Challenges in Compensating Employees in Cryptocurrencies

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I. INTRODUCTION

Employers have often implemented creative workplace benefits to attract and retain highly sought-after employees. These benefits range from generous profit-matching retirement plans to ping pong tables and unlimited, free popcorn. Although offering an employee a higher wage is the most common way to attract a new employee, stock options, noncash fringe benefits, health and wellness plans, and increased retirement options are some of the other, popular options employers have implemented. In the race to attract and

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retain the best talent, a few employers[1] have explored a new compensation strategy: compensation in cryptocurrencies. While allowing employees the option to receive all or a portion of their compensation in cryptocurrencies may seem like a simple proposition, the reality is that paying employees in cryptocurrencies summons a host of practical and legal problems that employers will likely want to avoid. The benefits of attracting an employee who insists on being paid in cryptocurrencies does not outweigh the risks involved for the employer that takes on the task of paying employees in cryptocurrencies.

First, this paper will review the history of cryptocurrencies and explore why some consider them an attractive alternative to government-backed currencies and traditional banking. Next, this paper will review the relevant statutes and caselaw that effect employee compensation. These statutes include the Fair Labor Standards Act (FLSA), individual state statute equivalents to the FLSA, and IRS regulations. Through this background, this paper will illustrate that the liabilities an employer takes on by paying employees in cryptocurrencies likely outweighs any benefits from attracting and retaining employees. Therefore, paying employees in cryptocurrencies is not advisable.

Still, for employers who insist on compensating employees in cryptocurrencies—whether because their employees demand it or because cryptocurrencies are attractive to them for philosophical reasons—there are some workarounds to the legal issues. Unfortunately, many of those workarounds defeat the purpose behind paying an employee in a cryptocurrency, and create an administrative burden when it would be simpler for an employee to purchase a cryptocurrency him or herself.

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1. Although more common internationally, some US companies are paying their employees in cryptocurrencies such as Bitcoin either internally or using a third-party administrator such as Bitwage. Bitwage boasts two-hundred employers using its third-party payroll platform. *See* Jasmine Ye Han, *Paying Workers in Bitcoins? It's Becoming a Reality*, BLOOMGBERG LAW (Dec. 1, 2017), https://www.bna.com/paying-workers-bitcoins-n73014473519/.

II.   Background

The phenomenon of employers paying employees in cryptocurrencies such as Bitcoin[2] is a new and still rare occurrence. This is partially because the philosophy behind cryptocurrencies does not generally support the traditional means by which employers must pay employees: via payroll that is governed by multiple federal and state statutes. This background section will explain the development of cryptocurrencies and its philosophical origins, examine federal and state legislatures' reactions to cryptocurrencies, and review state and federal employment law that effects wage and hour.

A. Origin and Development of Cryptocurrencies

To the layperson, cryptocurrencies bring forth images of hackers hunched over computers in dark rooms, drug transactions made on the dark web, hidden caches of millions of dollars that are not traceable, and a host of other nefarious activities—both online and offline.

The reality of cryptocurrencies is much more mundane. Cryptocurrencies can be used to purchase pizza from Domino's,[3]

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2.   In this article, Bitcoin generally refers to Bitcoin and not Bitcoin Cash. This is because Bitcoin tends to focus on the traditional values of cryptocurrencies such as a public, permissionless, strong network. This is different from Bitcoin Cash's main goal of enabling fast and cheaper payments. *See* Spencer Bogart, *Bitcoin Vs. Bitcoin Cash: A Story of Prioritization & Healthy Competition in Money*, MEDIUM (Jan. 4, 2018), https://medium.com/@Bitcom21/bitcoin-vs-bitcoin-cash-a-story-of-prioritization-healthy-competition-in-money-c934805a7254 (discussing the different priorities of Bitcoin and Bitcoin Cash); *see also* Jake Smith, *The Bitcoin Cash Hard Fork Will Show Us Which Coin is Best*, FORBES (Aug. 11, 2017), http://fortune.com/2017/08/11/bitcoin-cash-hard-fork-price-date-why/ (discussing why Bitcoin Cash forked from Bitcoin).
3.   Eric Mack, *The Bitcoin Pizza Purchase That's Worth $7 Million Today,* FORBES (Dec. 23, 2013), https://www.forbes.com/sites/ericmack/2013/12/23/the-bitcoin-pizza-purchase-thats-worth-7-million-today/#10893faa2509.

flights online,[4] and thousands of items from Overstock.com.[5] The multiple merchants that accept cryptocurrencies as payment illustrates that cryptocurrencies have grown past their fringe origins[6] and joined mainstream society. Although cryptocurrencies may have originally been created as a response to concerns surrounding government- and bank-backed currencies, cryptocurrencies are only another asset used as a medium of exchange. The exchange, not the asset itself, is what gives the medium it's "nefarious" nature. The main difference between cryptocurrencies and other assets that are traded, such as cash or stocks, is that cryptocurrencies are protected by cryptography[7] and most cryptocurrencies databases are not centralized.[8]

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4. *Bitcoin Terms & Conditions*, EXPEDIA.COM, https://www.expedia.com/ Checkout/BitcoinTermsAndConditions (last visited March 19, 2018); *see also Book Your Flights on CheapAir with Bitcoin*, CHEAPAIR.COM, https://www.cheapair.com/blog/book-your-flights-on-cheapair-with-bitcoin-virtual-currency/ (last visited March 19, 2018).

5. BITCOIN | OVERSTOCK.COM, https://www.overstock.com/bitcoin (last visited March 27, 2018).

6. Cypherpunks, agorists, and crypto-enthusiasts are fringe in the sense that, until recently, cryptocurrencies were not known by mainstream society, let alone discussed as an alternative to government-backed currencies. *See generally Fringe*, MERRIAM-WEBSTER DICTIONARY ONLINE (last accessed March 31, 2018).

7. Cryptography refers to the art of writing or solving codes that allow information to be kept secret. Modern cryptography involves mathematics used to encrypt data. There are multiple types of modern cryptography, but cryptocurrencies generally use hash functions. Hash functions are not used to keep information secret in the same way that other types of cryptography are, but rather they are used to verify that a file has remained unchanged. *See* Corin Faife, *Bitcoin Hash Functions Explained*, COINDESK (Feb. 19, 2017), https://www.coindesk.com/bitcoin-hash-functions-explained/.

