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Can We Pay Our Employees in Cryptocurrency? A 2022 Update.

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Shortly after his election in November 2021, New York City Mayor Eric Adams announced that he would accept his first three paychecks in Bitcoin. On January 20, 2022, the day before his first paycheck from the City was scheduled to arrive, Mayor Adams confirmed that his salary will be automatically converted into Bitcoin and Ethereum via Coinbase—a cryptocurrency exchange—prior to the funds being available to him.

As cryptocurrencies continue to make their way into mainstream consciousness, individuals—even beyond those in the tech sector—have been interested in receiving their pay (or a part of it) in cryptocurrency. This has prompted an increasing number of employers to consider, compensating their employees with Bitcoin, Ethereum, or other cryptocurrencies. While a cryptocurrency compensation scheme may help spark everyday usage of these currencies and attract tech-savvy talent to a company or organization, it may also place the employer at risk of wage and hour violations, and implicate additional regulatory regimes such as federal 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.

Failing to Pay Employees in U.S. Currency or its Equivalent

Employers may violate both federal and state law by paying their employees with a non-fiat currency. The federal Fair Labor Standards Act ("FLSA")—which governs minimum wage, overtime pay, and other wage-related issues for both the private and public sectors—"require[s] payments of the prescribed wages, including [minimum wage and] overtime compensation, in cash or negotiable instrument payable at par." There are specific and limited exceptions to the "cash or negotiable instrument" rule—for example, Section 3(m) of the FLSA allows an employer to count the value of food, housing, or other facilities provided to overtime-eligible employees towards wages under certain circumstances. "Other facilities" must "be something like board or lodging," and include general merchandise furnished at company stores and commissaries, fuel, utilities for personal use, and certain transportation between home and work. Most "exempt" employees—those who are not entitled to overtime pay, including many executives, senior administrative employees, and professionals—are required to be paid a minimum weekly salary "exclusive of board, lodging or other facilities." The rule notes that the minimum salary for exemption must be "free and clear" and "independent of any claimed credit for non-cash items of value that an employer may provide to an employee."

The U.S. Department of Labor ("DOL")—the federal agency that is responsible for FLSA enforcement—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 using the exchange rate current at the time of payment (*i.e.*, the rate generally available to an individual person in the vicinity where the employee is working), meet the relevant FLSA thresholds. However, it remains unclear whether the DOL or the courts will deem cryptocurrencies to be comparable to foreign currency as a lawful method of payment of wages under the FLSA, regardless of whether the payment is in a cryptocurrency that is relatively easy to convert to fiat currency (*e.g.*, Bitcoin , Ethereum) or another lesser-traded digital coin.

Notably, the FLSA's "cash or negotiable instrument" requirements apply only to those portions of compensation that are required under the statute—*i.e.*, minimum wage and overtime pay for non-exempt employees, and a minimum weekly salary for most exempt employees. If an employer decides to pay its employees amounts in addition to what the FLSA requires—*e.g.*, bonus or other incentive compensation—the "cash or negotiable instrument" rule would not apply, and such non-required compensation could be paid in cryptocurrency or through any other means.

State and Local Wage Laws

Employers must also be mindful of state or local laws that impose additional restrictions on their pay practices, and several states currently require wages to be paid in U.S. currency. For example, New York allows wages to be paid in cash, by check, via direct deposit, or by means of a payroll debit card. While New York's rule doesn't expressly prohibit other methods of pay, there's no indication that the New York State Department of Labor or courts will condone the practice. California law prohibits an employer from paying wages by means of "[a]ny order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument," or through "[a]ny scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money." Without clear guidance from the state, it's unclear whether payment in cryptocurrency would run afoul of these requirements.

Certain states' wage payment laws are more directly proscriptive. For example, Maryland law requires employees to be paid "in United States currency; or … by a check that, on demand, is convertible at face value into United States currency." Pennsylvania law states that "wages shall be paid in lawful money of the United States or check." Under Colorado law, "[n]o employer … shall issue, in payment of … wages due an employee, any order, check, draft, note, memorandum, or other acknowledgment of indebtedness unless the same is negotiable and payable upon demand without discount in cash at a bank organized and existing under the general banking laws of the state of Colorado or the United States or at some established place of business in the state."

A number of 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. Generally speaking, 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.

Failing to Adhere to Minimum Wage and Overtime Requirements

Cryptocurrencies are prone to dramatic fluctuations in price. Even if payment of compensation in cryptocurrency were permissible, the 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 applicable minimum wage, overtime pay, or minimum salary requirements but the price of Bitcoin spirals downwards between the date the employer submits its payroll for processing and the date the employee actually receives payment. If the value of the employee's Bitcoin compensation ultimately falls below the required pay thresholds, the employer is at risk of violating the wage laws. For both overtime-eligible and exempt employees, this can expose the employer to claims for unpaid wages, which can include claims for liquidated damages and attorneys' fees. For executive, administrative, and professional employees who are not paid the minimum salary for exemption, the underpayment can—in certain circumstances—lead to the loss of the exemption not only for the employees themselves, but for employees in the same job classification working for the same managers.

If and when payment of wages in cryptocurrency becomes permissible, it's safe to assume the DOL would apply the same valuation principles to such compensation as it does to payments in foreign currency—*i.e.*, "using the exchange rate current at the time of payment." At a minimum, therefore, an employer that pays its employees in cryptocurrencies 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 likely makes the DOL and state labor agencies quite skeptical about their effectiveness as a proper wage payment method.

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.

To comply with minimum wage, overtime, and minimum salary 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 wage law thresholds to ensure full compliance; the remainder of the compensation would come from the cryptocurrency. Employers that provide any compensation in the form of cryptocurrency should have the recipient employees sign written agreements confirming their assent to the arrangement, specifying which party is responsible for any exchange or broker fees, and informing the employees about and disclaiming employer responsibility for the potential risks that may flow from receiving their pay in cryptocurrency (*e.g.*, tax consequences, volatility risks, lost private keys or passwords, or lack of federal financial protections for deposits held in crypto wallets, such as FDIC protections).

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.

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