



HR Electronic Records

Electronic Signatures in Romania: What it means for HR

What is an electronic signature?

- An electronic signature is a technical process logically associated with a document in which two (or more) individuals or organizations (the signatories) agree to rely on in order to express their intent to sign.
- Three components are necessary: a document, a signatory and an e-signature tool. While the tool most commonly used for handwritten signatures is a simple pen, electronic signature tools are more complex.
- The term "electronic signature" is a broad category that encompasses many types (or levels) of electronic signatures. Depending on the country it is used in, there are differences in purpose, technical implementation, legal and cultural acceptance of electronic signatures.
- Most civil law countries (including the EU and most countries in South America and Asia) support a "tiered" approach with higher levels of signature called digital or qualified electronic signatures.
- Most common law jurisdictions (US, Canada, Australia, etc.) are typically more technology-neutral.
- In addition, specific industries (e.g. healthcare or banking) or specific documents (e.g. marriage or adoption contracts) often require a higher level of e-signature or handwritten signature.

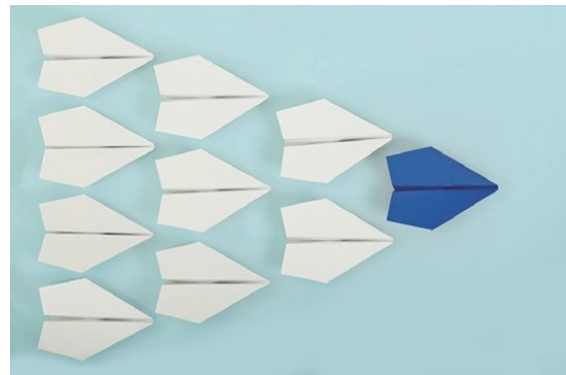
What are the laws and regulations in Romania?

- The main legal framework regulating electronic signatures and their value in Romania consists of:
- Law no. 455/2001 on electronic signature and related Methodological Norms approved by Government Decision no. 1259/2001 ("Law 455/2001");
- Government Emergency Ordinance no. 38/2020 regarding the use of electronic documents in public institutions and authorities ("GEO 38/2020");
- Law no. 53/2003 - Romanian Labor Code ("Labor Code") and
- A draft law (the "Draft law") which aims to create a unitary, common law legislative framework establishing guiding principles for the general legal effects of each type of electronic signature (simple electronic signature, advanced electronic signature and qualified electronic signature) and will repeal Law 455/2001 and GEO 38/2020. The Draft law sets out the conditions for the provision of trust services and the powers of public authorities and institutions in the field of the provision of

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trust services. In addition, the Draft law establishes the internal legal framework for the direct application of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (“eIDAS Regulation”) and for the incorporation into the internal legal framework of the measures left to the discretion of the Member States, by clarifying certain aspects relating to the electronic seal/timestamp and to electronic documents to which an electronic signature, a timestamp or an electronic seal has been applied. The Draft law confirms that all types of electronic signatures produce legal effects and can be used as a means of proof in court.

