

Salary Payment in Tokens: German Labour Law Considerations

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Summary

More companies are considering paying their employees in tokens such as Bitcoin. The Japanese GMO group and the German Digitalmagazin t3n, for example, have announced that they plan to pay their employees in Bitcoin. This trend gives rise to the question: Are there restrictions under German employment law that companies must take into account?

In Depth

Setting the Scene: Bitcoin, Tokens & Co.

Tokens are sets of data assigned to a certain user on a distributed ledger based network. A company can create tokens by initial coin offerings (ICOs), or it can purchase tokens in the market and transfer them to its employees. Tokens have different characteristics, but most academic works focus on Bitcoin. This makes it difficult to take all the different token forms into consideration and review the individual peculiarities of each. In order to understand the specific employment law issues and potential problems, it is therefore necessary to give an overview of the different types of tokens, their possible categorisation and the respective ways of creating them.

“Coins” and tokens are often differentiated based on their technical function. Advocates of such differentiation understand coins to be directly attributable to, and having an internal function for, a network, whereas tokens do not serve the network. Following such approach, Bitcoin and Ether would classify as coins, whilst OmiseGo would be deemed a token. This article does not make a distinction between coins and tokens, as it has no impact on the questions discussed.

Not All Tokens Are the Same

Tokens can be divided into different classes depending on their function. Broadly established classes include security tokens, cryptocurrency tokens and utility tokens. Security tokens feature the characteristics of transferable securities under Art. 4 (1) No. 44 Directive 2014/65/EU or, in the United States, the Howey Test. Cryptocurrency tokens are used as means of payment within a network between users, or between a user and the network provider. A utility token typically enables its holder to access a network or a service or product thereon.

While this categorisation seems straightforward in theory, tokens often fall into several of the above-mentioned classes. For the purpose of this article, it is to be assumed that the respective token has the characteristics of only one of these classes.

Tokens can be created in many different ways. For instance, as in the case of Bitcoin, they can be created by the system as a reward for the transaction's validator (in the Bitcoin network, the miner). Another option is creating them within an existing network via smart contract, e.g., in the context of an ICO. First, the tokens are created by the system, then they are distributed, for example, to the purchaser within an ICO. A third option is introducing them when setting up a new network.

The valuation of tokens poses certain difficulties. Because tokens do not have a "cryptocurrency exchange price" at the time they are created, it is difficult to assess their value at that point in time. One way of valuating the tokens at this point in time is to focus on the issuing price. However, a valuation based on this approach can vary greatly depending on the respective phase (ICO or pre-sale).

If tokens are issued in the context of an ICO, from an employment law perspective the legal relationship in which they are transferred must be taken into account. Various approaches are possible when conducting an ICO. For example, the token's issuer and the company developing the software or code for the network often are different entities. However, the developers of the software are usually employed by the company developing the software. In that case, if tokens are issued to the employees for the development of the software, this payment is ultimately made by a third party and not by their employer.

Tokens as Salary?

German labour law sets out certain rules when it comes to the payment of employees. An important regulation is § 107 GewO, which states a simple principle: "Wages shall be calculated and paid out in Euro". If this regulation is violated, the employer's contractual performance (the transfer of tokens) does not lead to the fulfilment of the employee's claim for performance. In other words, the employee keeps his or her claim to payment of salary.

The regulation only covers cases that are classified under employment law as payment of salary within an employment relationship, however. Otherwise the restrictions do not apply. The class of token to be transferred to an employee then is irrelevant.

If tokens are transferred to an employee, for example, by a parent company or a third party without any detailed regulation in the employment contract with the employer, § 107 GewO does not apply. According to the rulings of the Federal Labour Court (Bundesarbeitsgericht), agreements between the employee and group companies or third parties are not part of the employment relationship between the employee and the employer.

Some commentators also argue that § 107 GewO only covers the actual compensation for services rendered, and that therefore salary in the broader sense, e.g., rewards for the employee's loyalty to the company, is not included.

Furthermore, § 107 GewO does not apply to cases in which tokens are in addition to a salary, as opposed to part of a salary. For example, if an employer plans an ICO in the course of its business activities and assigns a certain number of tokens to its employees for this purpose without replacing salary components, the restrictions of § 107 GewO do not apply. It is subject to legal interpretation whether the transfer of tokens is such an additional payment. In any case, the employer should ensure that from the employee's perspective, the transfer of tokens cannot be considered a disguised, anticipated salary increase.

Salary Must Be Paid in a “Real” Currency

If the individual case concerns salary within the meaning of § 107 GewO, it is agreed that despite its wording, § 107 (1) GewO does not always prohibit payment of salary in foreign currencies. Especially when employees are employed abroad, there are circumstances in which payment of salary in a foreign currency is permitted by law on the grounds that the employee saves the cost of currency exchange. The question, however, is how to define the term “currency”. Among other things, § 107 (1) GewO has the protective purpose of ensuring that the employee can pay for his or her cost of living. This protective purpose is jeopardised if the payment given cannot be used for everyday payments.

