Legal Ramifications of Paying Employees with Cryptocurrency

Blockchain and the Law Blog on **December 1, 2017**

As cryptocurrencies surge in value and enter mainstream consciousness, an increasing number of employers may consider compensating their employees with bitcoin, ether, or other cryptocurrencies. While a cryptocurrency compensation scheme may proliferate everyday usage of these currencies and attract tech-savvy labor talent to organizations, it may also put an employer at risk of wage and hour violations, and implicate additional regulatory regimes such as the securities laws. Although lawsuits on such "crypto-compensation" issues have yet to materialize, employers should stay ahead of the curve by protecting themselves against these potential pitfalls:

1) Failing to Pay Employees with Cash or U.S. Currency

Employers may violate both federal law and state law by compensating employees with a non-fiat currency.

The Fair Labor Standards Act ("FLSA") is a federal labor law that governs minimum wage, overtime pay, and other wage-related issues for both the private and public sector. The FLSA "require[s] payments of the prescribed wages, including [minimum wage and] overtime compensation, in cash or negotiable instrument payable at par." 29 CFR § 531.27(a).   The U.S. Department of Labor ("DOL") has allowed employers to pay with foreign currencies to comply with the FLSA, as long as the amounts paid, when converted into U.S. currency, meet the relevant FLSA thresholds. It remains unclear whether the DOL or the courts will deem cryptocurrencies to be a lawful method of payment of wages under the FLSA.

Of additional concern are state statutes that require wages to be paid in U.S. currency. By way of example, Maryland's Wage Payment and Collection Law dictates that the form of payment for wages must be "in United States currency; or by a check that, on demand, is convertible at face value into United States currency." Md. Code Ann., Lab. & Empl. § 3-502(c). Similarly, Pennsylvania's Wage Payment and Collection Law requires that wages "shall be paid in lawful money of the United States or check." 43 P.S. § 260.3(a). Many other states have similar "cash payment of wages" laws. Employers that pay wages in cryptocurrencies in such jurisdictions run the risk of violating these state laws.

Some states also have laws or rules requiring employees to access their wages readily and without costs, fees, or encumbrances. This has been a recurring issue with respect to the movement to allow payroll through debit cards; the fees associated with utilizing such cards, and potential limitations on the employees' access to the funds on such cards, have created legal barriers to implementing such a payroll system in certain states. Unless employees have ready access to a market that will allow them to convert their cryptocurrency pay into cash without fees or encumbrances, the more likely the pay system will be viewed as problematic by a number of states.

2) Failing to Adhere to Minimum Wage and Overtime Requirements

Cryptocurrencies are prone to dramatic fluctuations in price. For example, this past May, bitcoin lost almost 30% of its value in two days, and on November 27, the price of bitcoin rose more than $1,000 in one day. These fluctuations in value may make it difficult to stay compliant with minimum wage and overtime laws.

Consider a scenario where an employee is set to receive an amount of bitcoin that exceeds the minimum wage and overtime requirements, but the price of bitcoin spirals downwards while the employer processes its payroll. If the value of the employee's bitcoin compensation ultimately falls below the minimum wage and overtime thresholds, can the employer be liable for violating these provisions?

The DOL has taken the position that, when analyzing whether an employee who is compensated in both foreign currency and U.S. currency has received the minimum salary for exemption from the overtime requirements, the foreign currency compensation should be valued "using the exchange rate current at the time of payment." DOL Op. Ltr. FLSA2006-17 (May 23, 2006). It is safe to assume that the DOL—and likely the courts—would apply the same principles when analyzing minimum wage, overtime, and other wage payment issues in the context of cryptocurrencies. At a minimum, therefore, an employer that pays its employees in cryptocurrencies (assuming that federal and state law would permit that in the first place) would have to ensure that the value of those payments—at the time they are made—satisfies all wage and hour obligations. The potential instability of, or fluctuations in, the value of cryptocurrencies would likely make the DOL and state labor agencies quite skeptical about their effectiveness as a proper method of pay.

3) Paying Employees with Securities

The Securities and Exchange Commission ("SEC") is still wrestling to determine which cryptocurrencies constitute securities. This is an issue that should be closely monitored by any employer considering paying employees in bitcoin, ether, or any other cryptocurrency. If certain cryptocurrencies are deemed to be securities, employers using them as a component in their compensation scheme may have to comply with a host of state and federal securities laws in addition to the wage and hour laws.

Potential Solutions

Adhering to state statutes that require payment in U.S. currency would require some careful maneuvering. While potentially impractical, employers may want to work with a bitcoin payment processing company to formulate a system where employees are paid in U.S. dollars and employees are able to immediately convert those dollars to bitcoin.

In order to comply with minimum wage and overtime laws, employers could protect themselves by paying a combination of U.S. currency and cryptocurrency. The amount of U.S. currency paid to employees should be above the relevant minimum wage and overtime thresholds to ensure full compliance; the remainder of the compensation would come from the cryptocurrency. Employers can also comply by committing to the aforementioned solution of paying employees in dollars and immediately converting those dollars to bitcoin.

Additionally, because the legal classification of cryptocurrencies remains ambiguous, employers would do well to remain cognizant that crypto-compensation may implicate regulatory regimes reaching beyond the immediate employment law context, of which the securities laws are just one example.

View Original

Related Professionals

- **Allan S. Bloom**
  Partner