8. Although oversimplified, a centralized database is one which data is stored in one location, whereas a decentralized database is where data is stored across multiple computers. *See* Andrew Tar, *Decentralized and Distributed Databases, Explained*, COINTELEGRAPH (Dec. 2, 2017), https://cointelegraph.com/ explained/decentralized-and-distributed-databases-explained. Ripple, a type of cryptocurrency, is notable because its network is managed by independently owned servers that are mostly owned by Ripple itself or its partnering banks, leading to criticism that it's not actually decentralized. *See* Ripple (XRP) Whitepaper, Whitepaper Database (Sept. 19, 2017), https:// whitepaperdatabase.com/ripple-xrp-whitepaper/. *See also* Jamie Redman, *Is the Centralized Ripple Database With the Biggest Pre-Mine Really a Bitcoin Competitor?*, BITCOIN.COM (Dec. 30, 2017), https://news.bitcoin.com/is-the-

The result is that, for the end user of a cryptocurrency like Bitcoin,[9] the transaction functions more like using PayPal[10] or sending a few dollars to a friend using Venmo,[11] rather than a secret account filled with money.[12] Yet it is an inescapable reality that cryptocurrencies can be and are used in illegal markets[13] or activities.[14]

It is helpful to examine why cryptocurrencies were created. It should be noted that supporters of cryptocurrencies are not one, homogenous group, and they have widely different points of view. This section serves only as an introduction into some of the basic philosophies behind cryptocurrencies and is not intended to be an in-depth examination.

Before cryptocurrencies, there was encryption. In the 1970s, cheaper hardware allowed computers to be used for storing data digitally. Doctors Whitfield and Martin Hellman suggested that developing a shared cryptography key between users to secure digital data was the best way to protect users' privacy.[15] In the 1980s, David Cham wrote extensively on the conflict between an organization's need for security and the benefits of automation, and

centralized-ripple-database-with-the-biggest-pre-mine-really-a-bitcoin-competitor.

9. Although the concept and implementation of Bitcoin will be expanded further in the paper, a simple explanation is that Bitcoin is a decentralized digital currency (meaning it is electronic and does not have a bank or central administrator) that allows transactions between individuals directly. These transactions are verified by equations using cryptography.

10. PayPal, established in 1998, is a worldwide, online payment system that allows businesses and individuals to transfer money through electronic means, rather than through paper methods such as checks or money orders.

11. Venmo is a mobile service that allows users to transfer money to one another using a phone app or Venmo's website.

12. Theodore W. Reuter, *Pitfalls for Paying Employees in Bitcoin*, 58 ADVOCATE 39, 39 (2015).

13. Kevin Singh, *The New Wild West: Preventing Money Laundering in the Bitcoin Network*, 13 NW. J. OF TECH & INTELL. PROP. 39, 39 (2015).

14. Frederick Coleman, *The Dark Side of Bitcoin: Illegal Activities, Fraud, and Bitcoin*, BLOCKONOMICS (Jun. 16, 2017), https://blog.blockonomics.co/ the-dark-side-of-bitcoin-illegal-activities-fraud-and-bitcoin-360e83408a32.

15. Whitifled Diffie and Martin E. Hellman, *New Directions in Cryptography*, 22 IEEE TRANSACTIONS ON INFO. THEORY (1976).

an individual's need for privacy.[16] These ideas combined into the Cypherpunk movement.[17]

Cypherpunks began as a small meeting monthly, started a mailing list in 1992, and by 1994 had 700 subscribers. [18] Cypherpunks tended to be libertarian-leaning in the sense that they believed society would be better with minimal government. [19] Cypherpunks believed one of the best ways to protect their interests was to remain anonymous and that "privacy in an open society requires [an] anonymous transaction system." [20] The Crypto Anarchist Manifesto, distributed in 1988, outlines their concern that governments will halt the spread of technology.[21]

Although Cypherpunks may have been the original impetus behind cryptocurrencies, many backers of cryptocurrencies now identify as agorists. Agorism, first proposed by Samuel Edward Konkin II in 1974, is a social philosophy that combines a libertarianism or anarchical point of view with counter-economics.[22] Agorism is a strategy for "ending the State's influence on people's lives." [23] It involves voluntary interaction between people via the market, without the influence of the State.[24] Counter-economics includes everything from the black market, acts of civil

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16. *See* David Chaum, *Security Without Identification: Card Computers to Make Big Brother Obsolete*, DAVID CHAUM (originally published Oct. 1985) https://chaum.com/publications/Security_Wthout_Identification.html.

17. James Lopp, *Bitcoin and the Rise of the Cypherpunks*, COINDESK (Apr. 9, 2016), https://www.coindesk.com/the-rise-of-the-cypherpunks/.

18. Robert Manne, *The Cypherpunk Revolutionary Julian Assange*, THE MONTHLY (March 2011), https://www.themonthly.com.au/issue/2011/february/1324596189/robert-manne/cypherpunk-revolutionary.

19. Kiran Vaidya, *Origins and Philosophical Ideology Behind Bitcoin*, MEDIUM (Nov. 11, 2016), https://medium.com/all-things-ledger/origins-and-philosophical-ideology-behind-bitcoin-680f09a6a063.

20. Eric Hughes, *A Cypherpunk's Manifesto*, ACTIVISM (March 9, 1993), https://www.activism.net/cypherpunk/manifesto.html.

21. Timothy C. May, *The Crypto Anarchist Manifesto*, ACTIVISM (Nov. 22, 1992), https://www.activism.net/cypherpunk/crypto-anarchy.html.

22. Samuel Edward Konkin III, *An Agorist Primer*, *9, *12 (Dec. 2008), http://www.kopubco.com/pdf/An_Agorist_Primer_by_SEK3.pdf.

23. Peter Kallman, *A 21st Century Introduction to Agorism*, MEDIUM (Dec. 12, 2016), https://medium.com/@Kallman/a-21st-century-introduction-to-agorism-5dc69b54d79f.

24. *Id.*

disobedience, or anything a government chooses to control through taxation or regulation.[25]

The combination of both agorism (using counter-economics as a means to achieve its end) plus the concerns expressed by Cypherpunks about privacy and the slowdown of technology due to government influence, helps explain the philosophy behind cryptocurrencies.

Which individual or group created the first true cryptocurrency is debatable, but most experts believe that a Netherland invention called Digicash was one of the first iterations of cryptocurrencies.[26] David Chaum began Digicash in 1989.[27] David Chaum, as mentioned earlier, authored many of the papers that influenced Cypherpunks and other crypto-enthusiasts.[28] Digicash functioned differently than how most modern cryptocurrencies operate now. Digicash was a simple, electronic payment that required a user to use a specific encryption key provided by a bank.[29] Unfortunately, as with many new technologies, Digicash struggled with successfully implementing its invention and encouraging others to buy into the idea of using a digital, encrypted currency.[30] Although Digicash signed up one bank as a client,[31] Digicash filed for Chapter 11 Bankruptcy in 1998.[32]

Soon after Digicash was implemented, e-Gold came onto the newly-formed cryptocurrency market.[33] E-Gold users deposited physical gold into their e-Gold and received gold credits in return.[34]

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25. *Id.*

26. Julie Pitta, *A Requiem for a Bright Idea*, Forbes (Nov 1, 1999), https://www.forbes.com/forbes/1999/1101/6411390a.html#62c913a6715f.

