

Arbitration Agreements And the Use of Electronic Signatures

Enforceability and Best Practices

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In most companies, an employee's first day on the job is spent filling out paperwork. For the better part of the last 50 years, the universe of federal and state laws regulating the workplace has expanded year after year. A natural result of the increasingly regulated workplace is that the number and size of personnel documents has also grown — it is not uncommon for an employee handbook to span more than 100 pages.

In order to manage and streamline an employee's orientation process, or simply to facilitate the roll-out of new policies to current employees, many companies have moved their human resource documentation systems into the electronic age. While employers are required to keep various employee records, this can generally be achieved electronically without the need for cumbersome hard copies. For many larger companies, maintaining electronic files can actually be much easier. The key to such paperless record-keeping systems is to ensure that they are legally compliant and defensible. To meet these requirements, it is critical

that employers follow accepted best practices and protocols to ensure that electronically distributed documents are enforceable. After all, that is why employees are asked to sign them in the first place.

ARBITRATION AGREEMENTS

One of the most important documents that employers frequently seek to enforce is an arbitration agreement. These agreements have grown in popularity in recent years due, in part, to the ability to include a class action waiver. However, despite the Federal Arbitration Act's express mandate that arbitration agreements be placed on equal footing with any other contract, judicial hostility to employment arbitration agreements remains common. As a result, there is a growing body of law scrutinizing the enforceability of electronically-signed arbitration agreements and imposing what some may consider to be heightened standards for enforcing such agreements. While this is an emerging and developing area of law, this article seeks to identify particular areas of concern and scrutiny in the enforcement of electronically-signed arbitration agreements and what employers should do to avoid these potential legal pitfalls.

USING ELECTRONIC SIGNATURES

What Is an Electronic Signature?

An electronic signature is a record of a person's actual intent to sign a docu-

ment, conveyed electronically rather than by ink. It is not the signature at the end of an e-mail or an image of someone's handwritten signature. While there is no specific mandate on what constitutes an electronic signature, federal law defines the term as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." (15 U.S.C. § 7006 (2006).) Essentially, it is the equivalent of a real signature indicating the employee's agreement to the document in question.

In practice, an electronic signature can be anything from a unique code embedded into an electronic form, a checkbox, or even biometric data attached to an agreement. The essential ingredient is that the signature must be capable of being tied to a specific person, and must be secure so as not to be invalidated by questions of tampering and authenticity.

Risks

Although electronic signatures have been approved by federal and state law, employers should be aware that the use of electronic signatures has been subject to legal challenges. These challenges, however, generally arise from the practice of obtaining electronic signatures, rather than the legality of the signatures themselves. Forms and contracts cannot be invalidated merely because they

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have been signed electronically. CAL CIV. CODE § 1633.7 (2008); 15 U.S.C. § 7001 *et seq.* (2006). Therefore, employers can minimize these risks by using methods that demonstrate the electronic signature could only have been obtained with a particular employee's consent. Employers can learn from decisions in prior cases and develop their processes accordingly.

In one recent California case, *Ruiz v. Moss Brothers Auto Group*, the Court of Appeal upheld a trial court's refusal to enforce an arbitration agreement because of questions regarding the authenticity and integrity of an electronic signature. Specifically, the court held that the employer failed to submit sufficient evidence that the plaintiff employee was the person who electronically signed the arbitration agreement. The court reached this conclusion based on the employee's testimony that he did not recall signing the agreement and would not have signed such an agreement if it had been presented to him. The court found that the employer's declaration did not provide details on how the employer verified that the employee electronically signed the agreement, even though it explained that each employee was required to log into the HR system with a unique login ID and password in order to review and electronically sign the agreement. The court determined that the business manager did not sufficiently explain how such an electronic signature could only be placed by the employee.

The *Ruiz* case reflects the importance of having very specific procedures, including unique login ID's and passwords known only by the employee, that allow employers to adequately identify, track, and explain how the employer knows that the electronic signature on any particular agreement is the "act of" the employee.

The enforceability of electronically signed arbitration agreements has also been addressed in employment cases across the country with mixed results. In *Kerr v. Dillard Store Services*, the

Kansas District Court refused to enforce an arbitration agreement because of questions regarding the authenticity and integrity of an electronic signature, finding that the employer did not have adequate security procedures to restrict unauthorized access to the execution of electronic documents. In a decision issued by the Ohio Court of Appeal, *Bell v. Hollywood Entertainment Corp.*, the employer avoided these issues by requiring the employee to affirmatively agree to arbitration through an e-signature before she could move from one electronic form to the next in order to complete her hiring process. Compelling arbitration, the court reiterated the acceptability of electronic signatures, especially given the clear instructions on the electronic form that negated the employee's claim that she did not understand. A third case, again out of California, reached a different result: The court denied arbitration not only because the employer's security procedures were inadequate to prove who had written the employee's full legal name, but also because the document title did not disclose that it contained an arbitration agreement. Similarly, yet another California court refused to consider an electronic document with names, but no "sound, symbol, or process" designating an electronic signature needed for a valid contract. (*Kaminsky v. Land Tec, Inc.*)

By contrast, an Indiana District Court enforced an arbitration agreement where the employer required the employee to click "I agree" to continue the new-hire orientation, and offered an alphanumeric code as proof. (*See Shimkus v. O'Charley's Inc.*) The Central District of California likewise held an employee's electronic signature to be binding where the arbitration agreement was presented in the context of a series of legally important tax and financial forms, and the employee's personal information was required for the electronic completion of the forms. (*Rosas v. Macy's Inc.*)

SECURITY AND TRANSPARENCY

These cases demonstrate the importance of both security and transparency in obtaining electronic signatures from employees. Employers should ensure that there are adequate security procedures in place to prevent allegations that the employee did not sign the document, when they later conveniently "forget." Such procedures include restricting unauthorized access to the documents and requiring the use of personalized information as part of the electronic signature. Additionally, employers should ensure that it is facially apparent that the employee is signing a legally binding document. This can be achieved by conspicuously labeling documents, bolding and capitalizing key statements, and including separate "I Agree" buttons.

SHOULD YOU IMPLEMENT A PAPERLESS PROCESS FOR ARBITRATION AGREEMENTS?

Despite legal questions surrounding electronic document management and the use of electronic signatures, these cases demonstrate that it is possible to successfully move to a paperless system. While there may be no one-size-fits-all solution, these early cases show that making forms clear and understandable is an important step to achieving compliance. Moreover, a secure and identifiable signature device, such as a unique alphanumeric code, could prove invaluable. Employers wishing to make this switch should undertake an individual assessment to determine what options are right for them, including a review of decisions in their local jurisdiction. With the growing popularity of arbitration agreements and paperless systems, this will remain an issue to watch.