



HR Electronic Records

Electronic Signatures in Germany: 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 Germany?

In Germany, the electronic signature was primarily implemented by the Signature Act (Signaturgesetz or SigG), the Signature Ordinance as well as the German Civil Code. Apart from specific cases, there are limited exclusions on the use of e-signatures under German law.

On July 1, 2016, Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the "eIDAS Regulation") came into force and replaced the former EU Directive on electronic signatures (1999/93/EC). The eIDAS Regulation, directly applicable in the member countries of the European Union, brought uniformity - and much needed clarity - among the EU member states' local legislations on electronic signatures.

There is no general format requirement for contracts, though some types of contracts are required to be in written form. When a contract is required to be in written form, it can be created electronically except when electronic form is specifically excluded, which is not the case for most employment agreements.

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Note that dismissal notices, termination agreements (Civil Code, Section 623) and reference letters (Civil Code, Section 630) explicitly exclude electronic form.

In addition, employers are required to hand employees a wet-ink signed document containing essential contractual employment conditions (Act on Notification of Conditions Governing an Employment Relationship, Sec. 2 (NachweisG)). The employer does not have to store this paper document, but a copy should be retained for evidence purposes, in case it is ever questioned. Other than these exceptions, the electronic form of HR related records generally meets the written form requirement.

Note that the cultural acceptance of using electronic signatures for German employment contracts varies, and some local administrations may be reluctant to accept them.

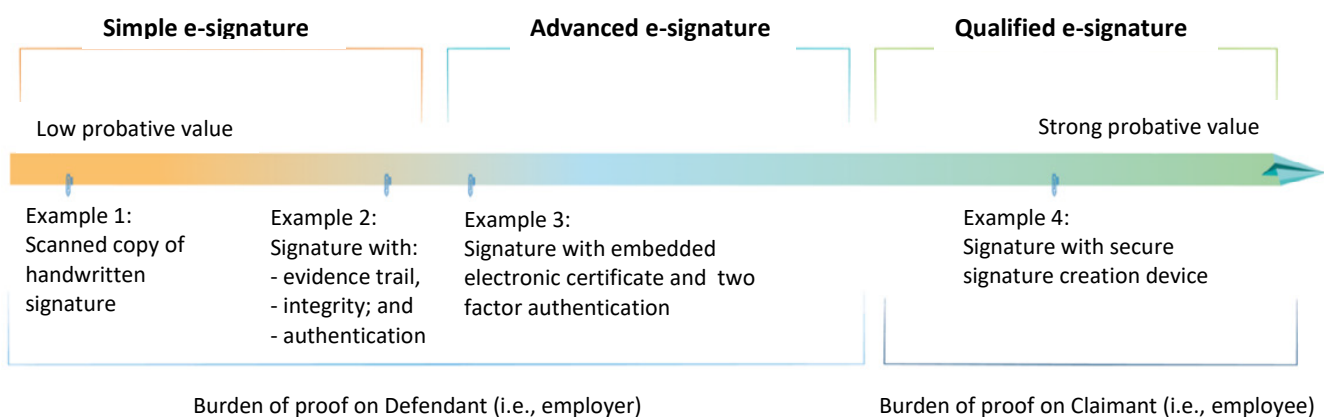
Are electronic signatures valid?

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 guaranties 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).

Probative value scale



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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.

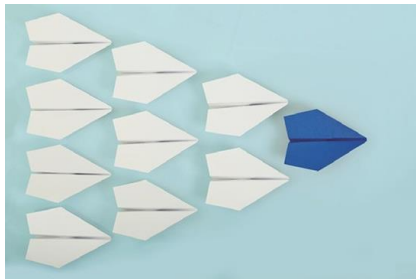
Advanced signature solutions typically offer a more robust evidence file in that regard than simple e-signatures solutions.

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.

What level of e-signature is recommended for HR documents?

The vast majority of HR-related documents are suitable for simple or advanced electronic signatures. Simple and advanced electronic signature are recommended for documents with a risk factor ranging from low to medium. These are often external documents with limited risk and typically include employment agreements, company policies, employee handbook, performance reviews, expense report, etc.

Qualified electronic signatures or handwritten signatures would only be justified in limited cases for very sensitive documents such as credit or life insurance agreements or when specifically required by law (e.g. specific healthcare documents).



HR Best Practices

Many employers 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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