- The use of a particular type of electronic signature is associated with the classification of legal acts according to the manner of formation, i.e. whether written form is required by law as a condition of validity (“ad validitatem”) or proof of a legal act. To achieve the goal to simplify and speed up the conclusion of legal acts between SMEs and businesses, the Draft law gives advanced electronic signatures wider effects than in the old regulation (i.e., Law 455/2001) and also provides a clear definition of the simple electronic signature. This Draft law is still subject to change, as it is still in the legislative process – at the moment it has been approved by the Senate, and is now before the Chamber of Deputies, as the decision-making chamber. Until the approval and entry into force of this Draft law, existing regulations (e.g., Law 455/2001 and GEO 38/2020) will apply – it should also be noted that the Draft law provides for a period of application of 3 months from the date of its publication in the Official Gazette of Romania (instead of 3 days, which would have been the generally applicable period).
- GEO 38/2020 was a regulatory novelty adopted in relation to the Covid-19 pandemic and establishes the obligation of public institutions and authorities to accept electronic documents. By means of this regulation, public authorities and institutions may choose which type of electronic signature they require for the documents that are submitted to them, subject to the eIDAS Regulation.
- GEO 38/2020 also provides that all documents issued by a public authority and institution will bear a qualified electronic signature being equivalent to authentic documents. It also stipulates that documents bearing an advanced electronic signature transmitted through authorization mechanisms of substantial or high level shall be assimilated with regard to their conditions and effects with documents under private signature.
- Even though adopted during the state of emergency caused by Covid-19 pandemic, GEO 38/2020 was not seen as a temporary normative act; as such, it will continue to generate effects even after the pandemic (of course, unless expressly repealed by the Parliament/Government).
- Law 445/2001 differentiates between two types of electronic signatures:
 - a) Simple electronic signature – electronic data which is attached or logically associated with other data and which serves as an identification method;



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- b) Extended electronic signature – is an electronic signature that meets the following cumulative requirements: (i) it is uniquely linked to the signatory; (ii) it is capable of identifying the signatory; (iii) it is created using electronic means under the sole control of the signatory; and (iv) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.
- Nevertheless, considering that the law was adopted more than 20 years ago, as well as the subsequent enactment of eIDAS Regulation, which is directly applicable in the national law, scholars have argued that many provisions of Law 455/2001 are no longer applicable. This includes the distinction between the two types of electronic signatures, considering the eIDAS Regulation defines three types: a) simple electronic signature (“SES”); b) advanced electronic signature (“SEA”); c) “qualified electronic signature (“QES”);
- Note: the definition of the extended electronic signature provided in Law 455/2001 is to a large extent the same definition as the one provided by the eIDAS Regulation for the advanced electronic signature. In this respect, the Draft law also provides that the legal provisions in force containing the phrase “extended electronic signature” shall be interpreted as meaning the use of advanced electronic signature. Existing legal provisions containing the phrase “extended electronic signature based on a qualified certificate” shall be interpreted as meaning the use of qualified electronic signature.
- The Labor Code provides details regarding use of the electronic signature on HR documents (as it is further indicated in question no. 6 below).
- According to Law no. 265/2022 regarding the Trade Register and the amendment and completion of other normative acts affecting registration in the trade register (“Law 265/2022”), from the date of its entry into force (26.11.2022), for registration in the Trade Register by electronic means, the qualified electronic signature will be used as a means of electronic identification. This law also provides for several general rules/situations regarding the use of electronic signatures in relation to the Trade Register.

Are electronic signatures valid?

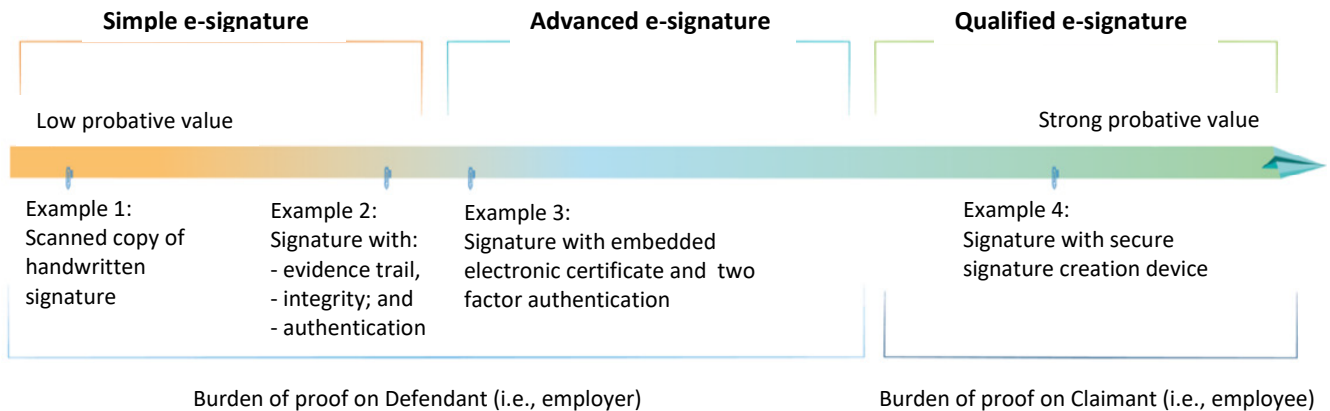
Under eIDAS, a valid electronic signature may be **simple, advanced or qualified**. All three levels of signature are legally **valid** and defensible in court. However, the **probative value** (i.e. how easily the validity of the signature can be proven in court) will vary depending on the type (or level) of electronic signature as illustrated by the graph.

