



WHEN & HOW TO USE
DIGITAL SIGNATURES
IN CONSTRUCTION

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An electronic signature,
or e-signature, is simply
data in electronic form

used by a signatory to indicate assent on an electronic document. An e-signature can be as simple as a name typed into an electronic document, or it can be more complicated, effectuated through a cryptographic digital security mechanism.

WHEN & HOW TO USE DIGITAL SIGNATURES IN CONSTRUCTION

The concept of signing a document remotely through electronic means is nothing new. Many jurisdictions have recognized the validity of faxed signatures since the 1980s. In some states, even telegraphic signatures – pounded out in Morse code – have been found legally valid, dating back as far as the mid-19th Century.

While the concept is old, the unprecedented ubiquity of e-signing, particularly in fast-paced industries like construction, is certainly a modern phenomenon. Construction operators who fail to embrace e-signing risk being left behind by competitors. On the other hand, those who blaze forward without fully understanding the implications of moving to a system of electronic signing risk rendering their business contracts unenforceable.

Construction professionals who wish to remain industry leaders need a solid understanding of both the potential benefits of digital signatures, and the potential pitfalls.

The Benefits of Digital Signatures in Construction

It may be a cliché, but in construction, it is a good one: time is money. There are a thousand reasons a construction project might be delayed, but waiting around for the delivery and return of physical documents should not be one of them. A document can be electronically signed in the time it takes to click a mouse or run a finger across a touchscreen. Two parties on opposite sides of the globe, as long as each has access to an internet connection, can electronically sign a document almost simultaneously.

Speed is perhaps the most obvious benefit of electronically signing documents. But it is far from the only benefit. Documents that are fully electronic save on printing and storage costs. These costs can add up for a high-volume construction company churning through hundreds or even thousands of signed documents every year. From a public relations perspective, cutting out the wastefulness of printed paper documents is also an easy and low-cost way to secure a reputation as a “green” company.

Furthermore, documents signed and maintained in an electronic format are more easily archived, and more easily searchable, than paper documents. Perhaps surprisingly, electronic signatures even allow for added security benefits compared to signing paper copies. After signing, e-signed documents can be tamper-sealed. Paper documents, however, are always open to tampering by more conventional methods. Even a skilled computer hacker cannot crack into a properly tamper-sealed electronic

document, but anyone with a steady hand, or access to a home printer, can make startlingly subtle alterations to paper documents.

Logistically, moving to electronic signatures is a winning prospect for construction companies. However, if a company does not implement a system of electronic signatures carefully, there can be real risks. In order to realize the many benefits of e-signatures, construction companies must take action to minimize the risks.

Keep Digital Signatures Safe & Effective

It is not uncommon in the construction industry to encounter business partners (or rivals) with vivid memories of a time when many construction contracts were not reduced to writing at all.

Today, most construction firm proprietors recognize the value and absolute necessity of having strong, enforceable contracts, in writing. Even so, given the history of handshake deals within the industry, it is not surprising that some view lengthy written documents and new ways of signing them with suspicion. That makes it all the more important to understand the potential pitfalls of electronic signatures, and when necessary, to be able to explain how those pitfalls are best avoided.

Enforceability Questions

To a person who is unaccustomed to dealing with electronic signatures, the first question is probably going to be, “Is an e-signature enforceable?” In other words, a signatory may wonder whether an electronic signature is as legally valid as a signature made by hand, with a pen.

In most cases, the answer is yes. Generally, an instrument signed electronically is just as enforceable in court as one traditionally signed on paper. A document signed electronically is therefore legally equivalent to the same document printed out and signed by hand. The United States has a very broad definition of what can qualify as an electronic signature.

The U.S. Uniform Electronic Transactions Act defines an electronic signature as “an electronic sound, symbol or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” The Uniform Electronic Transactions Act is a model law and has been adopted by most, but not all, U.S. jurisdictions. However, even states that have not adopted the Uniform Electronic Transactions Act have their own electronic signature statutes which also allow for e-signing.

So every state allows for legally enforceable electronic signing. Yet, allowing for electronic signing and effectuating electronic signing in the real world are different, albeit related, considerations.

Strong Business Processes

The broad definition of e-signatures from the Uniform Electronic Transactions Act is an embodiment of the flexibility built into the law. The law allows for a great range of electronic contracting, and allows businesses to specifically tailor the means of electronic contracting to fit their own unique needs.

Some businesses find it desirable to engage a third party contractor to supply electronic signature software. E-signature software can help provide added levels of security, for example, by requiring a signatory to enter a unique code provided through secure communications channels in order to sign a document.

But such elaborate measures are not an absolute requirement for effective e-signing. Given the broad definition of e-signing under U.S. law, even mutual assent to signing an attached document expressed in the body of an email exchange would likely create valid e-signatures.

Of course, just because it may be possible to validly e-sign documents through relatively simple methods does not mean one should be cavalier about e-signing. Since the intent to sign is key to the validity of an e-signature, the instrument itself should spell out how that intent is to be manifested.

For instance, if a contract is meant to be e-signed when a signatory types in his/her name in a box on the last page, it can be helpful for the contract itself to state clearly just that: by typing one's name in the box on the last page, the typist is displaying his or her intent to sign the document.

However e-signing is effectuated, it should be bolstered by extrinsic business processes. Talking with the signer in person or by phone before e-signing, relying on an existing and ongoing business relationship, and receiving payment are all things extrinsic to the electronically signed document which can serve as supplemental evidence of the intent to sign.

In addition to showing the intent to sign, extrinsic business processes can also help prevent forgery by documenting that the person you expect to e-sign the document is the one who in fact completes the electronic signature.

Forgery Common Concern, but Uncommon in Practice

Probably the most common fear among the e-signing uninitiated is forgery or fraud: a person signing a document purporting to be someone else, or a person signing a document then later claiming that he or she did not in fact sign the document.

Very few contract disputes are related to the identity of the contracting parties or the authenticity of the signatures on the documents. Even so, neither paper signatures nor electronic signatures are fully resistant to fraud, and occasionally accusations of forgery or fraud do come up in the e-signature context.

Fortunately, the two easiest ways to avoid forgery or fraud allegations when dealing with electronically signed documents are the same things that are best practices anyway in the business process of obtaining e-signatures.

One is relying in part on complimentary businesses processes. It is going to be hard for a signatory to claim it was not her who in fact e-signed a document if the other party can produce outgoing and incoming emails showing receipt and return of the signed document from the signatory's individual email address.

The second common method to prevent forgery or fraud in e-signing is the utilization of security software. Software can be effective, but executives need to remember that software alone is not a panacea.

While the specter of forgery and fraud in e-signing is a common concern among those who can remember doing business in a simpler time, the reality is that it is very rare for a forgery or fraud claim to arise out of the electronic signing of a document. Such claims are relatively easy to prevent with basic precautionary measures.

In fact, emailing a document for e-signing is more secure than sending a paper document, as people need unique user names and passwords to log in to email accounts but anyone can pick up a loose paper document left unattended.

Legal Help May Be Desirable

Transitioning to the e-signing of documents can be a great way to cut down on overhead, streamline business practices, and do a small part to help the environment, all with very little risk. The right attorney can draft documents which specifically allow for e-signing, and can offer advice on business practices which will ensure enforceability and prevent fraud.



Digital signatures in construction

are, without a doubt, the future in the industry. With a little forethought, and the right legal help, implementing e-signing can have a very favorable risk-to-reward ratio.



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