

Electronic Signatures Becoming the Norm during COVID-19 Outbreak

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The COVID-19 pandemic has fundamentally altered the way we live and conduct business. Most non-essential businesses have closed their offices and established entirely remote workforces, and many individuals may be in quarantine, which means that “wet” signatures on paper can be highly inconvenient. This reality has focused more attention on electronic formats. In this blog post we examine the landscape of electronic signatures in light of the pandemic and what it will mean for signature requirements going forward. Electronic signatures apply to both agreements entered into online, such as when completing an internet transaction or [assenting to a contract via email](#), as well as paper documents. With businesses wondering under what circumstances electronic signatures are binding, this post briefly lays out what rules businesses need to follow.

[Electronic Signature Laws](#)

Generally, electronic signatures have the same effect as paper and ink signatures throughout the United States. The U.S. generally has two sources of law that govern the legal effect of electronic signatures: The state Uniform Electronic Transactions Act (“UETA”) and the federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”). E-SIGN has many of the same rules as UETA. The guiding principles of both laws is that, absent exceptions, when the parties to a contract have agreed to use an electronic signature, a signature “may not be denied legal effect ... solely because it is in electronic form[.]” 15 U.S.C. § 7001(a)(1), and “a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.” UETA, § 7(b). UETA was passed to remove obstacles to electronic transactions by setting an expansive view of what constitutes electronic records and signatures. Having been adopted by 48 states and the District of Columbia (Illinois and New York are the exceptions), UETA is the law for most jurisdictions across the U.S. E-SIGN preempts a state’s law on electronic transactions unless the state has adopted UETA or rules consistent with E-SIGN. In states that have adopted UETA, E-SIGN governs only to the extent a state’s version is inconsistent with E-SIGN. For example, if New York’s Electronic Signatures and Records Act (“ESRA”) is consistent with E-SIGN, then ESRA applies. If ESRA is inconsistent with E-SIGN, then E-SIGN applies. Due to the similarity of UETA, E-SIGN and state enacted electronic signature rules, every jurisdiction in the U.S. has substantially the same rules for electronic signatures, which fortunately should make any expansion of the use of eSignatures a relatively easy accommodation during the pandemic.

UETA and E-SIGN define “electronic signature” to mean “an electronic sound, symbol, or process, attached to or logically associated with a contract or record and executed or adopted by a person with the intent to sign the record.” An eSignature can come from a person typing their name in an email or other window, clicking “I Agree” buttons or similarly styled digital icons, sending a signed document via fax, using DocuSign and AdobeSign signatures or similar technology, executing a [smart contract on a blockchain](#), or physically signing an agreement and sending a scan or image of that document as a signature page via PDF.

UETA, E-SIGN and other electronic signature laws give legal effect to electronic signatures because the actual use of electronically traded signatures manifests the parties' agreement to use them in the first place. Indeed, whether UETA is applicable to a specific transaction depends on whether the parties to the transaction have agreed to conduct the transaction by electronic means, which is determined by examining the context and circumstances of the transaction, as well as the parties' conduct.

It is important to note, however, that UETA and E-SIGN contain certain exceptions. For example, they do not cover probate and domestic law documents, real estate foreclosure proceedings, and certain agreements governed under the Uniform Commercial Code (UCC). The UCC itself has its own eSignature rules that often provide the same validation of electronic signatures as do UETA and E-SIGN.

Additionally, it should be noted that UETA, E-SIGN and ESRA address signatures on contracts and do not address corporate and other entity documents, such as board consents. Each state's entity statutes should be consulted for those sorts of actions.

Virtual Notaries

Although eSignatures have been around long before this pandemic, notarization is typically required to be in person. However, since the beginning of the pandemic in the U.S., many states have signed executive orders allowing for temporary remote notarization, including New York (see [Executive Order Guidance](#)). Unlike eSignatures, remote notarizations are required to be done via some type of video conference to ensure compliance as much as possible during this time. For example, under New York's executive order, the signatory may use an electronic signature, provided the document can be signed electronically under state law, and if the signer uses an electronic signature, the notary must witness the electronic signature being applied to the document via video conference.

Best Practices

While the E-SIGN statute is agnostic as to what technology is used to effect an electronic signature, it is still prudent to follow certain best practices. It is important to review any document that requires a signature and confirm that it is not the type of agreement prohibited from being signed electronically. Also, without everyone in the same room, parties should transmit documents from verified email addresses that are assigned to one account holder (as opposed to a shared family email address). It is also important to review the rules of the relevant jurisdiction to ensure compliance and validity of any eSignature, especially due to the patchwork of rules regarding virtual notaries. If possible, it's also preferable to have an express statement of agreement when utilizing eSignatures to avoid having to determine intent to conduct the transaction by electronic means from relevant documents or the conduct of the relevant parties.

The End of the “Wet Ink” Signature?

Although certain documents, such as wills, trusts, those relating to divorce, certain financings and contracts governed by the UCC currently do not fall under UETA and E-SIGN, most legal documents (including most UCC documents) have been signed by eSignature long before this pandemic. The process of releasing PDF signature pages has made most in-person closings for deals a thing of the past. The “new normal” in the age of Covid-19 continues to accelerate the use of eSignatures. The most recent example of this is that the Federal Reserve Bank of New York announced that it will [now accept certain documents with electronic signatures in specified circumstances](#). With the expansion of eSignature use in the current climate, such practices will likely continue to be used once life gets back to normal and offices reopen.

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