27. *How DigiCash Blew Everything*, NEXT, (Jan. 1999), https://cryptome.org/jya/digicrash.htm.

28. *See* sources cited *supra* note 17.

29. David Chaum, *Blind Signatures for Untraceable Payments*, DAVID CHAUM (originally published 1998), https://chaum.com/publications/Chaum-blind-signatures.PDF.

30. *How DigiCash Blew Everything*, NEXT, (Jan. 1999), https://cryptome.org/jya/digicrash.htm.

31. *See* sources cited *supra* note 26.

32. *See* sources cited *supra* note 26; *see also* Team Koinex, *A Brief History of Cryptocurrency*, MEDIUM (June 11, 2017), https://medium.com/koinex-crunch/a-brief-history-of-cryptocurrency-889fed168555.

33. *See* Team Koine *supra* note 32.

34. Kim Zetter, *Bullion and Bandit: The Improbable Rise and Fall of E-Gold*, WIRED (June 9, 2009), https://www.wired.com/2009/06/e-gold/.

Users could spend these credits to purchase goods across borders with other people who accepted the credits as a form of payment.[35] This is similar to PayPal in that the bank account linked to a user's PayPal account has a physical component at the bank's physical location.[36] It is similar to Bitcoin because the credits e-Gold users received were not backed by any governmental entity, yet could be accepted as payment at retailers. However, one important difference between early cryptocurrencies like e-Gold and cryptocurrencies as they exist today is how transaction information was held. Older cryptocurrencies tended to hold information centrally with one user or location, whereas most modern cryptocurrencies[37] utilize a peer-to-peer network for recordkeeping.[38]

The use of a peer-to-peer network to track transactions is one major reason why Bitcoin, the most popular modern cryptocurrency, gained a high market share. Bitcoin's peer-to-peer network called Blockchain was the major reason behind its success, and most other cryptocurrencies have followed suit by implementing Blockchain.

Blockchain was created in 2008 by Satoshi Nakamoto.[39] Blockchain is the technology behind Bitcoin's strong encryption

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35.   *See* Team Koine *supra* note 32.

36.   Admittedly, not all assets a bank holds are physically located at a bank, but banks are required to have a certain amount of cash in reserve ("reserve requirement"). *See generally Reserve Requirements*, Board of Governors of the Federal Reserve System (last accessed March 29, 2018), https://www.federalreserve.gov/monetarypolicy/reservereq.htm.

37.   The use of Blockchain technology in modern cryptocurrencies is so widespread that the first modern cryptocurrency created without the use of Blockchain, IOTA, did not launch until 2015. *See* Mike Orcutt, *A Cryptocurrency Without a Blockchain Has Been Built to Outperform Bitcoin*, MIT Technology Review, https://www.technologyreview.com/s/609771/a-cryptocurrency-without-a-blockchain-has-been-built-to-outperform-bitcoin/ (Dec. 14, 2017). *See also IOTA: First Cryptocurrency WITHOUT a Blockchain Launches, Jumps to 6th Highest Marketcap in 1 Day*, STEEMIT, https://steemit.com/cryptocurrency/@sirwinchester/iota-first-cryptocurrency-without-a-blockchain-launches-jumps-to-usd1-7-bn-market-cap-in-1-day (May, 2017).

38.   *See* Team Koine *supra* note 32.

39.   The true identity of the creator if Bitcoin is unknown; Satoshi Nakamoto is merely the name supplied by the person (or group of people) who released the software and communicated via email to the early developers. *See* Nathaniel Popper, *Decoding the Enigma of Satoshi Nakamoto and the Birth of Bitcoin*, N.Y. TIMES (May 15, 2015), https://www.nytimes.com/2015/05/17/

and record-keeping. Secured records distinguished bitcoin from other cryptocurrencies and launched its popularity.[40] Blockchain uses a peer-to-peer network to create and house a database that contains the payment history of every Bitcoin in circulation.[41] A peer-to-peer network is basically a group of computers or devices that store information and share a workload, usually without a central administrator.[42] This is different from a client-server network—which is how most users access information on the internet. A client-server network requests information from a central server.

Similar to a peer-to-peer network, using Blockchain apiece of a database is held by every computer connected duplicated to ensure that if one computer is lost the data still exists, and that data is publicly available.[43] What makes Blockchain so attractive is the safety in knowing the information held by the computers connected to the Blockchain network is not centrally located. The transaction information associated with a cryptocurrency that uses Blockchain can't be lost or deleted. This differs from a traditional bank, where account and transaction information is stored centrally. Because it is centrally stored, it can be vulnerable to attacks that would delete this information.

In addition, using Blockchain, the stored information is semi-anonymous. It is semi-anonymous because the transaction history associated with a cryptocurrency on Blockchain is visible by the public. "Each bitcoin is, in essence, a chain of digital signatures that, when decoded, provide the entire transactional history of the

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business/decoding-the-enigma-of-satoshi-nakamoto-and-the-birth-of-bitcoin.html; *see also* Adrian Chen, *We Need to Know Who Satoshi Nakamoto Is*, THE NEW YORKER (May 9, 2016), https://www.newyorker.com/business/currency/we-need-to-know-who-satoshi-nakamoto-is.

40. *The Great Chain of Being Sure About Things*, THE ECONOMIST (Oct. 31, 2015), https://www.economist.com/news/briefing/21677228-technology-behind- bitcoin-lets-people-who-do-not-know-or-trust-each-other-build-dependable.

41. *Id.*

42. *Definition – Peer-to-Peer Network*, TECHNOPEDIA (last accessed March 31, 2018) https://www.techopedia.com/definition/25777/peer-to-peer-network-p2p-network.

43. *See* sources cited *supra* note 40.

bitcoin."[44] Because the digital signature needs to be decoded, the person who initiated the transaction remains anonymous.[45] Multiple transactions could be linked together, but without knowing the user's pseudonym the user's identity would be an educated guess.[46] This is why Bitcoin suggests that users create new Bitcoin addresses each time a user receives a new payment.[47] Although Blockchain is most commonly associated with cryptocurrencies, Blockchain can store any electronic documentation.

