

SESSION OF 2023

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2105

As Further Amended by House Committee on
Financial Institutions and Pensions

Brief*

HB 2105, as amended, would create the Kansas Earned Wage Access Services Act (Act) and authorize the Office of the State Bank Commissioner to regulate earned wage access services providers. The bill would establish registration criteria, including annual reporting and business record requirements, as well as assign powers and duties to the State Bank Commissioner (Commissioner), including examination and enforcement, to ensure compliance with the Act. [Note: “Earned Wage Access” is often abbreviated as “EWA.”]

Designation and Definitions (Sections 1-2)

The bill would designate the sections of the bill as the Kansas Earned Wage Access Services Act.

Definitions

The bill would create several definitions for terminology used in the Act. Among the definitions established in the bill:

- “Consumer” would mean an individual who is a resident of the state. (Under the bill, a provider may use the mailing address provided by a consumer to determine a consumer’s residency.);

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- “Earned wage access services” would mean the business of providing consumer directed wage access services or employer-integrated wage access services;
 - “Consumer directed wage access services” would mean the business of delivering proceeds to a consumer prior to the date on which an obligor is obligated to pay salary, wages, compensation, or other income to such consumer based on the consumer’s representations and the provider’s reasonable determination of the consumer’s earned but unpaid income;
 - “Employer-integrated wage access services” would mean the business of delivering proceeds to a consumer prior to the date on which an obligor is obligated to pay salary, wages, compensation, or other income to such consumer, when the provider has verified the earned but unpaid income of the consumer through time and attendance or earnings data for the relevant pay period, using information provided by an obligor or a service provider of an obligor;
- “Obligor” would mean an employer or other person who is contractually or legally obligated to pay a consumer earned but unpaid income on an hourly, project-based, piecework, or other basis, including where the consumer is acting as an independent contractor;
 - “Obligor” would not include a service provider of an obligor or another third party that has an obligation to make any payment to a consumer based solely on the consumer’s agency relationship with the obligor;

- “Provider” would mean a person who is in the business of offering earned wage access services to consumers.

The bill would also create definitions for the terms act, commissioner, earned but unpaid income, mandatory payment, non-mandatory payment, nonrecourse, officer, outstanding proceeds, owner, person, proceeds, and registrant.

Registration for Persons Engaging in Earned Wage Access Services Business (Section 3)

The bill would require persons engaging in or willing to engage in any earned wage access services business with a consumer to register with the Commissioner. Such persons would be required to submit a registration application on forms prescribed and provided by the Commissioner. The application would be required to include:

- The applicant’s name, business address, telephone number, and if any, website address;
- The name and address of each owner, officer, director, member, or partner of the applicant;
- A description of the ownership interest of any officer, director, member, agent, or employee of the applicant in any affiliate or subsidiary of the applicant or any consumer relating to the applicant’s earned wage access services business; and
- Any other information the Commissioner may deem necessary to evaluate the financial responsibility, financial condition, character, qualifications, and fitness of the applicant.

Approval and Issuance of Registration

The bill would also require the Commissioner to approve an application and issue a nontransferrable and nonassignable registration to the applicant once the Commissioner receives the complete application and application fee and determines the financial responsibility, financial condition, character, qualifications, and fitness warrants a belief that the applicant's business will be conducted competently, honestly, fairly, and in accordance with applicable state and federal laws.

Registration Expiration; Renewal; Failure to Issue

The bill would provide the earned wage access services registration would expire on December 31 each year. A registration would be renewed by the filing of a complete renewal application with the Commissioner at least 30 calendar days prior to the registration's expiration. The renewal application would be required to contain all the information the Commissioner requires to determine the existence and effect of any material change from the information contained in the applicant's original application, annual reports, or prior renewal applications. A nonrefundable renewal fee would also be charged. The amount of such fee would be established by rules and regulations adopted by the Commissioner.

The bill would further provide, if the Commissioner fails to issue a registration within 60 calendar days after a filed application is deemed complete, the applicant is permitted to make written request for a hearing. Upon receipt of this request, the Commissioner would be required to conduct a hearing in accordance with the Kansas Administrative Procedure Act (KAPA).

