



HR Electronic Records

Electronic Signatures in United States: What it means for HR

What is an electronic signature?

Generally speaking, an electronic signature (or e-signature) is a technical process logically associated with a document which two (or more) individuals or organizations (the signatories) agree to rely on in order to express their intent to sign such document. Three components are therefore 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 typically more complex.

From a regulatory standpoint, an 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, legal acceptance, technical implementation and cultural acceptance

of electronic signatures. In particular, e-signature requirements tend to vary significantly between most “civil law” countries (including the European Union and many countries in South America and Asia), and most “common law” countries (such as the United States, Canada and Australia). Civil law countries typically support a “tiered” approach including higher levels of signature often called digital or qualified electronic signatures (typically required for specific types of contracts), as opposed to common law jurisdictions which are typically more technology-neutral.

In addition, some industries (such as healthcare or banking) and documents (such as marriage or adoption contracts) may require a higher level of e-signature.

What are the laws and regulations in the United States?

Various federal and state laws govern electronic signatures in the U.S. and make them legally effective. E-SIGN, for instance, provides for the validity of electronic signatures for transactions in or affecting interstate or foreign commerce as long as both parties agree to use electronic signatures. There are some exceptions, such as exceptions for records created for a government purpose. Other federal regulations govern the use

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of electronic signatures for specific types of documents, such as the Form I-9 or Form W-4.

In addition, all but one state has enacted some version of the Electronic Transactions Act or UETA (New York has not enacted the UETA but has a substantially similar law in place). The UETA provides electronic signatures with the same legal validity as ink signatures for signatures relating to an “action occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs” as long as both parties agree to use electronic signatures.



Is an electronic signature valid in United States?

Yes. Generally, as discussed above, an electronic signature on an HR document will be valid and given full legal effect as long as the employee agrees to use electronic signatures. An electronic signature has the same legal value as a handwritten signature under E-SIGN, other federal regulations and laws, and various state iterations of the UETA. However, there are some types of documents that might not be governed by E-SIGN, federal regulations, or a state specific

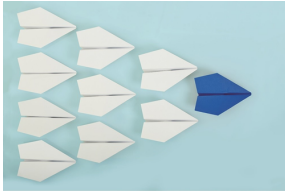
version of the UETA, such as worker’s compensation documentation, such that specific state laws would need to be analyzed.

Two forms that impact all employees in the U.S. are the Form I-9 and Form W-4.

Form I-9: The Form I-9 is used to confirm an individual’s eligibility to work in the United States. An employer may implement an electronic version of the Form I-9 with an electronic signature so long as the form includes a method to acknowledge that the attestation has been read, the electronic signature is logically associated with the completed form and is affixed at the time of signing. The electronic signature system must create and preserve a record verifying the identity of the person producing the signature and be capable of providing a printed confirmation to the person signing the Form I-9, if requested. Any resulting form must be legible.

Form W-4: The Form W-4 should be completed by all employees to determine the amount of federal income tax that should be withheld from each employee’s wages. Employers may implement an electronic W-4 system that allows for electronic signatures by the payee whose name is on the form. The electronic forms themselves must provide exactly the same information as the paper form, including the declaration made under penalty of perjury when one electronically signs the form.

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HR Best Practices

To ensure that an electronic signature is deemed authentic and

in order for the signature to be given full legal effect, an employer will need to be able to show (at minimum) the following steps were taken:

- the employee's login credentials are stored by the employer in a way that would only permit access to the relevant employee;
- the system saves a record of the date and time the electronic signature was made and the unique I.D. associated with the signature;
- a date-stamped copy of each signed document is retained;
- the employee was required to create an account with a unique I.D. and password for

accessing the documents to be electronically signed, such that an electronic signature could only be placed on the document by a person using the employee's unique I.D. and password;

- the employee was warned not to share their login credentials;
- and, the employee has the ability to retain a copy of the executed document, by printing it, downloading it to a personal device or, emailing it to a personal account.

As employees have been challenging the authenticity of electronic signatures with greater frequency in the United States, these steps have become increasingly important (especially for arbitration agreements and documents with restrictive covenants).

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