Bitcoin continues to be the most well-known and popular cryptocurrency. [48] In 2015, the total market capitalization of cryptocurrencies was over 5.75 billion dollars, but Bitcoin accounted for over five billion dollars of that capitalization. [49] Bitcoin has grown tremendously; in 2018, Bitcoin increased from a market capitalization of roughly 15 billion dollars to a capitalization of 231 billion dollars.[50] By December 2018, Bitcoin had reached a capitalization of 318 billion dollars. Yet, by January 2018, Bitcoin had plummeted to a market capitalization of about 195 billion dollars (about 11,617 dollars per Bitcoin), illustrating how volatile the cryptocurrency market continues to be.[51]

How are Bitcoins earned? Bitcoin relies on a network of participants to maintain a database of valid Bitcoins to verify transactions, using Blockchain technology. [52] This maintained

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44.   Stephen T. Middlebrooke & Sarah Jane Hughes, *Regulating Cryptocurrencies in the United States: Current Issues and Future Directions*, 40 WM. MITCHELL L. REV. 813, 820 (2014).
45.   *See supra* note 12.
46.   Aaron van Wirdum, *Is Bitcoin Anonymous? A Complete Beginner's Guide*, BITCOIN   MAGAZINE   (Nov.   18,   2015   2:34   PM), https://bitcoinmagazine.com/articles/is-bitcoin-anonymous-a-complete-beginner-s-guide-1447875283/.
47.   *Protect Your Privacy*, BITCOIN (last accessed March 31, 2018), https://bitcoin.org/en/protect-your-privacy.
48.   *See* Reuter, *supra* note 44 at 820.
49.   Judith Lee, et. al., *Bitcoin Basics: A Primer on Virtual Currencies,* 16 No. 1 BUS. L. INT'L 21, 22 (2015).
50.   *Cryptocurrency Market Capitalization¸* COINMARKET, https://coinmarketcap.com/currencies/bitcoin/ (last visited Apr. 14, 2018).
51.   *Id.*; *See also* Jim Edwards, *Bitcoin Is So Volatile Its Risk-Adjusted Return Is Worse Than Stocks*, INSIDER (Dec. 28, 2017), http://www.businessinsider.com/ bitcoin-volatility-risk-adjusted-return-worse-than-stocks-2017-12.
52.   *See supra* note 48.

database requires an enormous amount of computing power in order to record and validate the sale of a Bitcoin.[53] This computing power is required because packaged in with the sale of a Bitcoin is also the whole transaction history of that particular Bitcoin. In addition, there is an equation tacked onto the validation, known as "proof of work." [54] Proof-of-work ensures that the validation was time-consuming. [55] As a way to compensate people who use their computers to validate transactions, validating users receive Bitcoins as compensation.[56] This process is commonly known as "mining."

As the number of Bitcoins in circulation increases, the complexity of the mathematical equations used as a proof of work also increases. The increase in complexity creates longer computing times, which in turn results in a planned slowdown of the rate that new Bitcoins are produced.[57] Eventually, the number of Bitcoins in circulation will cap at twenty-one million.[58] There are about sixteen million Bitcoins in circulation today.[59]

B. *Legislative Response to Cryptocurrencies*

Although cryptocurrencies have existed since 1989, it was not until the early 2010s that United States' federal and state legislators began addressing how to regulate cryptocurrencies. Because cryptocurrencies were initially used in illicit transactions outside the confines of a government or financial institution, the Financial Crimes Enforcement Network (FinCEN) of the US Department of Treasury was one of the first institutions to release guidance on cryptocurrencies.

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53.   Anthony Cuthbertson, *Bitcoin Mining On Track To Consume All of the Worlds Energy By 2020*, NEWSWEEK (Dec. 11, 2017, http://www.newsweek.com/bitcoin-mining-track-consume-worlds-energy-2020-744036.

54.   Aleksandr Bulkin, *Explaining Blockchain—How Proof of Work Enables Trustless Consensus*, KEEPING STOCK (May 3, 2016), https://keepingstock.net/explaining-blockchain-how-proof-of-work-enables-trustless-consensus-2abed27f0845.

55.   *Id.*

56.   *See supra* note 49 p. 24.

57.   *See supra* note 56.

58.   *See supra* note 56.

59.   *Bitcoins in Circulation*, BLOCKCHAIN (last visited Oct. 22, 2017), https://blockchain.info/charts/total-bitcoins.

In the spring of 2013, the FinCEN issued guidance on the compliance obligations of virtual currencies under the federal Bank Secrecy Act (BSA).[60] The BSA mandates that "financial institutions (a broad category of businesses offering financial services) must collect and retain information about their customers and share that information with the Financial Crimes Enforcement Network."[61] Cryptocurrencies fall into the categories that must be reported to FinCEN.[62]

In 2014, the IRS released guidance on the taxation of virtual currencies. Like the guidance issued by FinCen, virtual currencies were defined broadly enough to include cryptocurrencies. The IRS defined virtual currencies as "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. . . that does not have legal tender status in any jurisdiction. . . [and] that has an equivalent value in real currency, or that acts as a substitute for real currency, or is referred to as a 'convertible' currency."[63] The IRS deemed that "general tax principles applicable to property transactions"[64] would apply to "transactions using virtual currency."[65] Thus, the IRS deemed virtual currencies as property, rather than a foreign currency.

Some proponents of cryptocurrencies had hoped that the IRS would classify cryptocurrencies as a foreign currency, rather than property.[66] Foreign currencies are subject to market-to-market rules under I.R.C. § 1256.[67] Foreign currencies are taxed on the gain or loss of their value,[68] whereas property can be treated as income and

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60.   *See supra* note 44 p. 815.
61.   Peter Van Valkenburgh, *The Bank Secrecy Act, Cryptocurrencies, and New Tokens: What is Known and What Remains Ambiguous*, COIN CENTER REPORT (May 2017), https://coincenter.org/files/2017-05/report-bsa-crypto-token1.pdf.
62.   *Id.*
63.   IRS Virtual Currency Guidance – Notice 2014-21 (RS NOT), 2014-16 I.R.B. 938, 2014 WL 1224474
64.   *Id.*
65.   *Id.*
66.   *Bitcoin Taxation is Broken Here's How To Fix It*, COIN CENTER (April 12, 2017), https://coincenter.org/entry/bitcoin-taxation-is-broken-here-s-how-to-fix-it.
67.   Laurence F. Casey, CASEY FEDERAL TAX PRACTICE: A TREATISE OF THE LAWS AND PROCEDURES GOVERNING THE ASSESSMENT AND LITIGATION OF FEDERAL TAX LIABILITIES § 3:07.33 (May 2017).
68.   IRC § 988(a)(1)(a).

subject to ordinary income tax or capital gains tax. [69] When computing gross income, the fair market value of the virtual currency measured in US dollars, as of the date the virtual currency was received, should be used.[70] As this article will explore later, this may cause problems for employers who choose to pay employees in cryptocurrencies.