***Surety Requirement on Applicants and Registrants
(Section 4)***

The bill would require each applicant or registrant to file with the Commissioner a surety bond in a form acceptable to the Commissioner. The surety bond would be required to be issued by a surety or insurance company authorized to conduct business in this state, securing the applicant's or registrant's faithful performance of all duties and obligations. The surety bond would be required to:

- Be payable to the Office of the State Bank Commissioner;
- Provide that the bond may not be terminated without 30 calendar days' prior written notice to the Commissioner, that such termination will not affect the surety's liability for violations of the Act occurring prior to the effective date of cancellation, and principal and surety must be and remain liable for a period of two years from the date of any action or inaction of principal that gives rise to a claim under the bond;
- Provide that the bond shall not expire for two years after the date of surrender, revocation, or expiration of the applicant's or registrant's registration, whichever occurs first;
- Be available for the recovery of expenses, fines, and fees levied by the Commissioner and payment of losses or damages that are determined by the Commissioner to have been incurred by any consumer as a result of the applicant's or registrant's failure to comply with requirements of the Act; and
- Be in the amount of \$100,000.

***Registration Requirements on Registered Providers
(Section 5)***

The bill would subject providers registered to the following requirements:

- The registrant is required to provide all proceeds on a non-recourse basis and non-mandatory payments would be treated as non-recourse payment obligations; and
- Before providing a consumer with earned wage access services, the registrant would be required to provide a consumer with written paper or electronic document, which meet reporting and disclosure requirements established by the bill, including terms and conditions of earned wage access services, the Commissioner's jurisdiction, treatment of payments, changes to terms and conditions, and the discontinuation of services without financial penalty.

Prohibitions and Restrictions on Registrants (Section 6)

The bill would impose certain restrictions and prohibitions on persons registered under this act, including:

- Imposing a mandatory payment on a consumer that directly relates to the provision of earned wage access services;
- Charging a late fee, interest, or any other penalty or charge for failure to repay outstanding proceeds;
- Soliciting a consumer to make a non-mandatory payment after informing the consumer that the consumer's request for proceeds was accepted; and

- Reporting a consumer's payment or failed repayment of outstanding proceeds to a consumer credit reporting agency or debt collector.

Non-mandatory Payments (Section 7)

The bill would provide that non-mandatory payments paid by a consumer to a registrant would not be considered finance charges.

Annual Reporting Requirement; Confidential Information; Maintenance of Business Records (Sections 8-9)

The bill would require registrants to file an annual report, on or before April 1 of each year, with the Commissioner relating to earned wage access services provided by the registrant in Kansas during the proceeding year.

Confidential Information; Legislative Review; Written Reports

The bill would provide the information contained in the registrant's annual report is confidential and not subject to the Kansas Open Records Act [KORA] (KSA 45-215 *et seq.*). This provision would expire on July 1, 2028, unless the Legislature reviews and acts to continue such provision under a requirement in KORA.

The bill would require registrants to file a written report with the Commissioner within 15 days of the occurrence of one of the following events detailing the event and its expected impact on the registrant's business:

- Filing for bankruptcy or reorganization by the registrant;
- Institution of a revocation, suspension, or other proceeding against the registrant by a

governmental authority that is related to the registrant's earned wage access services business in any state;

- Addition or loss of any owner, officer, partner, or director of the registrant;
- A felony conviction of the registrant or the registrant's owners, officer, principals, directors, or partners;
- A change in the registrant's name or legal entity status; or
- The closing or relocation of the registrant's principal place of business.

Failure to Report

The bill would provide that the failure to make any report to the Commissioner may subject the registrant to a late penalty of \$100 for each day such report is overdue.

Business Records

The bill would require registrants to maintain and preserve complete and adequate business records, including a general ledger containing all assets, liabilities, capital, income, and expense accounts for a period of three years. Additional recordkeeping requirements would include:

- Maintaining and preserving complete and adequate records of each earned wage access services contract during the contract's term and for a period of five years from the date on which the registrant last provides proceeds to the consumer; and
- Providing records, if the registrant's records are located outside Kansas, to the Commissioner within three calendar days or, at the

Commissioner's discretion, pay reasonable and necessary expenses for the Commissioner to examine them at the place where such records are maintained. The bill would also permit records to be submitted electronically in a manner prescribed by the Commissioner.

***Registration Denial, Suspension, or Revocation;
Opportunity for Hearing (Section 10)***

The bill would establish criteria in which the Commissioner may deny, suspend, revoke, or refuse to renew a registration if the Commissioner finds, after notice and opportunity for a hearing in accordance with the provisions of KAPA. Among the criteria, the Commissioner could take action if or when:

- The applicant or registrant has repeatedly or willfully violated any provision, any adopted rules and regulations, or any order lawfully issued by the Commissioner pursuant to the Act;
- The applicant or registrant has failed to file and maintain the required surety;
- The applicant or registrant is insolvent;
- The applicant, registrant, or an employee of the applicant or registrant has been the subject of any disciplinary action by the Commissioner or any other state or federal regulatory agency; or
- Facts or conditions exist that would have justified the denial of the registration or renewal had such facts or conditions existed or been known to exist at the time the application for registration or renewal was made.

