In March, U.S. Department of Treasury issued its annual *General Explanations of the Administration’s Revenue Proposals*, commonly known as the “Green Book.” Among other revenue proposals, the Treasury addressed the treatment of on-demand pay arrangements or earned wage access (EWA) programs, which have risen in popularity in recent years (previously discussed in our *Labor and Employment Blog*). EWA programs generally allow employees to access accrued wages before the end of their regular pay cycle.

While state and federal financial regulators have offered inconsistent guidance as to whether EWAs should be considered extensions of credit requiring standard consumer disclosures and other protections, a separate concern arises under current
tax laws. Specifically, employees receiving EWA advances may be deemed to be in “constructive receipt” of their wages, which creates payroll withholding and depositing burdens for employers to re-configure payroll systems to accommodate such withholding and depositing more frequently than the typical bi-weekly or monthly payroll cycle. The Treasury Department indicates in its proposal that EWA providers appear to have largely ignored the “constructive receipt” obligations to date.

To address the issue, the Treasury proposed the following amendments to the Internal Revenue Code:

- Provide a definition of on-demand pay arrangements;
- Clarify that on-demand pay arrangements are not loans;
- Provide that on-demand pay arrangements be treated as weekly payroll periods, even if employees have access to wages during the week; and
- Provide special deposit rules for on-demand pay arrangements.

According to the Treasury, “[l]egislation addressing the tax treatment of on-demand pay would provide certainty and uniformity for taxpayers and would establish a uniform and administrable system for the IRS.” These amendments would be effective for calendar years and quarters beginning after December 31, 2022.

**Putting It Into Practice:** While the proposal is intended to bring certainty to EWA arrangements, amending the tax law to clarify that on-demand pay arrangements are not loans is significant because, as noted above, the CFPB’s guidance to-date has been less clear when defining EWA products as extensions of credit. In addition, state regulators have weighed in and noted other legal considerations, such as state laws that deem advance of wages to be treated as loans (see here).

Apart from the appropriate tax and consumer credit considerations, EWA programs implicate multiple wage-hour considerations for employers utilizing EWA arrangements, including whether EWA programs:

- Represents an unlawful assignment of wages;
- Imposes transaction fees or subscription costs that operate as barriers to accessing earned wages;
- Transmits the earned wages to a qualifying account that discharges the employer’s obligations to pay wages; and/or
- Constitutes an unauthorized deduction.

As each EWA program typically utilizes a different framework and approach for the EWA offering, each program must be evaluated and assessed individually to appreciate the specific risks that may be presented by the EWA program. Further, employers that wish to offer this program to employees, or providers of EWA programs, should consult with experienced employment counsel prior to rolling out this payroll benefit so as to best position the program for success.