Tokens should therefore not be regarded as currencies in this context. Even if certain tokens are accepted as means of payment in many places—the most prominent example of this being Bitcoin—there is (so far) no general governmental obligation to accept them, nor is there sufficiently widespread acceptance.

Tokens as Payment in Kind

The fulfilment of an employee's claim for payment by means other than cash is not prohibited. According to § 107 (2), s. 1 GewO, employers and employees can agree on payments in kind as part of a salary, if this is in the employee's interest or part of the employment relationship's nature.

The wording of the regulation does not preclude the use of tokens as a payment in kind. Although tokens cannot be considered goods or objects in the legal sense, a parallel can be drawn to the legal situation of shares and stock options. These are considered payments in kind although they are not objects.

Not More Than 25 Per Cent Paid in Tokens?

Section 107 (2), s. 5 GewO states that the non-pledgeable part of a salary cannot be paid in kind. Concerning an upper limit in relation to the monetary components of a salary, the above-mentioned requirements of § 107 (2), s. 1 GewO are to be taken into account for payment in kind. This means that the employee's interest must be considered primarily.

One might think that it is always in the employee's interest to receive certain benefits in kind, if he or she has agreed to it. However, because of the regulation's protective purpose, this interest is determined objectively. This means the respective employee's perspective is not relevant.

In its judgment of 30 October 2008 (5 Sa 977/08), the LAG Düsseldorf made a decision regarding the question at what point a certain payment can no longer be considered to be in the employee's objective interest. In that case, the majority of an employee's salary was paid in stock options of the non-listed employer. According to the LAG, this was not in the employee's objective interest for the following reasons:

- The subscription rights received were de facto not usable, because the employer was not listed on the stock exchange.
- There was a risk that a certain part of the payment was worthless.
- The employee should be protected from the employer shifting its economic risks to the employee.

In this regard, the rulings of the Federal Labour Court (Bundesarbeitsgericht) concerning the possibility of free revocation of payment components should be applied, which provides for a limit of 25 to 30 per cent of the total remuneration.

When discussing the issue of tokens as part of salary, commentators often propose a limit of 25 per cent of the total remuneration in any case (with reference to the judgment of the LAG Düsseldorf). However, the matter should be differentiated even further: If the tokens are issued to the employee during an ICO, it is uncertain whether they can be sold at a later date or whether there is a risk that the employee will be "stuck" with them. If the latter were the case, it is questionable whether the payment could be considered to be in the employee's objective interest. Issuers regularly make great efforts to have the tokens listed on a crypto exchange. The risk that this will not happen can be classified as rather low. However, the regulatory environment and the specific token will be decisive. For example, if the token is a security token, listing can be more difficult depending on the market situation.

Even if this issue is not taken into account, the application of the "25 per cent limit" is not suitable for all circumstances. For example, certain types of tokens may incorporate general economic risks rather than shifting economic risks connected to the employer to the employee. The latter is the case when the issuer's economic development is related to the value and/or return of the token. While such a connection appears obvious with security tokens (for example, with regard to any promised interest payments), this is not the case with cryptocurrency tokens.

Further, the application of the principles of the LAG Düsseldorf judgment does not always lead to useful results. If, in addition to an amount of money, a certain number of tokens are agreed as a regular monthly salary component, the value of the tokens at the time they are given to the employee would be important for the legal validity of the agreement and thus also for the fulfilment of the employee's claim for performance. The token could be worthless at that time, however, and afterwards become worth several times more than the "euro part" of the salary.

Is Payment of Tokens Part of the Employment Relationship's Nature?

Whether the donation of tokens corresponds to the specific nature of the employment relationship depends on the respective industry and its development: payment in Bitcoin by companies that act as miners is often mentioned as an example in this context.

Provision of company infrastructure (e.g., company canteens and childcare) by the employer is classified neither as payment nor as payment in kind. For this reason, it is possible that § 107 GewO does not apply to utility tokens that enable the use of certain infrastructure maintained by the

employer (e.g., the use of networks).

Conclusion: The Result Depends on the Individual Case

Under German labour law, it is permissible to issue or transfer tokens to employees within the framework of an employment relationship. However, according to current legal opinions, payment of salary entirely in tokens is unlikely to satisfy the employee's claim to payment. As a result, the legal admissibility of transferring tokens to employees depends on a multitude of factors in each individual case. Among other factors, the type of token is decisive. Employers have certain options to circumvent the above-mentioned issues. So far there has been no reliable jurisprudence on the circumstances discussed in this article, but it can be assumed that tokens of all types and classes will make their way into more employment relationships in the future and will also be dealt with by the courts. Last but not least, it must be recalled that considerations in context of § 107 GewO always concern the content of an agreement with the employee, not the unilateral replacement of payment components by the employer. If the regulations' protective purpose does not require such intervention, restrictions on the contractual freedom of the employment relationship's parties should be applied sparingly.

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National Law Review, Volume VIII, Number 191

Source URL: <https://natlawreview.com/article/salary-payment-tokens-german-labour-law-considerations>