China's Ban on Crypto-Related Transactions Should Remind Employers That Volatility is a Feature, Not a Bug

Insights
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The People's Bank of China (PBOC) released a September 24 statement declaring that all cryptocurrency-related transactions will be deemed illegal and that foreign exchanges are banned from providing services to residents in China through the internet. This announcement – the latest in a long line of actions taken by China reinforcing the country's tough stance against cryptocurrencies – should serve as a reminder to employers across the country that volatility is inevitable when it comes to this area.

Volatility is a Feature, Not a Bug

Volatility in the cryptocurrency market is well documented, and many would argue in fact that this volatility is a feature of cryptocurrency, rather than an outlier. Following the PBOC's announcement, the price of Bitcoin fell more than 6% in 24 hours, while Ether tumbled 9%. Although each cryptocurrency then recovered most of those losses only a few days later, it was yet another rollercoaster ride that many in this space have grown accustomed to.

Indeed, since the creation of Bitcoin, the first cryptocurrency, there have been numerous skyrocketing highs and parabolic drops, with several mainstay cryptocurrencies continuing to weather each storm and increase its market cap over time. There have been numerous factors which have impacted the price of cryptocurrencies, including frothy markets, FOMO (Fear of Missing Out), FUD (Fear Uncertainty Doubt), media-pumped narratives, tweets from well-known CEOs, skits on late night television, and one seemingly constant topic – fear of regulation.

These recent events serve as a reminder for employers evaluating whether to pay wages in cryptocurrency that unexpected external factors can have a significant impact on the volatility of cryptocurrency and could result in drastic value fluctuations in short periods of time. For example, fluctuations in value could occur from the end of the payroll period to when the payment reaches the employee's digital wallet. Many pay systems have a delay in the pay cycle to serve as a disincentive to an employee trying to time the price of their preferred cryptocurrency. This could either result in an employee feeling undercompensated or feeling like they received free money. Alternatively, in circumstances of a significant increase in value, an employer may feel like they significantly overpaid for the work performed or that an exponential price increase between the contract execution and payment date resulted in an unforeseen event that changed the terms of an employment contract.

employment contract.

3 Considerations for Employers

Here are three key considerations for you to evaluate when deciding whether to pay your workers in cryptocurrency:

- **Check Relevant Wage and Hour Laws**: Employers should evaluate the applicable federal and state laws. As a reminder, the Fair Labor Standards Act requires that minimum and overtime wages be paid "in cash or negotiable instruments payable at par." In addition, there are some state laws which require employee compensation to be made in U.S. currency. This could be particularly important for national employers who must evaluate the currency laws of multiple states. (As a reminder, our Cryptocurrency and Blockchain Resource Center includes a free 50-State Wage Payment Survey to Assess Cryptocurrency Payment Restrictions). Employers should consider paying base compensation in U.S. currency in amounts that meet the federal, state, and local requirements for minimum wage, overtime, or salary-based exemptions to avoid compliance issues.
- **Determine How to Pay Workers**: An employer evaluating whether to pay workers as part of its payroll or bonus program should consider whether the workers will be paid (1) in their normal currency, with a designated portion of their wages being rapidly converted to their selected cryptocurrency at that moment's exchange rate; or (2) in the cryptocurrency itself. As a reminder, the IRS deems cryptocurrency to be property, which means the fair market value of the cryptocurrency is reportable. Many employers may want to consider using a third-party service specializing in crypto payroll processing to help manage this process.
- **Update Your Policies:** Any employer instituting a cryptocurrency payment program should strongly consider updating their policies. All employees participating in the program should provide their written authorization on a form clearly explaining the risks of participation. This documentation should be prepared in collaboration with counsel that has the necessary crypto subject matter expertise.

Conclusion

There are many potential benefits related to cryptocurrency compensation. That being said, legal authority on various employment-related issues is murky, at best, as many of the currently applicable laws were not designed to neatly address digital currency payments. This will likely change over time as cryptocurrency adoption increases. In the meantime, however, businesses and Human Resources Professionals considering the use of cryptocurrency compensation will need to have a clear understanding of the factors that may contribute to the volatility of cryptocurrency, the potential pitfalls that exist related to offering payment in Bitcoin or another cryptocurrency, and the reasons they are venturing into this space. As a best practice, you should consult with legal counsel when evaluating the various considerations related to cryptocurrency wage payments.

Fisher Phillips will continue to monitor the rapidly developing area. Should you have questions about compliance matters in this area, you should contact a member of Fisher Phillips' Cryptocurrency compliance matters in this area, you should contact a member of Fisher Phillips' Cryptocurrency and Blockchain Task Force or the authors of this article. To ensure you stay up to speed with the latest developments, make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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