

## DESIGNING AN E-HR PROCESS

The laws of every state now permit HR departments to complete and deliver the full range of HR/benefits documents using e-signatures and e-delivery. This article provides an overview of the applicable law, outlines the risks of such an e-HR process and describes a possible framework for designing and implementing an effective e-HR process, whether that process is via an intranet, an extranet, the Internet or in a face-to-face setting.

### WHAT IS E-SIGN?

The Electronic Signatures in Global and National Commerce Act (“ESIGN”) became effective in October 2000, but employers have been slow to seize the opportunities created by this federal law, as well as the state enactments of the Uniform Electronic Transactions Act (“UETA”) now adopted in at least 46 states, for the use of e-signatures and records in human resources functions. E-SIGN is particularly significant due to its broad pre-emption provisions and its interplay with UETA, allowing employers to develop a national e-signature strategy. E-signatures are only one important element of the federal E-SIGN law. The law:

- ◆ Permits delivering documents exclusively through electronic means; and
- ◆ Permits companies to satisfy statutory record retention and retrieval requirements exclusively through electronic means.

Summarized below are key aspects of the e-signature laws relating to developing and implementing an effective e-HR process. References in this article to E-SIGN apply equally to the various state enactments of UETA which would not be preempted by the federal law.

*Federal and State Law Interplay* E-SIGN does not entirely preempt state laws dealing with e-signatures. States have limited flexibility in adopting their own versions of e-signature laws. Understanding the interplay between the federal E-SIGN and the various states’ versions of UETA can be an overwhelming task, if not done in the context of a particular issue. The substantive differences between the state and federal law on most commercial issues is generally insignificant in designing and implementing an effective e-signature process.

### BASICS OF E-SIGN LAWS

*What is an “e-signature?”* Under E-SIGN and UETA, an e-signature can be as simple as:

- ◆ Clicking “I Agree;”
- ◆ Saying into a recording device, “I Agree;”
- ◆ Using a peripheral device that records an image of the signature; or
- ◆ Using an electronic sound, symbol, or process attached to or logically associated with the document or record, which is executed or adopted by a person with the intent to sign.

Selecting the method of electronically signing a document or record is a relatively simple element of an effective e-signature process.

*Categories of Signatures* There are many opportunities for employers to use e-sign and e-delivery in the HR area. For example, the e-process could include:

- ◆ New Employee Processing
- ◆ Employment and Confidentiality Agreements
- ◆ Benefits Enrollment and Status Changes
- ◆ Expense Reports and Other Internal Reports
- ◆ Performance Evaluations

### UNDERSTANDING THE RISKS

Below is a summary of the potential risks of using an e-HR process.

*Authentication Risk - “That’s not my signature!”* If the employee or applicant using an e-signature is not face-to-face with someone from HR, there is a risk of not being able to prove the actual identity of the person using the signature.

There are ways to authenticate the identity of a person on the other side of an e-process. Using PIN’s or other shared secrets (such as employee ID number and SSN) are two simple ways that are sufficient in particular scenarios. The degree to which a person is authenticated should be calibrated to the risk of the signature failing. For example, the authentication risk associated with authorizing a payroll deduction to participate in the company’s 401(k) Plan is significantly less than the risk associated with authorizing the company to complete a background check on the person.

*Repudiation Risk - “That’s not what I signed!”* The employee or applicant who signed a record using an e-process may claim that although the signature appearing on the record is his or hers, the particular record in question bearing his/her e-signature is: (i) not the record he or she signed; and/or (ii) that record was altered after it was signed. There are ways to secure e-records after they have been signed to reduce

employees' and applicants' ability to repudiate the contents of a record bearing his or her e-signature.

The records can be electronically sealed after the documents have been signed and the session ends using well-established technology, so that the records cannot be altered without detection. The process should also include an audit trail or record of each step in the transaction, indicating time and date of each critical step in the process. Providing the signed documents to the employee or applicant and requesting him or her to examine them carefully and to alert the company immediately if it is not exactly what he or she signed can also reduce the repudiation risk.

*Compliance Risk - "I never saw that!"* Employees or applicants may claim to have never received certain documents relating to compliance matters, such as summary plan descriptions, employee handbooks, or reminders of other company policies. Regulators may make the same claim regarding disclosures and acknowledgments required by law. There are ways to record the delivery of specific records to employees and applicants.

By having an audit trail in the e-process, which includes all significant steps, including where the employee was provided and acknowledged receipt of certain documents, proof of delivery can be established. Further, if this audit trail is part of a sealed process, it will be difficult for an employee or applicant to challenge receipt.

ESIGN requires certain steps if consumer disclosures required to be provided in writing are to be provided exclusively via e-delivery. Because this is in the federal law and none of the states have declared otherwise, this requirement applies to all states. The requirements are relatively simple to satisfy, except in certain scenarios involving call centers.

*Adoption Risk - "Am I done yet?"* If the e-process is not user-friendly and is not faster or more convenient for employees and applicants to use compared to traditional methods, employees and applicants may resist using the e-process or complain about the inconvenience. By involving a range of personnel from the company, conducting a number of tests, monitoring feedback and other results, and making adjustments to the e-process, a company can increase the adoption rate of the new process.

*Relative Risk - "How do the e-risks compare to the risks in the traditional process?"* The authentication, repudiation and compliance risks exist in conducting business the traditional way, i.e., hard copies and blue ink. Most of us have not considered how much of these risks are inherent in the current methods of completing most HR forms. In designing and implementing effective e-signature and e-delivery processes, focusing on the risks relative to the traditional methods is essential. The

standard for an e-signature and e-delivery process is not whether there is any risk. Rather, the goal is to have these risks be no greater than the risks using the traditional approach, unless there is a counterbalancing benefit to the company for assuming the greater risk, such as significantly lower costs.

## DESIGNING THE PROCESS

Experience tells us that a multi-disciplinary team (IT, HR, compliance/legal) familiar with existing technologies relating to e-signature and e-delivery can design an effective e-process, where the authentication, repudiation and compliance risks are at or below the levels of such risks using traditional methods and that it is possible to achieve this in a user-friendly way. Experience also tells us that focusing on just a few business processes first to work through the details of how the various pieces work together is best, rather than attempting to design a single process intended to cover all HR processes in a single step. Once the basics are resolved for a given process (such as completing the initial application for employment), it will be easier to consider how such a process could be changed to accommodate other HR functions, such as enrollment into benefit plans.

If you have questions regarding ESIGN Compliance, please contact your Lord, Bissell & Brook attorney or one of the following members of our ESIGN team:

**Patrick J. Hatfield** | 404.870.4643 | [phatfield@lordbissell.com](mailto:phatfield@lordbissell.com)

**Mark C. McDermott** | 404.870.4686 | [mmcdermott@lordbissell.com](mailto:mmcdermott@lordbissell.com)