Regarding the creation of Bitcoins (also known as Bitcoin mining), the IRS stipulated that net earnings from Bitcoins earned from mining must be taxed as income derived from self-employment.[71] According to the IRS, the medium a person is paid in for their services doesn't matter.[72] "[T]he fair market value of virtual currency paid as wages is subject to federal income tax withholding, FICA tax, and FUTA tax and must be reported on Form W-2."[73]

The vast majority of states have not passed statutes regarding cryptocurrencies.[74] A few states have issued guidance or passed new laws. In Washington state, a cryptocurrency (or other virtual currency) may need a license if the cryptocurrency is involved in transferring money via an exchange. [75] Alabama, Connecticut, Georgia, Hawaii, New York, and North Carolina passed similar legislation.[76] Kansas, New Hampshire, Tennessee, and Texas have stated that cryptocurrency creators do not need a money transferrer license. [77] Illinois has specified that third-party cryptocurrency

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69. Adam Bergman, *What You Need to Know About Cryptocurrencies and Taxes*, FORBES (July 10th, 2017), https://www.forbes.com/sites/greatspeculations/2017/07/10/what-you-need-to-know-about-cryptocurrencies-and-taxes/#140a09b61a95.
70. IRS Virtual Currency Guidance – Notice 2014-21 (RS NOT), 2014-16 I.R.B. 938, 2014 WL 1224474.
71. *Id.*
72. *Id.*
73. *Id.*
74. Rachel McIntosh, *The Good, the Bad, and the Ugly: Crypto Regulation in the USA*, CRYPTOCURRENCY (Jan. 1, 2018),
https://www.financemagnates.com/cryptocurrency/news/good-bad-ugly-crypto-regulation-usa/.
75. RCW 19.230.030; *see also Bitcoin and Virtual Currency Regulation*, Washington State Department of Financial Institutions (last accessed March 31, 2018), https://dfi.wa.gov/bitcoin.
76. *See supra* note 74.
77. *See supra* note 74.

exchanged need a money transferrer license.[78] In addition, those cryptocurrency exchanges "must maintain cash reserves equivalent to the transacted volume on their platform."[79]

In addition, some states have taken legal action against cryptocurrencies. The Texas State Securities Board has issued at least five cease-and-desist letters against dubious cryptocurrencies seeking investors.[80] California's Department of Financial Institutions sent a cease and desist letter to the Bitcoin Foundation.[81] Although the Bitcoin Foundation does not actually transfer or deal in Bitcoin directly,[82] the letter accused the foundation of transmitting money without obtaining the license or authorization required by California's Money Transmission Act.[83] The Bitcoin Foundation responded by pointing out that it does not maintain business operations in California, it does not sell or issue payment instruments, and it does not sell or issue stored value.[84]

C. The Fair Labor Standards Act (FLSA)

Despite early opposition to statutes that protected employee rights and compensation,[85] the Fair Labor Standards act (FLSA)

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78.   *See supra* note 74.

79.   Rakesha Sharma, *More US States May Roll Out Cryptocurrency Regulations,* INVESTOPEDIA (March 7, 2018), https://www.investopedia.com/news/majority-us-states-are-still-acknowledge-cryptocurrencies/.

80.   Samantha Ehlinger, *Texas Regulators Clamp Down on Cryptocurrency Investment Firm Displaying Likeness of Ruth Bader Ginsburg,* SAN ANTONIO EXPRESS-NEWS (Feb. 28, 2018), https://www.expressnews.com/business/local/article/Texas-regulators-clamp-down-on-cryptocurrency-12717301.php.

81.   *See supra* note 44 p. 815.

82.   Jon Matonis, *Bitcoin Foundation Receives Cease and Desist Order from California*, FORBES (June 23rd, 2013), https://www.forbes.com/sites/jonmatonis/2013/06/23/bitcoin-foundation-receives-cease-and-desist-order-from-california/#5c2d133c518c.

83.   *See supra* note 82; *see also* Rob Wile, *Bitcoin Foundation Gets Cease-And-Desist Letter from California*, BUSINESS INSIDE (June 23rd, 2013), http://www.businessinsider.com/bitcoin-cease-desist-letter-california-2013-6 (includes a link to the actual letter sent).

84.   *Bitcoin Foundation Response to CA DFI*, The Bitcoin Foundation (July 2nd, 2013), http://bitcoinfoundation.org/bitcoin-foundation-response-to-ca-dfi/.

85.   *See generally* Peter Cole, *The Law That Changed the American Workplace*, Time, (Jun 24, 2016), http://time.com/4376857/flsa-history/ (discussing state and federal courts striking down worker's compensation laws as unconstitutional); *see also* Hammer v. Dagenhart, 247 U.S. 251 (1918)

was passed in 1938. Initially, the FLSA only applied to about one-fifth of the labor force; it has since been amended numerous times to expand coverage. [86] It was created to "provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and other purposes."[87] It was also adopted as a means of economic recovery from the Great Depression. [88] The FLSA applies to employees, not independent contractors, nor to volunteers.[89]

One of the FLSA's primary goals was to establish a minimum wage that could provide a living wage. [90] The minimum wage provisions guaranteed that an employee received a minimum amount of money mandated by the federal government for each hour worked or a minimum weekly salary for employees who were exempt from some provisions of the FLSA. [91] An employer can comply with the minimum wage portions found in Section 6 of the Act if the hourly wage for the employee for the workweek equals or exceeds the minimum wage established by the federal government.[92] Employees are free to contract for a higher wage.[93] Employees and employers cannot, however, contract to pay a wage lower than the minimum wage.[94]

(holding that limitations on the right to employ children should be reserved for the states); *see also* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding that a minimum wage for women was unconstitutional because it made women unable to freely contract labor).

86. Thomas Gausden, *Constitutional Law: Tenth Amendment: Fair Labor Standards Act: Minimum Wage Requirement Held Inapplicable to State Employees (United States v. Darby),* 60 MARQUETTE L. REV. 185, 188 (1976).

87. 29 U.S.C. § 201 (2011).

88. Laurie E. Leader, WAGES & HOURS: LAW AND PRACTICE § 1.03 (Lexis-Nexis-Matthew Bender, 2017).

89. 29 U.S.C. § 203(e)(4) (2011).

90. William Quigley, *"A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum* Wage, 27 ST. MARY'S L. J. 513, 529 (1996).

91. Although the FSLA mandates a minimum hourly wage for non-exempt employees and a minimum weekly salary for exempt employees, some job categories such as an outside sales employee are excluded from the weekly minimum salary.

