deduction.
- Advance Delivery. FlexWage delivers all advances instantly to the debit card or bank account of the employee's choice.
- Fee Structure. FlexWage's compensation model varies by employer. The employee may pay a per-transaction fee, the employer may pay a monthly fee, or a combination of the two fees can be implemented. If the employee pays a transaction fee, fees are capped per pay period and per month, and fee caps bear no relation to an employee's eligibility for advances. FlexWage does not share any of the fee income it receives from employees with employers. FlexWage's maximum fee caps for employees are:

Pay Cycle	Maximum Fee Per Transaction	Maximum Pay Cycle Cap	Maximum Monthly Cap
Weekly Pay	$3.50	$4.50	$16.00
Bi-weekly/Semi-Monthly	$3.60	$9.00	$16.00
Monthly	$5.00	$16.00	$16.00

- Typical Usage. FlexWage represents that FlexWage users receive $184 on average per advance and use the service 2.55 times per month.
- No Legal Recourse Against Employee. FlexWage does not require any legally binding agreement with employees to repay amounts advanced and has no recourse against an employee should any employee ever receive more than they have earned.
- No Other Employee-Paid Products. FlexWage offers a financial health application called Sum180 that is an employer-paid benefit for employees. FlexWage does not provide or market any additional products or services to employees that use the FlexWage EWA product.

[1] In a November 5, 2021 letter, FlexWage represented to the DFPI that over the course of the past year it had experienced only one instance of an employee accessing more than what they had earned. This represented less than 1/100,000th of a percent of FlexWage's total transfers.

CFL Scope

The CFL requires any person "engage[d] in the business of a finance lender" to obtain a license from the Commissioner. (Fin. Code, § 22100, subd. (a).) A finance lender is a "person who is engaged in the business of making consumer loans or making commercial loans." (Fin. Code, § 22009.)

The CFL does not define "loan," but the Legislature has instructed that the CFL be "liberally construed and applied" to "protect borrowers against unfair practices." (Fin. Code, § 22001, subd. (a)(4).) In determining whether a transaction is a "loan" for purposes of the CFL, the Department generally considers how the term has been interpreted elsewhere in the law. Black's Law Dictionary defines "loan" as "a grant of something for temporary use." (Black's Law Dictionary (11th ed. 2019).) Civil Code section 1912 provides that a loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which is borrowed. *Milana v. Credit Discount Co.* (1945) 27 Cal.2d 335, 339, provides that a loan is "the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use[.]"

Financial Code section 22335 (Section 22335) also provides that "payment by any person in money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, is, for the purposes of regulation under [the CFL], a loan secured by the assignment." The CFL does not define sale, assignment or order for wages, and the Department is not aware of any published judicial opinions interpreting Section 22335.

Although the language pertaining to the sale or assignment of wages has changed over time, the current language appears to be modeled substantially on a model law, the Uniform Small Loan Law, which provided that:

> The payment of… money, credit, goods, or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, shall for the purposes of regulation under this Act be deemed a loan secured by such assignment…

(F. B. Hubachek, The Development of Regulatory Small Loan Laws, 8 *Law and Contemporary Problems* 108-145, 138, 142 (Winter 1941), https://scholarship.law.duke.edu/lcp/vol8/iss1/11.)

A 1941 law review article explains that the section was added to the model law to prevent evasions of state usury laws. The author notes that during the first half of the 20th century, many large employers paid wages "one or two weeks" after they were earned. (*Id.* at 121.) Wage buyers would "go through the motions of purchasing a portion of the earned wages at a

discount" and then roll over the transaction and charge additional fees if a recipient could not pay the amount owed on payday. (*Id.*) Although these transactions could ordinarily be proved to be loans in litigation, establishing that these transactions were loans was costly and "test cases were of no permanent value." (*Id.*) As a result, the drafters of the proposed law decided to control the practice by subjecting "all wage purchases, whether *bona fide* or not, to the small loan law." (*Id.*)

Although there are no cases interpreting Section 22335, California courts have interpreted similar provisions in other laws liberally to effectuate their purposes. (*See Lande v. Jurisich* (1943) 59 Cal.App.2d 613; *Reynolds v. Reynolds* (1936) 14 Cal.App.2d 481, 484.) For example, in *Lande v. Jurisich*, a court considered whether an agreement that placed a "lien upon wages" was subject to a Labor Code provision covering an "assignment of, or order for, wages or salary." (59 Cal.App.2d 613, 616 (citations omitted).) The court acknowledged that a lien upon wages is not an assignment, because one may enforce an assignment immediately and can only enforce a lien in court, but said there was "little difference… on the future condition of the worker and his family" between the two collection mechanisms. (*Id.* at 617.) The court stated that in enacting the Labor Code provision "the Legislature obviously sought to reach every form of instrument which would result in the impounding of a wage earner's wages before he received them." (*Id.* at 619.) In this context, the court concluded that the lien upon wages was subject to the Labor Code provision because the provision applied to "orders" for wages, and a lien upon wages could ultimately result in an order from the court. (*Id.*) The court reached this determination notwithstanding that the contract provided for a "lien" upon wages and not an "order" for wages.

