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Electronic Contracting, Part 1 – Practical Tips for E-Signing Transactional Documents

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Craig R. Auge

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This is the 1st of 2 installments on **electronic contracting** best practices and tips for businesses and their attorneys.

Accelerated by the lockdown and the increasingly popular remote work alternative, we field a growing array of questions about electronic contracting.

While most are aware generally of e-signature laws and platforms such as DocuSign, summarized here are some easy-to-implement best practices and tips that businesses should consider when sending and receiving transactional documents to be electronically signed.

Instituting an E-Signature Policy

An initial decision for any business is whether or not to use e-signatures on transactional and other documents – instituting an easy-to-follow policy can detail when and how that may be done. Some intentionally align or pair their e-signature policy with an e-records policy.

For example, some companies generally permit e-signing, but identify types of documents for which e-signatures should never be used, such as: those excluded by applicable e-signature laws, stock certificates, and documents requiring notarization (sidestepping possibly permitted remote online notarization).

Some companies identify certain types that are permitted only with prior internal executive approval, such as documents relating to personnel or human resources matters containing confidential or sensitive employee information or documents for which the other party is organized under the laws of another country. Special requirements or exceptions may also need to be factored in for documents to be filed with governmental offices.

Other companies categorize types of e-signatures or platforms. While “e-signature” is very broadly defined in the federal Electronic Signatures in Global and National Commerce Act (E-Sign) and the

Uniform Electronic Transactions Act (UETA), some companies – concerned about authenticity – do not permit inserting or applying an image of a manual signature when doing so does not require the person to verify her identity or do not permit merely typing an intention to be bound by an email or text. Others only permit the electronic creation and adoption process through a reputable platform, such as DocuSign.

Compared to “click-agreeing,” the acts of manually signing a blank signature line with a pen and completing a “Title / Position” blank line under that signature line are more likely to cause a signer to pause and first inquire about her authority to sign, before binding her company. Concerned about the ease and speed with which a “click-agree” may be done, some companies remind their personnel that an executive or officer must still pre-authorize entering an agreement, notwithstanding its electronic form.

Including Enabling Provisions or Processes

Whether parties have agreed to transact electronically is determined loosely by the context and surrounding circumstances, including their conduct.

However, a simple addition in the document to be signed (frequently near the end, such as in a counterparts provision) that *“the agreement and its order forms may be electronically signed”* clearly indicates the parties’ intent. Often that is combined with *“and signatures transmitted electronically shall be acceptable to bind the parties.”* By comparison, rare is the document that expressly indicates that it must be “manually signed,” but that would prohibit use of e-signatures.

As a precursor to sending multiple transactional documents, sophisticated companies are increasingly proffering a kind of pre-agreement to transmit and execute upcoming documents electronically. (While beyond the scope of this overview, special steps are required if consumers are to be provided information electronically.)

Click-wraps often include language – both at the beginning and the end near the click-button or e-signature step – that *“By selecting the “I Accept” button, you are agreeing to sign this Agreement electronically, and you agree that your electronic signature is the legal equivalent of your manual signature.”*

As a general rule for e-contracting, the more steps required to show contractual assent, the better. For example, requiring a signatory to both type her name and *“click here to sign”* or otherwise affirm she has read (or scrolled through), before being taken to a final e-signature step, solidifies intent.

Importantly, e-signature platforms often have a process, combined with language, that establishes intent to contract electronically, such as having a new signer (during his first use of the platform) step through sequential web pages that require first clicking an *“I agree to use electronic records and signatures”* box, before taking additional steps to adopt a stylized e-signature to use.

Change Orders and Amendments

Often overlooked are how to memorialize later mutual agreements to enter change orders and other varying amendments. As to formal contractual amendments, the same tips and principles above apply – and including reference to amendments in a statement like the following suffices: *“the agreement and*

any amendments to it may be electronically signed.”

For convenience, clients often want to exchange emails to enter change orders (to statements of work or the like) or to later elect to add on a smaller service or good to an existing order – and, again, adding an enabling provision in the main agreement sets that up: *“Any change order must be mutually agreed to in writing, and the exchange of emails between the parties that is intended to operate as a change order, references this agreement, and clearly indicates commitments to be changed, added, or removed may constitute a change order.”*

Choice of Law Provision

In the United States, signatures and contracts generally cannot be denied legal effect or enforceability solely because of their electronic forms.

While the primary e-signature and e-records laws are E-Sign and UETA (adopted in 49 states, with New York having its own law), there are some variations in UETA as adopted, as well as other state laws that may govern specific types of transactions (e.g., certain articles of the Uniform Commercial Code, some of which address their own particular electronic processes and requirements).

Rather than a short “This Agreement is governed by the laws of the state of Ohio,” some opt for a more robust provision to reinforce application of a state’s laws: *“The validity, interpretation, and performance of this Agreement shall be construed under the laws of the state of Ohio, without giving effect to the principles of conflict of laws.”*

Using Platform Offerings

E-signature platforms typically retain completed e-signed versions of documents and arrange to forward them to the signers, often with a certificate of completion or the like summarizing dates and times signed, names, email addresses, and IP addresses of signers – this is a valuable summary that both parties to a transaction should retain.

Optional services can be added, such as SMS and phone authentication that require signers to prove identity and use a passcode before accessing a document to be e-signed. Some companies opt to review or turn-on event notifications, such as when a document is sent, received, and opened, to enhance the audit trail.

*****Electronic Contracting, Part 2 – Adapting to Link-and-Layer Methods*****

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