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# Born Under a Bad Sign: Avoiding Electronic Signature Blues

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When Albert King sang "Born Under a Bad Sign," he was not referring to a document containing an invalid electronic signature. Nevertheless, in a post-COVID world with large numbers of remote workers, employers can take affirmative steps to minimize the kind of "bad luck" the blues singer referred to by understanding issues that may arise when using electronic signatures.

## Electronic Signatures are Generally Valid

Laws at both the state and federal level generally allow electronic signatures to have the same validity as their traditional handwritten counterparts. In an employment context, these laws can cover a wide range of documents, from contracts, to settlement agreements, to restrictive covenant agreements, and more.

**State Law**

At the state level, the Uniform Electronic Transactions Act (UETA) provides that a record or signature "may not be denied for legal effect or enforceability solely because it is in electronic form." Likewise, under the UETA "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." If a law does require that a record must be in writing, or

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that a signature is required, then the UETA allows an electronic signature to satisfy those requirements.

The UETA has been adopted by nearly every state, Washington D.C., Puerto Rico, and the U.S. Virgin Islands since it was first published in 1999 by the National Conference of Commissioners on Uniform State Laws. The sole exception is New York, which instead follows its own similar law, the Electronic Signatures and Records Act (ESRA). New York's ESRA defines an electronic signature the same way as the UETA.

**Federal Law**

At the federal level, the Electronic Signatures in Global and National Commerce Act (E-SIGN) was enacted in 2000. Like the UETA, E-SIGN allows for the validity of electronic signatures. Specifically, it provides that "[n]otwithstanding any statute, regulation, or other rule of law...with respect to any transaction in or affecting interstate or foreign commerce...a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form," and "a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic or signature record was used in its formation.

**Differences between State and Federal Law, and Preemption**

Because these laws are so similar, employers usually will not have to concern themselves over which applies to a particular transaction; compliance with one will usually mean compliance with the other. Nevertheless, there remain some differences. Most notably, E-SIGN broadly applies to "any transaction in or affecting interstate commerce," whereas the UETA more narrowly relates to transactions that arise out of business, commercial, (including consumer), and governmental matters. The federal E-SIGN thus generally preempts state laws that

govern written contracts affecting interstate (or foreign) commerce.

E-SIGN also allows states to "modify, limit, or supersede" its terms where the state: (1) has adopted the UETA; and (2) has specified alternative procedures or requirements that both (i) describe the use or acceptance of electronic records or signatures to establish the legal effect, validity, or enforceability of contracts or other records; and (2) are otherwise consistent with E-SIGN. In practice, this means that a state's adopted version of the UETA will not be preempted by E-SIGN where they are not inconsistent, or where the state has alternative procedures for using electronic signatures that are not inconsistent with E-SIGN. New York's ESRA is similar in that it should also be preempted where inconsistent with E-SIGN.

## Protecting Against the "It Wasn't Me" Argument

A threshold question that can arise for employers is whether it was in fact the employee who personally made the electronic signature. Indeed, multiple courts have found that an electronic signature was invalid where an employer was unable to sufficiently establish that the signature was made by the employee.

For example, one California court analyzing the state's adopted version of the UETA precluded a California automobile dealership from relying on an electronically signed arbitration agreement. In that case, the court found that the dealership failed to explain how it concluded or inferred that its employee was the person who electronically signed the agreement. Likewise, a federal district court in Kansas held that a department store failed to demonstrate by a preponderance of the evidence that a former employee knowingly and intentionally executed an electronic arbitration agreement.

Employers can proactively protect against such arguments in a number of ways. For instance, they could implement a practice of having employees access and sign documents through the company's intranet using a unique user identification and password. Another option might simply be to contemporaneously ask an employee to confirm that he or she was indeed the person who signed the relevant document, for example, by sending written confirmation through the employee's company-issued e-mail address. Although such confirmation may not necessarily be definitive proof in the event of a dispute (particularly if it was itself given through a writing), that evidence could still bolster an employer's chances at meeting its burden of proof if there is later a dispute.

## Coverage and Exemptions Under UETA, ESRA, and E-SIGN

Even if an employer is successful in demonstrating that it was in fact an employee who electronically signed a document, that is not necessarily the end of the inquiry. That is because not all types of electronic signatures are covered by the UETA, ESRA, or E-SIGN. Employers who mistakenly assume otherwise could find themselves in an undesirable situation where an employee could dispute an otherwise pristinely drafted contract or document on the basis of an allegedly invalid signature.

In particular, employers should take note: the UETA only applies when all parties agree to conduct the transaction electronically. Specifically, the UETA provides that "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." A comment accompanying that provision of the UETA notes that the "critical element is the intent of a party to conduct a transaction electronically." A court could thus hold that an employee's signature is void if an employer cannot show there was mutual intent to

conduct the transaction electronically. That was the case in one California case, where the court invalidated a settlement agreement after finding no "substantial evidence" that one party to the agreement consented to sign it electronically – despite the fact that he had negotiated its terms through e-mails that contained his name printed at the bottom.

Accordingly, employers seeking to enter electronically signed agreements with prospective, current, or former employees would be well advised to include language specifying that all parties have agreed on the use of electronic signatures. This could be particularly helpful in the context of a non-compete or non-solicit agreement, where a departing employee might seek to invalidate an agreement by any means necessary.

Moreover, the UETA also notes that just because a party has consented to conduct a particular transaction electronically, that does not mean that they cannot refuse to do so for a separate transaction. In other words, it is not enough for an employer to secure an employee's consent to use electronic signatures just once and then assume that the consent extends to other transactions; the parties' conduct should be separately evaluated on each transaction to determine whether a particular signature was valid.

New York's ESRA also contains exceptions, though they are not particularly relevant in an employment context. Although it leaves room for the New York State Office of Information Technology Services to exempt other types of records, it has yet to do so.

The Federal E-SIGN also exempts certain categories of documents. One such category that could potentially be relevant in an employment context would be a notice of cancellation or termination of health insurance/benefits or life insurance benefits. Generally though, most of the exceptions contained

in E-SIGN are not likely to be of particular relevance to employers.

**A Note on the UCC**

Though outside the scope of this article, it bears mentioning that neither the UETA nor E-SIGN apply to agreements governed by the Uniform Commercial Code (UCC), other than its provisions relating to sale and leasing of goods – which are generally not relevant in an employment context. Regardless, there are other provisions throughout the UCC that allow for the use of electronic signatures in various circumstances.

## Takeaway for Employers

Employers should not simply assume that their employees' electronic signatures are automatically valid in all cases. Employers can take proactive steps at the time an electronic signature is made to protect against the chance that it might later be invalidated. It is critical for employers to ensure – and be able to prove, if necessary – that all parties consented and intended to conduct transactions electronically. Employers should also consider implementing policies and/or procedures that minimize the chance that someone other than an employee is signing on his or her behalf, and procedures whereby the employee acknowledges s/he has signed electronically.

For guidance with electronic signatures and other workplace issues, consult your Akerman attorney.

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