"Daily Pay" and Cryptocurrency: Will Advances in Technology Change How Wages Are Paid?

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Technology seems to be advancing faster than we can keep up. These advances impact the employer community as well—even regarding basic things such as how, when, and in what manner wages are paid.

Take two recent examples straight from the headlines.

Two Modern Trends May Impact Pay Practices

First, as the Society for Human Resource Management (SHRM) recently reported, many employers are utilizing "daily pay" or "instant pay" apps that allow employees to receive their wages daily or more frequently than the common payroll schedule. Many employees favor this method because it allows them to access their wages immediately when faced with unplanned emergencies, such as automobile repairs or other expenses.

Second, as reported BNA Bloomberg, paying wages in cryptocurrency (such as bitcoin) is becoming more common, particularly for American companies with international workers. A number of third-party payroll platforms have emerged recently that either enable employers to make a cryptocurrency deposit to be converted to local currency when transferring to a worker's account, or vice versa. For international employees, these options may be attractive as they reduce complications and costs associated with international payroll, particularly for employees in parts of the world without developed banking systems or stable currencies.

Technology can be a great thing, and can greatly benefit both employers and employees. But just because technology makes something capable doesn't necessarily mean that it is lawful in every instance.

Daily Pay Issues

Take daily pay. Jurisdictions regulating the frequency of wage payments generally allow an employer to pay on a more frequent schedule than required. For example, in California, state law specifically provides that it does not prohibit the payment of wages "at more frequent intervals, or in greater amounts, or in full when or before due," as long as other provisions of law are not contravened. But employers still need to consider how more frequent pay (regardless of what payment method) may implicate a host of other issues and obligations.

For example, employers who are tempted to utilize a daily-pay app or similar platform should consider that the practice could necessitate complex reconciliations when properly calculating the "regular rate" and overtime pay, which are based on the employee's total remuneration and hours actually worked for the *entire workweek*. Additionally, in many ways paying daily runs counter to a common desire among employers to pay as *infrequently* as possible due to the administrative burdens and costs that recur each time payroll is processed. As just one example, state paystub or wage statement requirements usually apply at the *time* of the wage payment. There also is the matter of calculating legally-required deductions, which often correlate to the length of the pay period. Employers should closely consider *all* applicable requirements before increasing the frequency of wage payments.

Bitcoin And Other Cryptocurrency

Similarly, wage payments in cryptocurrency (regardless of frequency), could raise a whole host of issues that employers should consider before taking the plunge into the digital payment world.

First, employers must ensure that non-exempt employees are paid the applicable minimum and overtime wages. Some employers have faced these types of issues already with respect to employees paid in foreign currency. The U.S. Department of Labor has provided some guidance by its finding that a salaried employee who was paid partially in foreign currency had indeed met the minimum salary requirements for an FLSA exemption.

Second, employers must ensure that all applicable withholding and deductions are made and remitted appropriately. Last I checked, the IRS didn't accept bitcoin.

Third, employers need to evaluate whether any of these platforms charge fees to the employees. Some states have specific rules that employees must be afforded an opportunity to access or withdraw the *full amount* of their wages without being charged a fee. Moreover, there could be a violation in any jurisdiction if these fees cut into legally-protected wages due under FLSA or similar state or local provisions.

Finally, we've seen some pretty significant spikes and falls in the value of bitcoin, to name just one cryptocurrency, in the last few months. What if you deposit the full amount of an employee's wages in cryptocurrency at midnight, but by the time the employee wakes up to access the wages, the value has plummeted 30 percent? The volatile nature of cryptocurrency may simply be inviting problems and litigation.

The Bottom Line

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No doubt technology can be tremendously valuable, and these new advances in payroll practices may be very beneficial to both employers and employees. Nonetheless, particularly given that these forms are still evolving, if an employer desires to offer payments in such ways, the best practice is not to mandate payment, but rather permit employees to "opt in" voluntarily. Probably not a good idea to walk into your workplace one day and announce to your employees that, "Guess what? From now on we're paying you in bitcoin!" For one thing, short notice could cause a violation of yet another type of provision in some jurisdictions.

Do your homework in consultation with employment counsel before implementing the latest technology, and minimize the risk of a lawsuit later.

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