

## Thinking of Paying Your Employee with Virtual Currency? Not so fast.

Law In The Workplace, Labor and Employment, Employment Law, Articles / May 10, 2022 / Michael Twomey

Bitcoin and other cryptocurrencies have come a long way from fringe, speculative assets of the tech world. Digital assets and currencies are becoming more mainstream, and virtual currencies are becoming more widely accepted by businesses including most major online retailers. With more and more companies getting on the crypto bandwagon, employers eager to stay on the cutting edge to attract talent in a tight labor market may be wondering whether they can pay their employees in Bitcoin or other virtual currency under federal and state law. The short answer is, not yet.

At the federal level, the Fair Labor Standards Act (FLSA) regulates wages paid to employees. For exempt employees, there is no express statement in the FLSA that such employees must be paid in cash or its equivalent, but payments in dollars are clearly contemplated. Exempt employees must be paid a minimum dollar amount per week on a “salary basis” to keep their exempt status. The current Department of Labor regulations do not address the use of alternative (non-dollar) payments, such as virtual currency, to meet the specified minimum salary amounts. For purposes of determining whether the minimum salary level is met, the Department of Labor has endorsed the idea of valuing payments in foreign currency using the exchange rate in effect at the time of the payment.<sup>[1]</sup> In that situation, though, there was a reasonable basis to make the payments in a foreign currency because the employees were foreign nationals temporarily residing in the U.S. and receiving payments from their home-based country affiliate. There is no evidence the Department of Labor would take the same approach with virtual currency. Of course, exempt employees sometimes receive equity or stock options as additional compensation (in addition to a base salary paid in dollars), which certainly lends support to the idea that similar bonus compensation (in addition to base salary) could be made in virtual currency. However, the Department of Labor has not squarely addressed this issue.

For non-exempt employees, the FLSA requires employers to pay wages “in cash or negotiable instrument payable at par.” Virtual currencies, such as Bitcoin, don’t meet this definition. Even if permitted, the fluctuating value of virtual currencies compared to the U.S. dollar may make them ill-suited for compensation payments to non-exempt employees since the value of the payment may fluctuate wildly over time. The value of wages is important for non-exempt employees in determining the employee’s regular rate of pay and overtime payments. Regulators have also not addressed whether bonus or incentive payments for non-exempt employees may be paid in virtual currency. Congress has previously provided special rules for stock option incentives for non-exempt employees, so it is possible Congress could do the same for company-performance incentive payments in virtual currency. But there is no federal guidance permitting the practice at this time.

At the state level, the law in most states, like Texas, require wages be paid in U.S. currency, by a written instrument issued by the employer that is negotiable on demand at full face value for U.S. currency, or by electronic funds transfer to a bank or payroll card account of the employer. Virtual currency doesn’t fit this definition either. Texas law does provide, however, that the employer and employee may agree in writing to receive part or all of the wages “in kind or in another form.” A historical example of an “in kind” payment would be a farmer paying a laborer with crops that the farmer grows. It is not

illogical to think that a Bitcoin miner would meet this definition, but until regulators squarely address this issue, be wary of contemplating such payments to an employee. Additionally, until virtual currencies are more widely adopted, if an employee is required to pay a commission or other fee to trade their cryptocurrency for U.S. dollars, such fees may present other issues not yet resolved at the federal or state level. Many states prohibit payment of wages by methods that potentially incur additional fees, such as company-issued debit cards.

All is not lost, however. Regulators are making progress in addressing the use of virtual currencies. Texas became one of the first states to **recognize** the legal status of virtual currencies, and President Biden recently signed an **executive order** directing the federal government to examine the risks and benefits of virtual currency. The executive order signals the federal government's recognition of the significant growth of virtual currencies and interest in regulating the virtual currency market. Most notably for businesses and employers, the executive order directed the government to explore a U.S. Central Bank Digital Currency. There have been similar efforts at peg virtual currencies to U.S. dollars through so-called "stablecoins," which are backed by a reserve asset. These types of digital currencies may be more amenable to use by employers than traditional virtual currencies, such as Bitcoin.

Of course, all of the aforementioned laws apply to and are intended to benefit "employees." If you are considering compensating an individual as an independent contractor to avoid these laws, be sure to consult with counsel to ensure the individual does not meet the definition of employee under applicable law. Merely naming an individual an "independent contractor" will not save the worker from the definition of "employee," as courts review the realities of the arrangement, not merely the title used.

[1] DOL Opinion Letter FLSA2006-17.

## **Related Attorneys**

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