

BURR ALERT

Frequently Asked Questions (FAQ) for Using Electronic Signatures

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March 2020

The COVID-19 outbreak presents not just major concerns for personal and public health, but also for enterprise continuity when companies must conduct business remotely. This FAQ answers questions you may have about using electronic signatures as part of your business continuity plan generally, and specifically for signing and closing contracts in commercial transactions.¹

Are electronic signatures legal?

Yes. Electronic signatures (“e-signatures”) have been legal for over 20 years for transactions where the parties agree to conduct business by electronic means. The federal E-SIGN Act and the Uniform Electronic Transactions Act (collectively in this FAQ, the “E-Sign Laws”) do not apply to all legal documents and signatures, however, but only to electronic contracts and signatures relating to a **transaction** (for our purposes here defined as interactions between parties relating to business and commercial affairs). So court pleadings, or wills, trusts and estate documentation, for instance, are not covered by E-Sign Laws (but other laws and regulations may allow for electronic signatures separately from the E-Sign Laws in such other circumstances).

Special consideration should also be given to certain kinds of legal documents, such as promissory notes and mortgages, as discussed in other questions below.

How do I make an electronic signature?

An e-signature is defined very broadly under E-Sign Laws as an electronic sound, symbol, or process attached to or logically associated with a contract and executed or adopted by a person with the **intent** to sign the contract. E-Sign Laws do not require a specific technology, however.

While just signing a contract—pulled up on an iPad or other tablet—on the signature line with a finger or stylus and emailing it to someone else who pulls it up on their tablet for their signature (a “DIY e-signature”) can constitute a valid and binding use of e-signatures to sign a contract, this is **not** advisable as a matter of course. The main concern in using an e-signature is not necessarily the form it takes, but in eliminating a later challenge to the validity of a contract if an opposing party claims **someone else** signed the contract.

¹ This FAQ (i) does not include considerations for consumer transactions, (ii) is a summary only for states that have adopted the Uniform Electronic Transactions Act (all but NY, IL, and WA) and (iii) is not a substitute for legal advice from an attorney experienced in this area.

How do I demonstrate later in court that the other party to a contract was in fact the party that actually e-signed the contract?

An e-signature is attributable to a person if it was the act of the person (such as clicking “Yes, I Agree” on a screen, or using a stylus or finger to “write” their name on a screen, each of which is an act). The act of the person may be demonstrated in any manner, including a showing of a security procedure applied to identify the person to which the e-signature was attributable.

So, if parties are using DIY e-signatures (again, not advisable), it will be very important to use security procedures for later demonstrating an e-signature so obtained was attributable to the opposing party e-signing the contract. Emails, text messages and telephone calls between the parties signing the contract can later be used as evidence of attribution, for instance. However, there is an easier and less risky method of doing this.

Numerous e-signature service providers on the market today (such as DocuSign, Adobe Sign, RightSignature, AssureSign and SIGNiX, among others) include as part of their services sophisticated security procedures in their e-signature process that can be used to demonstrate proper attribution of an e-signature in court.

There are several options for such security procedures, such as the use of email addresses, passwords, codes sent via text or a telephone call, and the like, all usually readily available in an audit trail certificate produced by these companies. The best options are those that incorporate at least a dual-factor authentication procedure (that is, at least two of the above options). Also, these e-signature services can demonstrate that all parties obtained access to the final, authoritative copy of the contract that was e-signed.

How do I store e-signed contracts?

After distributing the e-signed contract to all of the parties to such contract, you will need a secure system for storing and reproducing the final signed and unalterable copy of the e-signed contract so it can be later retrieved and read (and produced in court, if necessary). E-signature service providers can assist with this process, often in combination with a so-called e-vault provider for certain kinds of electronic contracts (such as promissory notes).

So what are the special considerations for promissory notes and mortgages?

Promissory notes: If your company is the recipient of a promissory note issued by another company payable to you, this can be signed by an e-signature (an “e-note”), but here are some items to remember.

1. If your business requires you to transfer such promissory notes you receive to another party (such as to your bank as collateral), you will need to discuss with those other parties whether this is permissible under your agreements with them.
2. Your note needs to include language similar to the following: “This note is issued as a “transferable record” under UETA and/or ESIGN or other equivalent, applicable law.”
3. If you are a bank, you will need to ensure that such a process complies with your internal policies and practices.

4. Finally, you will want to have “control” over the e-note. Generally, a person has control over an e-note (called by E-Sign Laws a “transferable record”) if it is retained on a system that can reliably establish you as the recipient of the e-note and any new transferee as the person to which the e-note was transferred. As noted above, an e-signature service provider can assist with this.

Mortgages: An electronic mortgage (an “e-mortgage”) is permitted under E-Sign Laws, but whether it can be recorded in the land records and thereby “perfect” your lien as a mortgagee is a more complicated and not-quite-settled issue that depends on local county recordation office practices and the kind of electronic notarization that will be accepted in that jurisdiction (which may or may not permit “remote” electronic notarization, for instance).

Can I use e-signatures to contract with parties in other countries?

It depends on the laws of that country.

To discuss this further, please contact:

If you have questions or need advice regarding the use of e-signatures for your business you may contact any of the following lawyers on the Burr & Forman Electronic Transactions team for more information.

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