Based upon the legislative history and the interpretation of an analogous law discussed above, Section 22335 should be interpreted broadly to cover any transaction where a worker grants someone an interest, or otherwise agrees to allow a someone else to receive, their earned or unearned wages. The provision brings within the CFL's scope any contract that effectively operates as a sale or assignment of a recipient's unpaid wages, whether or not that sale or assignment is bona fide.

<u>The CFL Does Not Apply to FlexWage's Product</u>

FlexWage's EWA product is not a loan subject to the CFL. In reaching this conclusion, the DFPI relies upon two necessary elements: (1) employers, *not Flexwage*, provide EWA funds that do not exceed what they already owe recipients; and (2) the fees charged do not suggest that the product evades California's lending laws.

With respect to the first element, it is important to note both that the funds come from the employer, not FlexWage, and those funds do not exceed the amount the employer owes a recipient. Thus, it appears that the payment that FlexWage facilitates simply satisfies part of an existing financial obligation from the employer to the employee. Given that the payments that

the employer makes satisfy part of the employer's existing obligation, it does not appear that the employer is providing the recipient with money "for temporary use." (Black's Law Dictionary (11th ed. 2019).) Similarly, FlexWage's product does not appear to involve an arrangement in which the recipient agrees to a repay their employer the amount received. (Civil Code § 1912, *Milana v. Credit Discount Co.* (1945) 27 Cal.2d 335, 339.) Rather, the recipient has simply agreed to accept a portion of their earned wages from their employer earlier than their regularly scheduled payday.

For the above analysis, it is essential both that the employer, not FlexWage, is the source of the funds, and that the funds available are limited to what the employer owes the recipient. 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.)

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. Because a FlexWage EWA is funded by the employer, not Flexwage, and the employer only pays an employee wages that the employee has already earned, it appears that the employer is simply paying wages earlier than the employee's payday.

With respect to the second element, a FlexWage EWA's cost also counsels against application of the CFL. Although cost typically does not factor into the assessment of whether a particular transaction is a loan, the DFPI considers in this case whether FlexWage's product suggests evasion of the credit cost protections of the CFL. (See *Milana v. Credit Discount Co.* (1945) 27 Cal.2d 335, 339 (a product may be a loan "with or without" a charge in addition to the principal advanced); Fin. Code, § 90009, subd. (f)(3).[2])

The cost of a FlexWage EWA does not suggest evasion of the CFL. As described above, the typical FlexWage user receives $184 for each advance, and the maximum fee for each advance is $5. This fee is substantially lower than the 5 percent administrative fee that a licensee could charge under Financial Code section 22305, even without charging additional periodic interest permitted under other parts of the CFL. That the average transaction's charges fall below the

[2] "To clarify the applicability of state credit cost limitations, including rate and fee caps, to the offering and provision of consumer financial products and services by covered persons, the department may interpret and implement, including to prevent evasion thereof, all California credit cost provisions as to their applicability to consumer financial products and services." (Fin. Code, § 90009, subd. (f)(3).)

CFL's permissible fee structure is not a sufficient condition for a finding that a product is exempt from the CFL,[3] but it is necessary for the DFPI's ultimate conclusion in this case, made in light of the additional analysis set forth above. If FlexWage's per-advance fees or its fee caps were higher, or FlexWage accepted higher optional payments,[4] this could suggest an attempt to evade the CFL's credit cost protections and therefore counsel in favor of application of the CFL and its attendant rate caps. (Fin. Code, § 90009, subd. (f)(3).)[5]

CDDTL Scope

The CDDTL provides that a person may not make or arrange a deferred deposit transaction without first obtaining a license from the Commissioner. (Fin. Code, § 23005, subd. (a).) A "deferred deposit transaction" (DDT) means a transaction in which "a person defers depositing a customer's personal check until a specific date, pursuant to a written agreement for a fee or other charge." (Fin. Code, § 23001, subd. (a).)