92. Adair v. City of Kirkland, 185 F.3d 1055, 1064 (8th Cir. 1985).

93. Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 741 (1981).

94. Satterwhite v. United Parcel Service, Inc., 496 F.2d 448, 451 (10th Cir. 1974).

Although used often, the FLSA does not define "wages."[95] Wages most commonly refer to cash payments for work performed,[96] but wages can also include the cost of board and lodging,[97] taxes assessed against the employee and collected by the employer,[98] and tips received by employees.[99]

The FLSA also requires "payments of the prescribed wages, including overtime and compensation, in cash or negotiable instruments[100] payable at par."[101] Wages are usually paid in either cash or a negotiable instrument such as a check addressed to a particular employee.[102] "Scrips tokens, credit cards, 'dope checks,' coupons, and similar devices are not proper mediums of payment."[103] In addition, wages must be paid "free and clear," meaning there are no kick-backs to the employer or a third-party.[104]

D. State Laws on Wages

Prior to the FLSA, some states had established their own minimum wage laws. In 1912, Massachusetts enacted the first minimum wage law (although it was not compulsory and only applied to women and minors).[105] By 1938, twenty-five states had passed some kind of minimum wage statute.[106] Under the FLSA, states are allowed to enact their own wage and hour laws;[107] these

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95.   Laurie E. Leader, WAGES & HOURS: LAW AND PRACTICE § 4.01 (Lexis-Nexis-Matthew Bender, 2017).

96.   *Id.*

97.   29 U.S.C. § 203(m) (2011).

98.   20 C.F.R. § 531.38 (2011).

99.   *See supra* note 97.

100.   A negotiable instrument is "a written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money, (3) is payable on demand or at a definite time, and (4) is payable to order or the bearer." *See Negotiable Instrument*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See also* U.C.C. § 3-104(a) (AM. LAW. INST. & UNI. LAW COMM'N 2016).

101.   29 C.F.R. § 531.27 (2017).

102.   Laurie E. Leader, WAGES & HOURS: LAW AND PRACTICE § 4.03 (Lexis-Nexis-Matthew Bender, 2017).

103.   29 C.F.R. § 531.34 (2017).

104.   29 C.F.R. § 531.35 (2017).

105.   *See supra* note 90 p. 516.

106.   *See supra* note 90 p. 517.

107.   29 U.S.C. § 218(a).

laws can be more protective.[108] The law that is the most protective of the employee is the law that governs the issue.[109]

Although the Department of Labor has stated that employers can pay employees in foreign currency so long as the payment still meets the minimum wage requirements, [110] some states have legislation that says employees must be paid in US currency. For example, Texas[111] and Michigan[112] have mandated that employees must be paid in US currency. Arizona specifically prohibits including non-monetary compensation in minimum wage calculations.[113]

E. Payroll cards

Although the FLSA specifies that employees must be paid in cash or negotiable instruments, [114] some employers compensate their employees using payroll cards.[115] A payroll card functions like a bank debit card except an employer is partnering with the financial institution to issue and maintain the card, rather than an individual contracting with a financial institution for an account to deposit

108. Salim Shahriar v. Smith & Wollensky Rest. Group, Inc., 659 F.2d 234, 248-47 (2nd Cir. 2011). Even though the Fair Labor Standards Act will not preempt state statutes that have higher minimum wage requirements, the Fair Labor Standards Act may preempt common law claims via conflict preemption. *See* Laurie E. Leader, WAGES & HOURS: LAW AND PRACTICE § 4.01 (Lexis-Nexis-Matthew Bender, 2017).

109. Laurie E. Leader, WAGES & HOURS: LAW AND PRACTICE § 13.01 (Lexis-Nexis-Matthew Bender, 2017).

110. *See generally US Labor Department Investigation Reveals Silicon Valley Employer Significantly Underpaid workers from Mexico*, Department of Labor News Release (Feb. 4 2013), https://www.dol.gov/opa/media/press/whd/WHD20130137.htm (stating that an employer paying employees in Pesos below the US minimum wage were in violation of the minimum wage, overtime, and record-keeping provisions of the FLSA).

111. Tex. Lab. Code Ann. §§ 61.016.

112. MCL § 408.476.

113. Reyes v. LaFarga, No. CV-11-1998-PHX-SMM 2013 WL 12098794 at *2 (D. Az. Nov. 11, 2013).

114. 20 C.F.R. § 531.27 (2017).

115. Maria LaMagna, *More Employees Are Getting This Instead of a Paycheck*, MARKETWATCH (Oct. 9, 2017), http://www.marketwatch.com/story/more-employees-are-getting-this-instead-of-a-paycheck-2017-10-09.

money.[116] Similar to how many individual bank accounts have fees associated with them, some payroll cards have fees associated with withdrawing cash from the card, making deposits, requesting paper statements, or inactivity.[117]

The Electronic Funds Transfer Act (EFTA) regulates some aspects of payroll cards. The EFTA was enacted in 1978 to "establish rights, liabilities, and responsibilities of participants in electronic fund[s]."[118] An electronic funds transfer includes, but is not limited to, ATM transfers, direct deposits, cash withdrawals, and transfers related to debit card transactions.[119] The EFTA applies to payroll cards because using a payroll card involves many of these actions. In addition, "regulation E [of EFTA] requires employers utilizing a payroll card to offer employees the choice of at least one other method of receiving their wages."[120] The Department of Labor has echoed the EFTA, releasing guidance that states employees may receive their wages in the form of a payroll card if another option, such as a paper check or direct deposit, is given to an employee.[121]

State legislatures have passed statutes addressing the use of payroll cards. Nebraska passed a statute that closely mirrors the ECTA with an additional requirement that employees must have access to the full amount of wages without a fee on the paycard at least once per pay period.[122] Similarly, Illinois has passed legislation that grants additional rights to employees who receive their compensation on a payroll card. Employees must be offered another method of payment to a paycard, may withdraw wages at

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116.   Kevin Vance, *Using Payroll Cards to Pay Employees' Wages*, LAW 360 (Dec. 6, 2016), https://www.law360.com/articles/869181/using-payroll-cards-to-pay-employees-wages.

117.   Jessica Silver-Greenburg & Stephanie Clifford, *Paid Via Card, Workers Feel Sting of Fees*, N.Y. TIMES (June 30, 2013), http://www.nytimes.com/2013/07/01/business/as-pay-cards-replace-paychecks-bank-fees-hurt-workers.html.

118.   15 U.S.C.A. § 1693 (2010).

119.   Electronic Fund Transfer Act: Key Provisions (Practical Law Practice Note 2017), https://1.next.westlaw.com/9-575-7125.