***Administration of the Act; Powers Granted to
Commissioner (Section 11)***

The bill would authorize the Commissioner to administer the provisions of the Act and would authorize the Commissioner to exercise powers as designated, including:

- Adopting, amending, and revocation of rules and regulations as necessary to carry out the intent of the Act;
- Making any investigation and examination of the operations, books, and records of an earned wage access services provider as the Commissioner deems necessary;
- Establishing, charging, and collecting fees from applicants or registrants for reasonable costs of investigation, examination, and administration of the Act, in such amounts as the Commissioner may determine sufficient to meet the agency's budget requirements;
- Exchanging information regarding the administration of this act with any federal agency or any state that regulates the applicant or registrant; and
- Requiring fingerprinting of any officer, partner, or director of an applicant or registrant. The bill would further specify the Commissioner could not authorize receipt from a state and national criminal history record check from a private entity unless the Kansas Bureau of Investigation or the Federal Bureau of Investigation is unable to supply the criminal history record check. Such checks would be considered confidential and subject to KORA and its disclosure and legislative review provisions.

The bill would further specify examination reports and correspondence regarding such reports would be considered confidential and not subject to disclosure provisions of KORA. The Commissioner would be permitted to release examination reports and correspondence in connection with a disciplinary proceeding conducted by the Commissioner, a liquidation proceeding, or a criminal investigation of a proceeding. The bill would further specify actions the Commissioner would be permitted to take in order to conduct examinations, investigations, and proceedings under the Act and also provide for confidential information contained in informal agreements.

Violations of the Act; Enforcement Actions (Section 12)

The bill would also prescribe enforcement actions the Commissioner could take in the event the Commissioner determines, after notice and opportunity for a hearing pursuant to KAPA, that a person has engaged, is engaging in, or is about to engage in an act or practice constituting a violation of any provision of this act, adopted rules and regulations, or issued order. These actions would include directing:

- The person cease and desist from the unlawful act or practice;
- The person pay a fine not to exceed \$5,000 per incident for the unlawful act or practice and further, in the instance such violation is committed against elder or disabled persons (as defined in consumer protection law), the Commissioner may impose an additional penalty not to exceed \$5,000 for each violation in addition to any other civil penalty provided by law;
 - The bill would specify that any collected fines and penalties associated with the above violations must be designated for use by the Commissioner for consumer education;

- The person pay restitution for any loss arising from the violation or requiring the person to disgorge any profits arriving from such violation;
- The person take such action as in the judgment of the Commissioner that will carry out the purposes of this act; and
- The person be barred from subsequently applying for registration under this act;
 - The bill would further specify actions that could require issuance of an emergency cease and desist order and notification requirements, including an opportunity for a hearing.

***Failure to Obey a Subpoena; Permissible Actions
(Section 13)***

The bill would also establish requirements for cases of failure or refusal to obey a subpoena and would permit a court to issue an order requiring a person to appear before the Commissioner. A failure to appear could be punished by the court as contempt of court. The bill would further specify that no person could be excused from attending, testifying, or producing any document or record before the Commissioner or in obedience to the subpoena or any proceeding initiated by the Commissioner.

***Criminal Penalties; Intentional Violations of the Act;
Actions in District Court (Sections 14-15)***

The bill would state it is unlawful for any person to violate the provisions of, any rules or regulations adopted under, or any order issued under the Act. A conviction for an intentional violation would be a Class A nonperson misdemeanor. A second or subsequent conviction would be a severity level 7 nonperson felony.

The bill would permit the Commissioner, Attorney General, or a county or district attorney to bring an action in a district court to enjoin any violation of this act or rules and regulations adopted thereunder.

Fees Collected by the Commissioner (Section 16)

The bill would provide that all fees collected by the Commissioner would be subject to the provisions requiring 10.0 percent of fees collected be deposited to the credit of the State General Fund (SGF).

Background

The bill was introduced by the House Committee on Financial Institutions and Pensions at the request of EarnIn.

