

Crypto's creep into the workplace is creating concerns

Cryptocurrencies aren't legal tender. This hasn't stopped employees from wanting to be paid in crypto. Nor has it stopped Fidelity Investments from offering crypto as a 401(k) investment option. Is it a lifesaver for employers with young employees or an unnecessary risk?

Let's work through the issues, bit by Bitcoin.

Paying wages in crypto

Believe it or not, the IRS got [ahead](#) of this issue eight years ago.

Neither you nor employees can evade withholding and reporting by paying in crypto. In fact, the process is much more arduous. You may, according to the IRS, choose to pay employees in Bitcoins or other cryptocurrencies, but you must peg the fair market value of your cryptocurrency on payday to U.S. dollars. And all the usual withholding, depositing (also in U.S. dollars) and reporting rules apply.

How do you get the FMV? If a cryptocurrency is listed on an exchange and the exchange rate is established by market supply and demand, the fair market value is determined by converting the crypto into U.S. dollars at the exchange rate. The IRS warns your conversion must be reasonable and consistent.

State payday laws, on the other hand, do require employees to be paid in legal tender; they can't be paid with script, tokens, or similar media. But they also recognize that employees may receive property, such as stock or stock options. While paying in crypto arguably is equivalent to property, you'd still need to find the crypto's FMV on payday and make the conversion into cash.

How you would go about actually paying in crypto is another story, because, obviously, direct deposit is off the table.

You can have a policy against paying employees in crypto and it probably won't be a deal-breaker for the vast majority of employees. But if paying in crypto sounds good, you should check with your state labor department for clear guidance before you take the plunge.



401(k) investment options

The Supreme Court recently reminded 401(k) plan sponsors of their duty to offer employees only prudent investment options. (Fidelity isn't a fiduciary, so it has nothing to lose.)

Which begs the question of whether offering a crypto option is prudent.

The Department of Labor doesn't seem to think so. It's **cautioning** employers to tread carefully if they want to offer investment options in crypto or other digital assets, like tokens.

What's bugging the DOL and the SEC: Crypto hasn't been around for a long time and it's a risky, volatile investment, which is a real turn-off for the DOL and the Securities and Exchange Commission. And then there are these reasons:

- **Not an even playing field:** What makes investing in crypto risky are incidents of fictitious trading and incidents of theft and fraud, according to the SEC.
- **Not employee-friendly:** Employees may not be able to make informed investment decisions. Cryptocurrencies are different from typical 401(k) investment options, says the DOL. The extreme volatility can have a devastating impact on employees, especially those approaching retirement and those with substantial allocations in cryptocurrency.
- **Not easy to keep track of:** A crypto option in a 401(k) plan presents record-keeping challenges. Cryptocurrencies aren't held like traditional plan assets in trust or custodial accounts. Instead, they're lines of computer code in a digital wallet. What would happen if employees forgot their passwords? It's happened.
- **Not easy to value:** None of the proposed models for valuing cryptocurrencies are as sound as traditional discounted cash-flow analysis for equities or interest-and-credit models for debt. *Worse:* Cryptocurrency market intermediaries may not adopt consistent accounting treatment and may not be subject to the same reporting and data integrity requirements.
- **Not regulated:** The regulatory landscape for crypto is all over the place. Some market participants may be operating outside existing regulatory frameworks or not complying with them.

If this isn't enough of a deterrent, consider this the icing on the cake: The DOL is investigating plans offering crypto options. Plan fiduciaries responsible for overseeing investment options or allowing such investments through brokerage windows should expect to be questioned about how they square their actions with their

duties of prudence and loyalty under ERISA.