120.   *See supra* note 44 p. 265.Sarah Jane Hughes & Stephen T. Middlebrook, *Are These Game Changers? Developments in the Law Affecting Virtual Currencies, Prepaid Payroll Cards, Online Tribal Lending, and Payday Lenders,* 70 BUS. LAW. 261, 265 (2015).

121.   *Id.* at 262-63.

122.   *Id.* at 265.

least once per pay period without cost, must have unlimited access to balance info by telephone, not be charged inactivity fees until after a full year of account abandonment, receive two free declined transactions per month, and subsequent charges capped at a commercially reasonable price.[123]

Finally, there have been several class action lawsuits against employers that implemented payroll cards. In particular, the plaintiffs in *Lapan v. PVHS Corp.* asserted that the fees associated with the paycard caused the "Plaintiffs and the Class to be paid less than the statutory minimum wage and statutory overtime compensation for all hours worked."[124]

III.   ANALYSIS

Although employees may request compensation in a cryptocurrency like Bitcoin, and employers may see paying employees in cryptocurrencies an indication of a forward-thinking, technology-focused company culture, the practical considerations of paying an employee in a cryptocurrency and potential litigation issues outweigh the benefits to the employer.

First, paying employees in cryptocurrencies may conflict with the FLSA. Employers must be concerned with whether a cryptocurrency would run afoul of the FLSA's requirement that employees be paid in cash or negotiable instrument. Even though the federal legislature has indicated that employees can be compensated by board, lodging, or via payroll cards, it's unlikely that cryptocurrencies would fit under these categories. In addition, employers will have a higher administrative burden to ensure they are complying with the minimum wage standards of the FLSA; this process is made more difficult by the volatile nature of cryptocurrencies.

Second, employers may violate a state equivalent of the FLSA. This is especially likely in states requiring that employees must be paid in US currency. Employers who reside in this state will run into an insurmountable obstacle as a cryptocurrency is clearly not US currency.

Third, employers need to be concerned with the administrative burden that comes with paying an employee in a cryptocurrency.

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123.   *Id.* at 262-63.
124.   *Id.* at 266 (quoting First Amended Complaint ¶¶ 1-4, Lapan v. PVH Corp., No. C 13-05006-YGR (N.D. Cal. Dec. 9, 2013).

The use of a currency that is not a US currency makes withholding employer taxes more complicated, and it will most likely result in additional costs employers did not anticipate.

Finally, even though an employee may voluntarily agree to be paid in cryptocurrencies, doing so violates some strong public policy considerations present in the FLSA. Furthermore, the concept of an employer paying an employee in a currency that is subject to taxation and regulation runs counter to the philosophies behind cryptocurrencies.

However, for employers who wish to take the plunge into cryptocurrencies and compensate their employees in something like Bitcoin, a few workarounds are available.

A. Fair Labor Standards Act

The FLSA requires that employees be paid in cash or negotiable instrument.[125] The FLSA does not define wages, but it does mention that employees cannot be paid in tokens or scrips as a substitute for wages, unless the tokens or scrips are the reasonable value of housing, board, etc.[126]

A scrip is a document that entitles the holder to receive something of value. [127] Traditionally, scrips were issued by an employer and could only be redeemed to purchase goods such as food and clothing at a company store.[128] If an employer issued a cryptocurrency that could only be redeemed at a website run by the company, it likely would be considered a scrip because it's a token (not a government-backed currency) that could only be redeemed at a place the employer designated. However, it is unlikely that the currency would be considered a cryptocurrency. It may be a virtual currency, but an employer issuing and tracking a currency to its employees tends to imply that there is centralized control, which most cryptocurrencies do not have.

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125.   29 C.F.R. § 531.27 (2017).
126.   Laurie E. Leader, WAGES & HOURS: LAW AND PRACTICE § 4.01 (Lexis-Nexis-Matthew Bender, 2017).
127.   *Scrip*, BLACK'S LAW DICTIONARY (10th Ed. 2014).
128.   Price V. Fishback, *Did Coal Miners "Owe Their Souls to the Company Store"? Theory and Evidence from the Early 1900s*, 46 J. OF ECON. HIST. 1011, 1011 (1986).

Some states have specific statutes that require that a token or scrip be transferrable. For example, in *Barker v. Stearns Coal & Lumber Co.*, Kentucky had a statute stating that a scrip must be transferrable.[129] Because the scrip could only be redeemed at a company store, it violated a portion of the Kentucky constitution.[130]

Even when employees have been paid cash, rather than scrip, the mere act of putting that money on some sort of cash voucher may run afoul of the FLSA and equivalent state laws. For example, in *Matter of Angello v. Labor Ready*, employees who opted for a cash voucher received a paper check that looked similar to a payroll check, but the voucher could only be redeemed at a company-owned ATM.[131] New York's Labor Law § 191(1)(b) prohibits an employer "from deducting monies from the wages of an employee except as required by law or as 'expressly authorized in writing' and by 'for the benefit of the employee'."[132] The court concluded that the service fee for the transaction had already been taken out of the paycheck and issuing the voucher benefitted the employer since the employer received a portion of the fee from the cash machines.[133]

Similarly, an employer who decides to take on the administrative burden of process a cryptocurrency transaction—for example, using the employee's wages to purchase a cryptocurrency, then putting that cryptocurrency into the account of the employee-may run afoul of New York statute § 191(1)(b). This is because the employer may be earning gains on the cryptocurrency that was purchased if the price fluctuates. In addition, the employer would likely be unable to ask the employee to pay any transaction fees. The situation could be further complicated if an employer issued cryptocurrencies in a type of currency not as popular as Bitcoin (which can be redeemed or transferred on several different website). If the employer had its own cryptocurrency, for example, and made money from transfer fees, the situation would be analogues to *Matter of Angello*.

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129.   Baker v. Stearns Coal & Lumber Co., 287 Ky 340, 342-44 (Ky. Ct. App. 1941).
130.   *Id.* at 350-51.
131.   Matter of Angello v. Labor Ready, Inc., 7 N.Y.3 570, 582 (N.Y. Ct. App. 2006).
132.   *Id.* at 584.
133.   *Id.* at 584-87.

B. Taxation

Compensation issued in cryptocurrencies effects the taxes that both employees and employers would pay. These taxation issues can be subdivided into two categories: additional taxes the employee must pay as a result of being paid in a cryptocurrency, and additional takes that an employer may pay as a result of paying employees in cryptocurrencies.

