



**LET'S MAKE A DEAL -- REMOTELY:  
Practical Advice for Using E-Signatures**

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Quarantines and stay-at-home orders won't prevent law firms, legal departments, and businesses from negotiating transactions using remote technology. But, when it comes to memorializing and authenticating an eventual agreement between the parties, obtaining handwritten signatures in front of witnesses or notaries is no longer feasible. Fortunately, another practical option exists: e-signatures.

**What Is an E-Signature?**

An e-signature is “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.S. § 7006(5); Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc., 722 F.3d 591, 592 (4th Cir. 2013).

**The E-Sign Act, UETA, and Similar State Laws**

The Federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C.S. § 7001, et. seq. (the “E-Sign Act”) and the Uniform Electronic Transactions Act (UETA) (adopted by all states except for Illinois, New York, and Washington) provide that electronic signatures are legally valid, and commercial contracts cannot be invalidated solely because an electronic signature or electronic record was used in their formation.

Illinois, New York, and Washington have enacted similar legislation that explicitly regulates and recognizes the validity of digital signatures. For example, Illinois's Electronic Commerce Security Act, 5 ILCS 175/5-120(a), provides that “[w]here a rule of law requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law.” Likewise, New York's Electronic Signatures and Records Act, State Technology Laws, Article III §§301-309, provides that “electronic records” have the same force and effect as records not produced by electronic means, and electronic signatures have the same validity and effect as handwritten signatures.

**What You Need to Know Before Using an E-Signature**

- **NOT all documents can be signed electronically. Some exclusions apply.**

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Always consult an attorney with specific legal issues.

You can use e-signatures for most types of commercial transactions. However, the following types of legal documents/notices are not eligible for e-signatures under the E-Sign Act and the UETA:

- wills, codicils, or testamentary trusts;
  - adoption, divorce, or other matters of family law;
  - court orders or notices, or official court documents required to be executed in connection with court proceedings (including briefs, pleadings, and other writings), unless another law or local procedural rule permits them; and
  - any notice of the cancellation or termination of health insurance or benefits or life insurance benefits.
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- **You need everybody’s consent.** All parties must agree to do business electronically. Document this consent, either in the agreement itself or in a separate acknowledgement that says e-signatures will be considered the same as handwritten signatures for purposes of validity, enforceability, and admissibility of evidence in a court of law or arbitration.
  - **Consent should not continue indefinitely.** The law requires not only that the parties opt-in, but that they be given the opportunity to opt-out if they change their minds. Include an expiration date and make sure you include an easy-to-follow opt-out notice.
  - **Use a clear, unambiguous process to avoid claims of “mistake.”** Just like “wet” or handwritten signatures, an electronic signature is effective only if the person signing *intends* to enter into the agreement. Make sure the electronic signing process is clear and unambiguous. Include warnings in CAPITAL LETTERS, **bold print**, and/or **red typeface**, advising the parties about the significance of typing their name or clicking on a box. Use more than one step to complete the signature.
  - **Authenticate the identity of the person who is signing.** A common challenge to electronic transactions is that it is difficult to confirm that the person signing the electronic agreement is really who they say they are. Take steps to authenticate the identity of the signatory, either by using a service that monitors and records keystrokes and document views, by setting up a system that requires the user to enter a unique identifier or password known only to the person who is signing, or by using an independent provider who has a “security protocol.” (Both Adobe and DocuSign advertise that they have this capability and would be able to provide evidence of the signing). Consider using a digital signature (that uses encryption) to authenticate the signer for highly sensitive documents. If you are in one of the jurisdictions that allows e-notarization, consider using a notary public to verify identification and witness the signing by videoconference. (Online notary platforms include DocVerify, Notarize, NotaryCam, Pavaso, Safedocs, and SIGNiX).
  - **Lawyer up.** Consult a legal professional before using electronic signatures for the first time or before using it for a new type of transaction.

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