

NFTS AREN'T JUST REVOLUTIONIZING ART, SPORTS, AND VIDEOGAMES – THEY'RE CHANGING THE FUTURE OF EMPLOYMENT

Insights
Sep 15, 2021

NFTs – or non-fungible tokens – are increasingly popular among artists, sports figures, and the video game industry. But NFTs (some selling for upwards of eight figures) are not just for gamers, Mark Cuban, and the ultra tech-savvy. They will soon revolutionize the employment world, and the sooner your business understands the implications, the sooner you'll be able to capitalize on this new trend.

What are NFTs? A Primer

At their core, NFTs are unique data, usually for a specific item or containing information about a specific person. Their unique aspect is what makes them “non-fungible” as opposed to something like the U.S. dollar or Bitcoin, which is fungible. While an NFT certainly could represent an artist's work and fetch high figures, it could also represent something basic, like a birth certificate, a property deed, or college degree. For an NFT in this space to be reliable, the recipient must be able to trust the institution that mints the token, the blockchain it sits on, as well as the smart contract interfacing between the two.

As a reminder, for those who have not read [the previous articles we have authored on blockchains and smart contracts](#), a blockchain is a distributed ledger, or database, run by a network of computers, while a smart contract is automated code that self-executes according to programmed conditions.

How Can NFTs Benefit Employers and Businesses?

Related People



Phillip C. Bauknight

Partner

908.516.1059

Industry Focus

Healthcare

Sports

Those wishing to send confidential information such as medical records, personnel files, or even security clearances can encrypt some, or all, of the data held within the NFTs to provide privacy preserving features. To view data within the token, recipients require a code to decrypt the NFT, which could allow read-only and single-use access, rather than allowing recipients to edit or granting them indefinite access. Thus, while the location of the data remains public and the owner retains the ability to send the data to whomever they wish, users' confidential information is both securely protected and yet instantly deliverable.

Healthcare Organizations

In this regard, NFTs can transform healthcare administration, paving the way for a data storage revolution and allowing users to own their data. Token holders can send their medical history quickly and easily to institutions of their choosing, rather than requesting their records from healthcare providers or completing repetitive paperwork at each provider they visit.

General Employment Uses

In the employment setting, NFTs have unlimited potential. Applicants can hold tokens representing their academic degrees, credentials, previous jobs, and references. Indeed, a large institution (such as the U.S. government or any institute of higher learning), could establish their own blockchain and mint their own NFTs. The NFTs they produce would then result in immediate, trustless verification the institution can instantaneously send anywhere in the world. For example, if a university mints NFTs and sends one to each graduate, those tokens provide instantly verifiable proof of education. Moreover, NFTs can include signature lines for previous employers, personal references, or institutions themselves. Thus, if an applicant includes Oprah Winfrey as a reference, a prospective employer can immediately certify that Oprah's signature is, in fact, legitimate. Alternatively, Oprah could create an NFT representing her signature, allowing her to send tokens to those she is willing to act as a reference for.

The use of NFTs will not only allow employers to effortlessly and instantly verify an applicant's job history, references, and credentials, it can streamline the entire application process. Applicants can easily store their applications, resumes, and security clearances on their personal NFTs,

which they can then send to whomever they choose. Provided the institution that mints and stores the NFT can be trusted, this cryptographic assurance creates instantaneous, trustless data transfer and verification.

What are the Potential Issues For Employers and Businesses to Consider?

NFTs are growing faster than the law can develop, however, leaving these unique tokens in a legal gray area. There are some open questions you need to keep in mind before integrating NFTs into your day-to-day business activities.

To begin, it's uncertain what law applies to NFTs and how to classify them – whether as commodities, collectibles, cryptocurrency, or investment contracts and, accordingly, securities. The commonly applied *Howey* test (i.e., a test created by the U.S. Supreme Court for determining whether certain transactions qualify as an “investment contract”) would consider NFTs a security if, due to the effects of a third party or promoter, there's monetary investment in a common enterprise with the expectation of profit. While the use of an NFT to represent one's college degree may not satisfy the *Howey* test, an NFT that benefits from cash flows from other NFTs, or an NFT that's been fractionalized such that it or its profits are sold in parts, certainly could. On a related note, if an NFT is not resold through the same platform, royalty payments may cease to the original owner. Since U.S. law does not protect royalty resales relating to creative works, creators could take a serious loss.

Moreover, while one of the touted benefits of the NFT is that it is immutable, and the transparency of the transactions completed on a blockchain allow for proof of ownership and authenticity, would a court accept the code as binding without a separate agreement? In addition, if there is not a separate agreement, an argument exists that purchasers may not be able to realize the full extent of their ownership as it is unclear whether copyright rights would automatically come with the right to use the token for personal use.

Another issue for consideration is that while buyers and sellers can negotiate what rights transfer along with the NFT – such as the ability of the recipient to modify, sell, or publicly display the token – purchasers who are unaware of their rights may invite infringement liability. What's more, although this immutability may authenticate transactions

and data in the eyes of the parties, the inability to change the data may run afoul of data protection laws.

Finally, the NFT is only as secure as the blockchain it lives on. If the consensus mechanism running the blockchain fails or is attacked, it could seriously disrupt data storage, record keeping, and workflow. Moreover, an NFT is physically separate from a tangible asset, such as a truck. While someone could purchase the NFT signifying the rights to own the truck, the owner may have little recourse if the truck is stolen and their jurisdiction does not accept NFTs as valid. This example highlights an important difference between the right to custody and actual possession, revealing struggles NFT owners may face in seeking judicial remedies and maintaining inventory.

Best Practices

Whether you're purchasing an NFT from your favorite artist or considering incorporating them into your business, it's best to deal with NFTs cautiously and with open eyes. So before transforming how you store applicant and employee data, you should take into account data privacy laws and potential data storage disruptions that could result from failing servers.

If you decide to make a purchase, you should also consider who you're transacting with and what exactly you're acquiring, whether it be a copyright, an original, the ability to sell, or simply a copy. Finally, you should contemplate drafting a separate agreement specifying the rights and obligations of the parties and in what forum to enforce these terms.

While the law surrounding these tokens may still be unclear, NFTs are unmistakably transforming the future of art, business, gaming – and beyond. We'll continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Cryptocurrency and Blockchain Taskforce](#).