Although this definition is not particularly illustrative, CDDTL licensees typically offer cash advances to consumers in exchange for a fee. On a date specified in the contract, the licensee attempts to collect the amount advanced to the consumer plus the agreed-upon fee. In practice, a licensee who collects the maximum permissible fee under the CDDTL will advance $255 dollars to the consumer and collect $300 on a date up to 31 days from the date of the advance, resulting in a fee of $45. (Fin. Code, §§ 23035, subd. (a); 23036, subd. (a)). The maximum fee on a DDT is approximately 17.6 percent of the amount advanced.

The CDDTL Does Not Apply to FlexWage's Product

FlexWage's EWA is not a DDT under the CDDTL for some of same reasons it is not a loan subject to the CFL. In a DDT, a financing provider advances funds and attempts to recoup those funds, plus a fee or charge, on a future date. (*Id.*) Here, the source of the funding, the limit on funding amount, and the limit on fees counsel against application of the CDDTL. Because the employer, not FlexWage, provides funds, and FlexWage limits the amount funded to money the employee

[3] If that were the case, all CFL-compliant transactions would not require a CFL license.
[4] The CFL defines a "charge" subject to its credit cost protections as any cost "received by a licensee" in connection with a loan. (Fin. Code, § 22200.) As such, the DFPI would consider whether optional payments, such as tips or gratuities, result in payments that exceed the CFL credit cost protections when assessing whether a transaction is structured to evade the CFL.
[5] It is also relevant that FlexWage does not attempt to sell any other products or services to employees, either by pairing these products with the FlexWage EWA product for an additional fee or offering a traditional credit product to employees after they have received a FlexWage EWA. Depending upon the circumstances, such arrangements could indicate an attempt to evade the CFL's credit cost protections.

has earned, the transaction appears to be a payment of an existing obligation by the employer rather than an advance of funds that creates an obligation for the employee.[6]

The FlexWage EWA fee structure also counsels against application of the CDDTL. As discussed above, the maximum fee on a DDT is approximately 17.6 percent of the amount advanced. FlexWage has represented that the average FlexWage EWA is $184 and the maximum fee for a single advance is $5, or 2.7 percent of the average amount advanced. This fee is well below the fee threshold permitted under the CDDTL. The DFPI understands that it is possible for a recipient to incur a $5 fee for a lower payment amount, and that this could result in a fee exceeding 2.7% of the amount advanced. Nonetheless, it does not appear that, based on actual use of FlexWage EWAs, that FlexWage or its employer partners use the product to evade the CDDTL's credit cost limitations. (Fin. Code, § 90009, subd. (f)(3).)

Conclusion

Based upon the analysis above, the DFPI concludes that FlexWage does not originate or facilitate loans subject to the CFL or DDTs subject to the CDDTL.[7] For this reason, neither FlexWage nor its employer partners are subject to the CFL or CDDTL's licensing requirements when offering the product described above. In issuing this letter, the DFPI expresses no opinion as to whether FlexWage's EWA product, or any other EWA product, complies with the California Labor Code.

This specific ruling is issued by the Commissioner of Financial Protection and Innovation pursuant to Financial Code sections 22150 and 23015. It is applicable to the specific factual situation identified in the request for ruling and may not be relied upon in connection with any other factual situation. Any changes in the facts or circumstances, as we understand them, could lead to a different conclusion.

[6] As with the DFPI's analysis relating to the CFL, it is essential for the DFPI's analysis under the CDDTL that the employer, not FlexWage, is the source of the funds, and the funds available are limited to what the employer owes the recipient.

[7] In reaching these conclusions, the DFPI does not rely upon FlexWage's representation that it does not require employees to agree to repay amounts advanced and has no recourse against an employee if the employee receives more than what they have earned. The DFPI finds nothing in the language of Section 22335 to suggest that it applies only to wage sales or assignments that accompany an agreement by the employee to take on a fixed irrevocable personal obligation to repay the amount advanced. The legislative history and legal interpretations discussed above suggest that Section 22335 applies whenever the financing provider's expectation in making advances is to recoup amounts advanced through receipt of an employee's wages. It is also immaterial whether collection occurs by agreement with a consumer's employer, deductions from a consumer's account, or any other arrangement that effectively results in the provider receiving payment of the employee's wages. Similarly, the definition of a DDT does not appear to exclude transactions where a provider has limited recourse against a recipient. (Fin. Code, § 23001, subd. (a).)

If you have any questions, please feel free to contact me at (415) 972-8570 or charles.carriere@dfpi.ca.gov

Sincerely,

Clothilde V. Hewlett
Commissioner
Department of Financial Protection and Innovation

By

Charles Carriere
_____
Charles Carriere
Senior Counsel