# 6 Things Employers Need to Know Before Offering Cryptocurrency in 401(k)s

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Cryptocurrencies are currently one of the hottest topics in the world, and for good reason. Bitcoin's fluctuations over the past year – from $10,000 in July 2020 to $63,000 in April 2021 and now settled to around $41,000 – has some employees and retirees asking to include cryptocurrencies in their employer-sponsored 401(k) retirement plans. The potential for negative valuation swings, on the other hand, has others saying they might be too risky for retirement savings. This Insight will provide six key considerations for Plan sponsors before considering including a cryptocurrency option in your retirement plans.

**General Overview of 401(k)s**

Plan sponsors hold in trust the retirement assets of 401(k) plans they're responsible for overseeing. According to the Employee Retirement Income Security Act of 1974 (ERISA), individuals making decisions about the plan serve as fiduciaries. It is well-settled law that fiduciaries must act exclusively in the best interest of the plan participants and beneficiaries. This includes ensuring that plan assets are diversified, understanding the fee structures to ensure reasonability, and carefully selecting and monitoring managers and service providers.

ERISA does not dictate which specific types of investment options must be included in a 401(k). Rather, the law instructs fiduciaries to show the care, skill, prudence, and diligence that a prudent person would exercise when choosing an investment option to minimize the risk of large losses. The focus is on the process, rather than the investment returns.

Many employers utilize an Investment Policy Statement (IPS) to help govern the 401(k) management by the plan fiduciaries. An IPS will often contain provisions for the fund selection process, the frequency and factors used in monitoring performance, and asset allocation targets. Deviation from the IPS guidelines can serve as evidence of a breach of fiduciary obligations. This could result in employer and individual liability.

**4 Cryptocurrency Risks With 401(k)s**

In a typical 401(k), an employer offers its employees limited investments, such as ETFs, mutual funds, and sometimes company stock. This is because of the employer's role as a fiduciary and the risks associated with making inappropriate investment choices. Indeed, one of the most common reasons 401(k) participants sue their employers is due to inappropriate investment choices.

Cryptocurrency as a 401(k) investment option would be an exotic choice by current standards, and would present several risks, including:

- Cryptocurrency **doesn't quite fit the definition** of traditional investment vehicles. Depending on how it is drafted, the IPS might be construed as prohibiting cryptocurrency, even if it does not expressly do so.
- The IPS guidance for selecting investments to offer **may not speak to the unique issues** involved in evaluating cryptocurrencies and amendments may be required.
- Cryptocurrencies have a **history of dramatic declines** in value, putting the fiduciaries at risk for losses and risking the employer's public reputation.
- If **fees associated with offering cryptocurrency** in the plan are significantly greater than those of the other investments available, the fiduciaries may be at risk for a breach of duty claim (an issue currently pending before the United States Supreme Court).

### Why Consider a Crypto 401(k)?

Given the potential risks, employers may ask: why bother? There are several reasons why, as an employer, you may want to consider giving your employees the option to invest in cryptocurrency through their 401(k):

#### *Cryptocurrencies are Available*

Cryptocurrencies are not prohibited as an investment option in a 401(k) plan by ERISA. In addition, as cryptocurrencies such as bitcoin and ether become more mainstream, regulating bodies have taken note. For example, the Office of the Comptroller of the Currency (OCC) recently ruled that national banks can hold cryptocurrency and can manage cryptocurrencies in the way they manage other assets.

#### *Cryptocurrency-Related Benefits Could Attract Talent*

Simply put, more employees want to invest in cryptocurrency, and they want to use retirement accounts to do so. Most employers are not yet providing their employees with this option. Employers that do may be at an advantage when it comes to attracting and retaining talent, especially at a time when many employers are struggling to do so.

#### *401(k)s Provide Tax Advantages*

Utilizing a 401(k) to buy cryptocurrency allows employees to take advantage of 401(k) tax incentives, whether they use a tax-deferred 401(k) or Roth 401(k). Buying cryptocurrency in a traditional 401(k) of Roth 401(k) means that employees could invest in cryptocurrencies without needing to worry about the complexity of tracking cryptocurrency trades to calculate any taxes they may owe resulting from buying or selling.

**6 Crypto 401(k) Considerations for Employers**

Before deciding to offer cryptocurrency in your 401(k) plans, you should consider the following six concepts:

1. You should **confirm with your 401(k) provider** whether providing cryptocurrency is an option.
2. You should **evaluate the IPS** to insure there are no provisions expressly prohibiting cryptocurrencies from inclusion in the plan.
3. You should **ensure that fiduciaries follow all steps** in their IPS for selection and performance monitoring of new asset class.
4. You may want to consider **some type of limit on the amount** an individual can commit to crypto to reduce potential risk associated with volatility.
5. You should keep participation in a Crypto 401(k) **optional**. Ideally, employees would be able to choose from among a list of cryptocurrencies *which* they want to hold in their 401(k) portfolios – but most importantly, they must be able to choose *whether* they want to include them at all.
6. Decisions related to retirement investments are arguably the most important an individual can make in their lifetime. You should be sure that you, or your retirement benefits provider, can give employees **necessary informational materials** on cryptocurrencies to ensure employees aren't going it alone when making critical investment decisions for their future. Despite the increased popularity of cryptocurrencies, it should not be assumed that a would-be investor knows the difference between a meme coin and the more established coins.

**Conclusion**

The world and the employment space continue to change rapidly. Employees want to have autonomy in everything they do, including their retirement options. As cryptocurrency continues to gain adoption and the number of cryptocurrency retirement providers continue to grow, we expect more employees will begin asking about the availability of cryptocurrency retirement accounts.

Crypto retirement plans, however, are not without risks.  As a result, substantive evaluation with legal counsel trained on these issues is necessary before making a determination about which path is right for you. 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.

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