E-signatures almost always offer higher guarantees than handwritten signatures, regardless of the level of the e-signature being used:

- the **evidence trail** associated with superior electronic signature tools will allow defendant to prove the validity of the signature.
- the use of time-stamping and encryption technologies will provide a much higher level of confidence in the **integrity** of an electronically-signed document compared to the limited level of protection provided by a handwritten original (unless notarized).

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Probative value scale



For **simple and advanced electronic signatures**, it is the employer's responsibility to bring evidence of the validity of the signature if an employee challenges the document.

Advanced signature solutions typically offer a more robust evidence file in that regard than simple e-signatures solutions.

Qualified electronic signatures offer the same probative value as a handwritten signature it is the responsibility of the party challenging the validity of the signature (most likely the employee) to bring evidence of the signature's invalidity.

The Labor Code provides that employment agreements must be concluded in written form. Apart from the wet signature (which is the basic and widely-used method of signing), the advanced electronic signature and/or qualified electronic signature also represent valid manners of expressing consent in HR matters / signing HR documents. In addition, even the simple electronic signature and/or the electronic seal of the employer may be valid manners to sign some HR documents, as it will be further described below.

More specifically, according to the law, it is expressly provided that:

- the parties may opt to conclude, amend, suspend or terminate employment agreements/relationships using the advanced electronic signature or the qualified electronic signature; and that
- in addition, the employer may use the simple electronic signature, advanced electronic signature, qualified electronic signature or the electronic seal to prepare specific ancillary paperwork/documentation in employment relationships, resulting from the conclusion, execution or termination of the employment agreement (i.e. not the employment agreement itself or a suspension/dismissal decision – for these the first bullet above being applicable –, but e.g., health & safety training records, announcements/communications etc.), as per the conditions set forth by the

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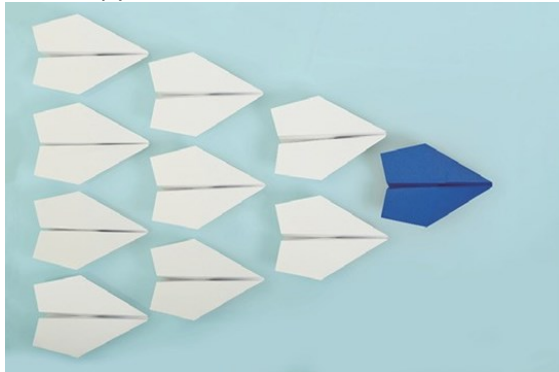
internal regulation or the collective bargaining agreement (if the case) (which means that such instruments should contain relevant provisions in order to make use of this legal possibility).

There are however some specific requirements/aspects that should be noted/observed, such as:

- To perform any of the above operations, the parties (i.e. where the document is not an unilateral one) must use the same type of signature, handwritten or electronic;
- The employer cannot oblige the person selected for employment or, as the case may be, the employee, to use the advanced electronic signature or the qualified electronic signature, at the conclusion, modification, suspension or, as the case may be, at the termination of the individual employment agreement;
- The procedures for using of these forms of signatures will be part of the informing process of future employees and will be reflected in the content of the employment agreement.

