

No Printer, No Scanner, No Problem: Electronic Execution of Agreements in the Remote Working Environment

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One of the many impacts of the COVID-19 crisis has been the need to execute contracts in remote working environments. While virtual closings were not uncommon pre-COVID-19, generally through manually signing, scanning, and emailing pdfs of signature pages, many people working remotely today may not have easy access to a printer or a scanner to print and send pdfs of signed documents. This situation has caused a heightened focus on the laws and regulations regarding electronic execution and notarization¹ of documents and opinion practice regarding electronically executed agreements.²

Electronic signatures include signatures in e-mails, PDFs, and faxes, and signatures processed by commercial software such as DocuSign and Adobe Sign. The enforceability of an electronic signature depends on several factors, including governing law, whether the signer is executing on behalf of herself or an entity, the subject matter of the contract and where the contract is to be filed. Given these considerations, this memo includes suggested language to include in contracts to expressly permit electronic execution.

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¹ In response to the COVID-19 pandemic, on March 20, 2020, New York Governor Andrew Cuomo issued Executive Order No. 202.7 stating that “any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology” provided that certain conditions are met. The executive order is effective through April 18, 2020. Additionally, there are bills pending in both the New York State Senate (S4352B) and New York State Assembly (A4076B) that would permit remote electronic notarization with the use of video conference technology.

² Earlier this week, the TriBar Opinion Committee released a Comment Concerning the Use of Electronic Signatures and Third-Party Opinion Letters (March 24, 2020) https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/tribar/materials/esignatures.pdf.
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Governing Law

The TriBar Opinion Committee comment notes that in the United States, the Uniform Electronic Transactions Act (“UETA”) and the federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”) generally provide that a signature may not be denied legal effect solely because it is in electronic form.³

UETA

The UETA has been adopted by most states as a uniform response to effectuating electronic signatures, but the UETA has not been adopted by New York, Illinois, or Washington – each of which has enacted their own legislation governing electronic signatures. Additionally, certain states that have enacted the UETA have non-uniform exceptions in their enactments. California, for example, has several non-uniform exceptions primarily with respect to consumers. Thus, parties should review the specific implementing laws and regulations for each state even if the state has adopted the UETA.

E-SIGN

Although, execution of a contract is typically a question of state law, the federal E-SIGN law preempts state law that is inconsistent with E-SIGN. In cases where a state has either enacted the UETA or enacted laws governing electronic records or electronic signatures that are consistent with E-SIGN, E-SIGN defers to the state law.

New York, for instance, enacted the Electronic Signatures and Records Act State Technology Law §§ 301-309 (“ERSA”). ERSA is not an adoption of UETA and one court in New York, reviewing the history of ERSA and related amendments, noted that lawmakers “appear to have chosen to incorporate the substantive terms of E-SIGN into [ERSA].”⁴ If a court determines ERSA is inconsistent with E-SIGN, then E-SIGN will preempt ERSA and if a court determines ERSA is consistent with E-SIGN, then ERSA will not be preempted by E-SIGN.

Signing on Behalf of an Entity

In addition to relevant governing law, the validity of a signature executed on behalf of a legal entity may also depend on the statute under which the entity was formed, the entity’s constituent documents and on relevant contract law. For example, Delaware’s General Corporation Law provides its own set of rules for the use of electronic signatures.⁵

Subject Matter of the Agreement: Exceptions for UCC Governed Agreements

E-SIGN and UETA do not apply to transactions governed by the Uniform Commercial Code, except for agreements governed by UCC Articles 2 and 2A. However, the UCC governs only certain aspects of transactions within its scope, so for other parts of the transaction outside the scope of the UCC, execution by electronic signature pursuant to UETA, E-SIGN or relevant state law may still be applicable.

Filing the Agreement: Court Documents and Documents Filed with Governmental Entities

For court documents such as briefs, pleadings and documents for testamentary matters, family law matters, and certain notices relating to utilities and insurance – wet signatures are generally needed as E-SIGN does not apply. Additionally, for documents required to be filed or recorded with a governmental authority such as mortgages and copyright security agreements, wet signatures may be needed as the UETA gives governmental authorities control over deciding if and when to use electronic records and signatures.

Contract Drafting Tips

It will be prudent for parties to specify in their agreements whether electronic signatures constitute due execution (including through the exchange of emails) and parties may consider including language

³ UETA §7; E-SIGN, 15 USCA § 7001(a).

⁴ *Naldi v Grunberg*, 80 A.D.3d 1, 12 (1st Dep’t 2010).

⁵ *See, e.g.*, Delaware General Corporation Law § 116.

that electronic signatures have the same legal effect as manual signatures. One sample of such language is:

Delivery of an executed counterpart of a signature page of this Agreement by telecopy or other electronic imaging means, or confirmation of the execution of this agreement on behalf of a party by an email from an authorized signatory of such party, shall be effective as delivery of a manually executed counterpart of this Agreement.

Conclusion

While the COVID-19 pandemic has created unprecedented global disruption and challenges for even commonplace tasks like contract execution, the legal framework for electronic signatures and records offers practical alternatives to overcome some of the unique challenges presented by today's environment.

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