

Make Your Electronic Contracts **Enforceable**



Q: Are electronic contracts as legal as paper ones?

A: Yes. Electronic contracts and electronic signatures are as legally effective and enforceable as paper agreements with handwritten signatures, as long as certain conditions are met.

The federal Electronic Signatures in Global and National Commerce Act (“E-Sign”), passed several years ago, established the framework that allows electronic signatures to be used in consumer and business transactions, opening the door for electronic contracts of all types.

Regardless of the format, the basic rules of contracts apply: A valid contract requires clear terms and a clear “manifestation of intent” to enter into the contract. In the paper context, a handwritten signature on a piece of paper that contains all the terms of the contract suffices to show clear intent to accept those terms.

In the electronic context, the rules are the same although the agreement may look slightly different. As with a paper agreement, the terms of an electronic agreement must be displayed clearly with an opportunity for the signer to review the terms. In fact, using display techniques that will encourage — or even force — the signer to read the terms before signing minimizes potential claims that the signer did not know the terms. For example, in a click-through contracting process, before a responding party can say “yes, I agree,” he or she could be required to scroll

through a pop-up window or other display of terms.

A second element in electronic agreements is some affirmative action indicating that the parties clearly and unambiguously express consent. Under E-Sign, an electronic signature is “any electronic sound, symbol, or process attached to or logically associated with a record executed or adopted by a person with the intent to sign the record.” The law does not require a signature to be digital or encrypted — or even look like a signature — to be valid. An electronic signature may be an e-mail message indicating acceptance, or clicking on an “I Agree” button.

An additional step is necessary for “click-through” agreements. In order to minimize the possibility that a party clicked the “agree” button by mistake, the party agreeing to the terms of the electronic contract must have an opportunity to confirm consent and correct errors. In other words, after the first click on the “I Agree” button, the signer also must have the opportunity to change his or her mind and revoke the agreement by, say, clicking on “Cancel,” or in some other way confirm agreement. Confirming assent in the electronic context essentially is a substitute for putting pen to paper and signing a name, while still having the opportunity in the moment to scratch out the signature or tear up the contract and start over.

The signer also must be able to keep

a copy of the terms to which he or she agreed. Under E-Sign, the party proposing an electronic agreement must describe the hardware and software requirements necessary, if any, to read and save the electronic document that is signed. The signer must then have the ability to print and store an electronic record of the transaction or agreement that was signed.

E-Sign also requires that the party responding to an offer to sign an agreement via electronic means be allowed to opt out and use a paper contract instead. The offering party, however, may charge a fee for using paper agreements in lieu of electronic ones. It should be noted that the law also provides that certain types of documents cannot be signed or agreed to electronically. Those include wills, divorce and adoption papers, court documents, notices of cancellation or termination of utilities or insurance benefits, eviction and foreclosure notices, and recall notices.

In summary, the key elements for making electronic contracts enforceable are the same as for paper contracts: clear and prominent terms, the opportunity to review and keep a record of the terms, and methods to ensure unambiguous agreement. **■**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.

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