The Labor Code also requires that termination documents be in written form in order to be valid. Therefore, as anticipated above, the parties can use wet ink signatures or an advanced or qualified electronic signature.

Hard-copy documents are still considered to be the most reliable piece of evidence in order to prove



one's consent, but since the above legal provisions entered into force, the authorities should have no reason to be reluctant in case HR documents are signed properly with electronic signatures (and by meeting all the legal conditions). In this sense, even the Labor Code provides that the competent inspection bodies have the obligation to accept, for verification and control, individual employment agreements and addenda, as well as paperwork / documents in the field of labor relations / occupational health & safety, concluded in electronic format, with electronic signature, according

to law, without requesting them in hard copy format.

What is the legal value of the Electronic Signature?

Generally, signature is a method of expressing the consent to a particular act; hence, there are few documents that do not require signature by the parties. In principle, a document that is not bearing a signature may qualify as a "deed" (in Romanian, înscris) in the sense of Romanian Civil code and will have the probatory value of a commencement of proof and may be used in court in correlation with other means of proof (e.g., witnesses, presumptions). Nevertheless, this aspect should be analyzed on a case-by-case basis.

From an employment law perspective, in principle there are no such direct restrictions on distributing and storing native electronic documents (as this scenario is not even covered by law). However, if

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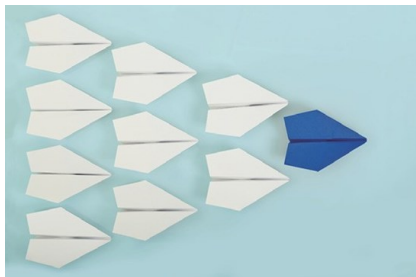
requested during a labor inspector's control, these documents might be required by the inspector in a hard copy format, so they should be accessible at all times in order to be able to show/hand them to the authorities (e.g. printed for the inspectors). In any case, there is a very limited number of employment related documents that do not require signature (at least by the employer) and, therefore, this scenario may be quite unlikely.

Considering the national legislation in this matter has not yet been amended after the entering into force of eIDAS Regulation, the legal effect of the SES and SEA is still the one provided by Law 455/2001 correlated with the provisions of the Romanian Civil Procedure Code. Please see the answer provided at questions 3 and 6 with regard to the legal effects of such signatures.

In addition, Law 455/2001 provides that an electronic document that has incorporated an extended electronic signature (i.e., the QES defined by the eIDAS Regulation) is considered to have the same legal effect as a handwritten document. If the document is signed using an SEA, the person invoking such a signature must provide evidence that the signature complies with the requirements provided by the law (see answer 5 for the requirements).

Note: the rules stipulated above may be modified by the previously referred Draft law (see answer 5 for details). For example, it is expressly provided that, where written form is required by law as a condition of proof of a legal document ("ad probationem"), the electronic document fulfils this requirement if it has been signed with a qualified electronic signature, an advanced electronic signature or even a simple electronic signature (in the latter case, only in those situations/cases where the simple electronic signature produces the same effects as the handwritten signature – the Draft law expressly providing for two situations in this respect). According to the Draft Law, if, according to the law, written form is required as a condition for the validity of a legal document ("ad validitatem"), the electronic document fulfils this requirement if it has been signed with a qualified electronic signature or with an advanced electronic signature (in the latter case, only in those situations/cases where an electronic document signed with an advanced electronic signature produces the same legal effects as a handwritten document – also provided for by the Draft Law).

Those mentioned above are also applicable in case of conclusion, modification, suspension or, as the case may be, termination of the individual employment agreement.



HR Best Practices

Most customers elect to use different electronic signature solutions depending on the type of document being signed.

In Europe, customers typically use an advanced electronic signature for employment agreements as well as other HR-related agreements and rely on a strong simple e-signature solution for

other less sensitive HR documents such as policies and performance reviews. However, this decision also depends on an employer's internal culture and its level of risk-adversity.

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