



LEGAL UPDATES

Electronic Signatures

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We have all experienced significant changes in our daily lives as a result of the Coronavirus pandemic. Implementation of social distancing and self-isolation has changed many businesses' day-to-day activities as well. Although electronic signatures for documents is in no way a new technology or business practice, its preference in today's environment has seen a new surge in use and necessity. Traditionally, agreements require a "wet" or original signature. As technology has paved the way for electronic signatures to be used in place of wet signatures in certain circumstances, the rules applicable to when and how an electronic signature can be used may not always be well understood.

While electronic signatures provide an easy way to provide authorization to a document, certain questions may nonetheless arise as to the enforceability of the document:

1. How do we know or demonstrate that the person named to sign the agreement is actually the person signing the document?
2. If the document is later changed after the document is signed, is the agreement still valid?
3. What about outside of California – are electronic signatures valid?

Validity of Electronic Signature

In the United States, the Electronic Signature in Global and National Commerce Act (ESIGN) and the Uniform Electronic Transactions Act (UETA), as adopted by individual states, govern the validity of electronic signatures and electronic records. ESIGN applies to federal law and preempts any inconsistent state law, except that where a state adopts UETA without amending it, ESIGN does not preempt. E-SIGN is also the governing law in states that have not adopted UETA (or a statute regarding the use of electronic signatures consistent with E-SIGN).

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California enacted the Uniform Electronic Transaction Act (“CUETA”), effective January 1, 2000, which recognizes the validity of electronic signatures. Generally, CUETA provides that an agreement cannot be denied its legal effect solely because it is in electronic form. An electronic signature is an electronic sound, symbol or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. We typically see agreements signed in compliance with CUETA through various electronic applications, such as DocuSign, Adobe Sign or similar services.

At a high level, for an electronic signature to be recognized as valid, CUETA requires a few things. First, the parties must have intended and agreed to conduct the transaction electronically. “Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.” In addition, an electronic signature must be attributable to the signatory. CUETA provides that an electronic record or electronic signature is attributable to a person if it was the act of the person. Cal Civ. Code S. 163.9. The act of “signing” can be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable. In other words, you can show that the act of signing was performed by a specified individual by demonstrating that the individual signing the document has a secured account with the electronic signature service. Courts have established that evidence of use of a unique, secure username and password may adequately authenticate a signature when that signature is a typed name inputted by the user. The use of a checkbox to show acknowledgment and agreement with a specific policy document has also been found sufficient where a unique, secure username and password was used to access the website containing the policy document. Similarly, the mere act of inputting a username and password has been found sufficient to constitute an electronic signature. It should be noted that the certain instruments or documents are specifically excluded, so be sure to check in advance.

What if the signatories agreed to the document and signed it, but then realized changes were necessary. Does the document need to be resigned or can you simply switch out the pages?

Under California law, a contract in writing may be modified by a contract in writing. This means that when a contract is modified, the modification itself should be captured in a writing executed by the parties. A contract could also be amended verbally, but this approach is fraught with evidentiary probably and is not advisable. In situations where the document is amended and a term is modified after the contact has been signed, best practices dictates that the revised agreement should be signed by the parties again so that the modified agreement can be more easily understood and enforced. In other words, the fact that an agreement is signed electronically does not modify long-standing rules. In addition, it’s important to remember that as with any contract – whether amended or not – a copy should be retained.

What about outside of the United States – are electronic signatures valid?

Online activity is seldom limited to one jurisdiction, and the same goes for contracts, many of which involve parties from different jurisdictions and include specific choice of law provisions. While many countries have adopted rules similar to ESIGN and UETA, it is important to check the law of the specific jurisdiction to ensure that it will be deemed enforceable in the event of a dispute. In some jurisdictions, for instance, certain types of transactions (or records) cannot be formalized with electronic signatures. This is often the case with respect to real property transfers, deeds, and inheritance-related acts.

The EU is a good example of why it is important to check. EU Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the “eIDAS Regulation”), which came into force in 2016, is directly applicable to member states (as opposed to a directive). However, as with many EU regulations, it does provide for certain derogations, meaning that individual member states may provide for specific requirements and circumstances that are – or are not – appropriate for electronic signature.

Bottom line: many electronic signatures and records are valid, but there are some exceptions both here in California and abroad, so we always recommend that you check before moving forward.