1. Employee Taxes

Capital gains and losses taxes are taxes as a result of a net increase or decrease of total compensation when an asset is sold.[134] Because cryptocurrencies and other virtual currencies are treated as property by the IRS for taxation purposes, rather than US currency or a foreign currency, it is likely that employees will have to calculate capital gains or losses when a cryptocurrency is used as payment for goods or services. This can be contrasted with how relatively simple taxation on income from an employer issued in US currency is. Employees do not need to calculate capital gains and losses if they use their US currency received from their employer to purchase goods or services.

Although it is unlikely that employees would need to report capital gains upon receiving the cryptocurrency from an employer, employees would need to once they exchange the cryptocurrency for property.[135] Essentially, cryptocurrency is used in a transaction, that transaction would need to be recorded and taxes would need to be paid on it. It is like an individual keeping track of his or her online purchases to calculate sales tax, or to an individual having to calculate capital gains when they sell stocks. Calculating capital gains and losses tends to be more complicated than simply filling out a 1040 Individual Income Tax Return at the end of the year, thus paying an employee in a cryptocurrency may needlessly complicate an employee's financial situation.

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134. *Capital Loss*, BLACK'S LAW DICTIONARY (10th Ed. 2014). *See also Capital Gain*, BLACK'S LAW DICTIONARY (10th Ed. 2014).

135. Lorena Yashira Gely-Rojas, *Cryptocurrencies and the Uniform Commercial Code: The Curious Case of Bitcoin*, 8 No. 2 U. PUERTO RICO BUS. L.J. 129, 134 (2015).

2. Employer Tax Withholding

Just as employees likely must calculate capital gains and losses for taxation purposes, employers holding onto cryptocurrencies to pay their employees likely would have to make the same calculations once they transferred the cryptocurrency to their employees as compensation. This is because employers would be using a cryptocurrency as a form of payment for a service.

A possible solution to this issue would be for an employer to simply pay the employee in US currency and encourage the employees to purchase their own cryptocurrencies without the involvement of the employer. Although this negates the convenience factor of having an employer purchase the cryptocurrency and flies in the face of the reasoning behind an employer offering a cryptocurrency service, this would shift any employer tax liability to the employee.

Some companies, such as BitWage, are offering to run payroll for employers and allow employees to designate how much of their paycheck they would like to convert to Bitcoins. Again, this solution would successfully shift an employer's liability and taxation issues because the employer is not holding the cryptocurrency in its own business accounts.

C. Minimum Wage

The FLSA's and state's equivalent minimum wage requirements present an additional issue. Because the prices of cryptocurrencies fluctuate daily, an employer needs to calculate the cryptocurrency minimum wage daily to ensure that an employee is receiving the correct wage and overtime compensation. For example, if minimum wage was set at $7.25 an hour, an employer would need to convert that dollar amount to the cryptocurrency amount (and vice versa). This is more complicated than paying an employee in US currency because US currency does not need to be re-calibrated each day for employee compensation purposes.

Although there is no case law dealing directly with employees paid in cryptocurrency, employers in the past have miscalculated minimum wage when they have used lodging or board as part of the minimum wage calculation.

D. Public Policy Considerations

Requiring that employees be paid in cryptocurrencies without an alternative such as US currency available is problematic. This requirement strays from the intent behind the FLSA that employees should know and understand their actual compensation, it should be transparent, and that compensation should only be offset by deductions in a commercially reasonable manner.

Second, paying an employee in a cryptocurrency flies in the face of the public policies behind state and federal legislators establishing additional employee rights for payroll cards. Chief among the concerns that encouraged legislatures to adopt specific legislation was that (1) employees are made responsible for fees that they would not be responsible for if they had direct deposit or were given cash, and (2) employees do not have access to their funds.

Paying employees in a cryptocurrency does not address either of these public policy considerations. As discussed above, employees who receive payment in cryptocurrency likely will have to keep track of their purchases for IRS purposes, as well as calculate capital gains and losses. Having to calculate capital gains and losses means that an employee will end up paying additional taxes than if the employee received income in the form of US Currency.

In addition, it is likely that the average employee would need to contact a tax professional for help with capital gains and losses taxation, instead of simply using a W2 form to complete taxes. Cryptocurrencies fluctuate so often that it could be difficult for an employee to track whether they are being compensated accurately for their services. For example, an employee would have to look up the price of a Bitcoin on the date that the employee was paid, convert that to the dollar amount, then potentially divide it further because it's doubtful that an employee would be paid in a *whole* Bitcoin when the price of a Bitcoin sits at 10,000 dollars as of January 2018, and then the employee would have to translate that into an hourly or weekly salary amount.

Although these situations are different from employees having to pay fees to access their wages, these considerations do impact the money that employees receive. In addition, if an employee wishes to convert Bitcoins to US Currency that can be used *anywhere* (since not all retailers accept Bitcoin as payment), they may have to pay conversion fees or work with a third party. Again, this is similar

to the concern that employees who receive payroll cards need to go through additional, costly steps in order to access their wages.

One solution would be to regulate payment in Bitcoins in a similar fashion that payment in payroll cards has been regulated. For example, statutes could require that employees must be given the option to be paid in an additional manner. By giving employees another option, many of the concerns outlined above of alleviated. Furthermore, only those who truly wish to participate in cryptocurrencies are forced into the payment scheme.

E. The Purpose Behind Paying Employees in Bitcoin

Cryptocurrencies were originally created as a way to circumvent government- and financial institution- backed currencies. They sprung up out of a concern for privacy and for government slowing down the advancement of technology. Therefore, the idea of paying an employee in cryptocurrencies—with all of the taxation, tracking, and regulation requirements that go along with it—seem to be the antithesis of the original purpose behind cryptocurrencies. An employer must keep records of wages and hours in order to comply with the FLSA. In addition, the IRS regulations state that users must "keep a strict record of every purchase made all year long."[136] By forcing users of cryptocurrencies to keep records of their transactions, the semi-anonymous purpose behind them is defeated.

IV.   CONCLUSION

While some employees may appreciate being paid in a cryptocurrency, ultimately it is a poor idea for an employer to pay employees in cryptocurrencies unless how cryptocurrencies are taxed and regulated changes. If more employees begin requesting to be paid in cryptocurrencies—or more employers want to pay their employees in cryptocurrencies, the administrative burden may encourage legislatures to change how cryptocurrencies are classified from property to a foreign currency. Although crypto-enthusiasts have a valid critique that the philosophy behind cryptocurrencies is incongruent with compensating employees in the US via cryptocurrencies, as cryptocurrencies continue to be a

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136.   Jose Pagliery, *New IRS Rules Make Using Bitcoins a Fiasco*, CNN TECH (March 31, 2017), http://money.cnn.com/2014/03/31/technology/irs-bitcoin.

part of mainstream society, employers will continue to try to use cryptocurrencies as compensation.

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