

## ELECTRONIC ARCHIVING OF PAPER ORIGINALS

### Legal Framework for Electronic Archiving

Although some countries require certain types of documents to be kept and archived in their original paper form, for most categories of documents, including HR-related records, there is no such requirement, and it is generally acceptable to use electronic versions of paper records (i.e., scanned copies of paper originals) during most government agencies' inspections and audits or in court proceedings.

The evidential or probative value of electronic versions of paper records may be more easily challenged before a court than it would be for the originals. This is mainly because the original records could be tampered with or changed before being scanned, and, unless proper technology has been used (e.g., encryption and timestamping), it may not be easy to detect such changes from a scanned copy. In specific situations, it may be good practice for employers to retain archives of paper originals in the event such originals would be requested by a specific investigator, auditor, judge or authority.



### Are electronic scanned copies of paper originals legally valid?

In Germany, there is no statutory provision that comprehensively governs electronic archiving of paper originals of employment documents. Some employment documents, in particular payroll records, are covered by Sec. 257(3) of the Commercial Code (Handelsgesetzbuch or HGB) and Sec. 147(2) of the Tax Code (Abgabenordnung). Such documents may be retained electronically, provided that such retention complies with accepted accounting principles and ensures that the electronic record, when made legible, is visually identical or is content-wise identical to documents retained under the above provisions.

If the validity of a scanned copy is questioned, the court will evaluate the content of the employee record and assess whether they are convinced that the scanned employee record is authentic. Therefore, it may be necessary to convince the court by other evidence that the electronic scanned copy of the signed paper original proves the existence of the signed paper original.

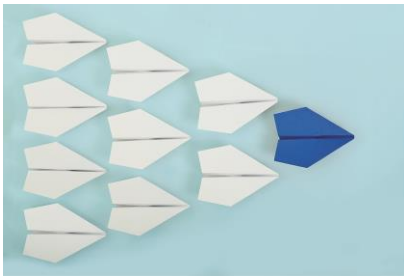
Note that certain employee documents, such as dismissal letters, termination agreements and reference letters, are subject to a strict paper form requirement. In these cases, paper originals with the wet signature should be retained.

### Are there any legal requirements for electronic archiving systems (EAS)?

There are no binding legal requirements specific to electronically archiving employee records. That said, the general requirements in the General Data Protection Regulation must be followed along with the German data protection regulation (BDSG). Germany has issued a Recommendation for Action on Data Protection in Technically Supported Procedures of Personnel and Budgeting by the German Government which includes many best practices, such as:

- ensuring personal employee data is only stored, transmitted and used when legally permitted and limited to what's necessary for the defined purpose;
- restricting access to only authorized individuals (and maintaining an authorization concept that specifies and restricts who can access specific data or carry out evaluations);
- informing employees of the personal data that's being processed, the purpose of the processing and, their rights relating to accessing/blocking/deleting their data;
- prohibiting making decisions exclusively on the automated processing of personal data when the decision can have a significant impact on employees;
- anonymizing/pseudo-anonymizing interdepartmental evaluations of processed personnel data wherever possible.

When implementing electronic archives, the participation rights of the Works Council (if established) must be observed (Sec. 87 Nr. 6 of the German Works Constitution Act).



**HR Best Practices:** The full electronic archiving era is approaching, but for now it is not possible to guarantee that all paper documents can be destroyed. Indeed, the acceptance of digital copies remains subject to the discretion of the judge.

Similar to the electronic signature, electronic archiving will probably also develop to a three-level structure: simple, advanced and certified archiving. Over time, this means that certified electronic archiving will make the burden of proof fall under the responsibility of the challenging party.

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