House Committee on Financial Institutions and Pensions

In the House Committee hearing, a representative of the EarnIn provided **proponent** testimony, describing its business as an Earned Wage Access (EWA) provider, which gives customers access to their earnings as they are earned and before they are paid. The conferee stated access to “pay-on-demand” reduces financial anxiety by allowing individuals to spend, transfer, and save their money as they choose. The conferee outlined EarnIn’s presence in Kansas (more than 22,000 unique users) and noted EWA is currently unregulated in the state and its business model does not fit easily into existing regulatory frameworks. The conferee noted the bill provides the framework that protects consumers and gives businesses certainty to invest and grow, regardless of EWA business model.

Representatives of Payactiv, an EWA provider, and Kansans for Payday Loan Reform provided neutral testimony. The Payactiv representative encouraged amendments to the bill to split regulation of the two different EWA models – the

employer integrated earned wage access model and the direct-to-consumer advance model, given the differences in how these models operate. Written-only neutral testimony submitted by the Office of the State Bank Commissioner (OSBC) noted concerns with the bill, as introduced, and support for an amendment that was to be offered by the proponent.

Opponent testimony provided by a representative of Daily Pay, Inc., (employer-integrated EWA provider) who noted Kansas would be the first in the country, if the bill is enacted, to have an earned wage access law. The conferee shared concerns about the need to include the entire industry within the scope of regulation and addressed changes needed in the bill, as introduced, including the licensing criteria, different standards to govern the various EWA models, and clear disclosure requirements for all fees.

On February 8, 2023, the House Committee adopted several amendments incorporating recommendations from the OSBC, in consultation with other parties to the bill. The amendments incorporate the business models associated with the provisions of EWA services. The amendments also:

- Add and clarify existing defined terms;
- Update the registration expiration date;
- Increase surety requirement from \$25,000 to \$100,000;
- Remove language applicable to finance charges and specific lending act requirements;
- Clarify information required to be contained in a registrant's written report following certain reportable events and reduce the filing requirement timeline from 30 days to 15 days;

- Modify the powers assigned to the Commissioner to clarify an access requirement and add additional requirements regarding information obtained from fingerprinting and criminal history record checks; and
- Increase, from \$2,000 to \$5,000, the per incident fine maximum on persons committing an unlawful act or practice and the fine maximum associated with violations committee against elders or disabled persons (as defined in consumer protection law). Further, any fines collected for either of these violations would be required to be designated for the purpose of consumer education.

On February 23, 2023, the bill, as amended by the House Committee, was withdrawn from the House Calendar and referred to the House Committee on Appropriations. On March 1, 2023, the bill was withdrawn from the House Committee on Appropriations and rereferred to the House Committee on Financial Institutions and Pensions.

On March 13, 2023, the House Committee recommended further amendments to the bill. The amendments clarify the term “commissioner” to mean only the State Bank Commissioner, add a disclosure requirement on the registrant regarding changes to the terms and conditions of the earned wage access services, remove language pertaining to compliance with National Automated Clearinghouse Association rules, modify participant cancellation provisions, remove disclosure requirements relating to nonpublic personal information, and remove language regarding applicability to the Uniform Consumer Credit Code.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the OSBC indicates it

would require an additional 1.0 FTE position for an Examiner, at a cost of \$70,200 from the Bank Commissioner Fee Fund for salaries and wages and an additional \$1,200 for information technology licenses and other operating expenses for FY 2024. Any fees collected under the bill would be remitted to the State Treasury with 10.0 percent credited to the SGF, and the remaining balance would be credited to the Bank Commissioner Fee Fund. However, the OSBC cannot estimate the amount of revenues the bill could generate.

The Kansas Sentencing Commission estimates enactment of the bill could have an effect on prison admissions, bed space, and workload; however, it anticipates any fiscal effect to be negligible. The Kansas Department of Corrections indicates the bill would have no fiscal effect. The Office of Attorney General indicates that costs associated with any increase in cases or complaints as a result of the bill's enactment would be absorbed within existing resources. The Kansas Judicial Branch indicates the bill would increase the number of cases filed in district courts because the bill would allow court actions to be filed to enforce the Act and the bill would create a new crime. The bill could result in the collection of additional docket fees, fines, and supervision fees, most of which would be deposited in the SGF.

The Kansas Association of Counties indicates that the fiscal effect of the bill would be negligible unless the number of violations would require additional court and staff time than could be absorbed within counties' current resources.

Any fiscal effect associated with the bill is not reflected in *The FY 2024 Governor's Budget Report*.

Financial services; Kansas Earned Wage Access Services Act; earned wage access services; EWA; State Bank Commissioner; registration; fees; rules and regulations