

Cryptocurrency As Compensation: Beware Of The Risks

Article By:

Daniel J. Butler

Kevin J. White

A small but growing number of employees are asking for cryptocurrency as a form of compensation. Whether a substitute for wages or as part of an incentive package, offering cryptocurrency as compensation has become a way for some companies to differentiate themselves from others. In a competitive labor market, this desire to provide innovative forms of compensation is understandable. But any company thinking about cryptocurrency needs to be aware of the risks involved, including regulatory uncertainties and market volatility.

Form of Payment – Cash or Negotiable Instrument

The federal Fair Labor Standards Act requires employers to pay minimum and overtime wages in “cash or negotiable instrument payable at par.” This has long been interpreted to include only fiat currencies—monies backed by a governmental authority. As non-fiat currencies, cryptocurrencies therefore fall outside the FLSA’s definition of “cash or negotiable instrument.” As a result, an employer who chooses to pay minimum and/or overtime wages in cryptocurrency may violate the FLSA by failing to pay workers with an accepted form of compensation.

In addition, various state laws make the form of wage payment question even more difficult. For example, Maryland requires payment in United States currency or by check that “on demand is convertible at face value into United States currency.” Pennsylvania requires that wages shall be made in “lawful money of the United States or check.” And California prohibits compensation that is made through “coupon, cards or other thing[s] redeemable...otherwise than in money.” It is largely unclear whether payment in cryptocurrency runs afoul of these state requirements.

Of note, the U.S. Department of Labor (“DOL”) allows employers to satisfy FLSA minimum wage and overtime regulations with foreign currencies as long as the conversion to U.S. dollars meets the required wage thresholds. But neither the DOL nor courts have weighed in on whether certain cryptocurrencies (e.g., Bitcoin) are the equivalent, for FLSA purposes, of a foreign currency.

Volatility Concerns

When compared to the rather stable value of the U.S. dollar, the value of cryptocurrencies is subject

to large fluctuations. Bitcoin, for example, lost nearly 83% of its value in May 2013, approximately 50% of its value in March 2020, and recently lost and then gained 16% of its value in the span of approximately 15 minutes one day in February 2021.

Such volatility can give payroll vendors a nightmare and can, in some instances, lead to the underpayment of wages or violation of minimum wage or overtime requirements under the FLSA.

Tax and Benefits Considerations

Aside from wage and hour issues, the payment of cryptocurrency implicates a host of tax and benefits-related issues. The IRS considers virtual currencies to be “property,” subject to capital gains tax rates. It has also confirmed in guidance materials that any payment to employees in a virtual currency must be reported on a W-2 based upon the value of the currency in U.S. dollars at the time it was delivered to the employee. This means that cryptocurrency wage payments are subject to Federal income tax withholding, Federal Insurance Contributions Act (FICA) tax, and Federal Unemployment Tax Act (FUTA) tax.

For 401k plan fiduciaries, the Department of Labor recently issued [guidance](#) that should serve as a stern warning to any fiduciary looking to invest 401k funds into cryptocurrencies. Specifically, the DOL wrote: “[a]t this early stage in the history of cryptocurrencies, the Department has serious concerns about the prudence of a fiduciary’s decision to expose a 401(k) plan’s participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies.” Given the risks inherent in cryptocurrency speculation, the DOL stated that any fiduciary allowing such investment options “should expect to be questioned [by the DOL] about how they can square their actions with their duties of prudence and loyalty in light of the risks.”

Considerations for Employers

Given the combination of uncertain and untested legal risks, employers should consider limiting cryptocurrency compensation models to payments that do not implicate the FLSA or applicable state wage and hour laws. For example, an employer might provide an exempt employee’s base salary in U.S. dollars and any annual discretionary bonus in cryptocurrency.

Whether investing in cryptocurrencies themselves to pay employees or utilizing a third-party to convert US dollars into cryptocurrency, employers should also stay abreast of the evolving tax and benefits guidance in this area.

Ultimately, the only thing that is clear about cryptocurrency compensation is that any decision to provide such compensation to employees should be made with a careful eye towards the unique wage, tax, and benefits-related issues implicated by these transactions.

Copyright © 2025, Hunton Andrews Kurth LLP. All Rights Reserved.

National Law Review, Volume XII, Number 101

Source URL: <https://natlawreview.com/article/cryptocurrency-compensation-beware-risks>