

Digitalising the world of work – how legally watertight are electronic signatures and what requirements must they fulfil?

Pia Pracht

The digitalisation of the world of work has become clearly noticeable at least since the beginning of the Covid-19 pandemic. Digital personal files, electronic doctor's notes, digital annual leave requests, electronic A1 certificates and electronically signed employment contracts are just some examples of the continual digitisation of the HR workflow. This allows for significant cost reductions and accelerates processes. Legally watertight electronic signatures are at the heart of this. But what must employers pay attention to when using electronic signatures to sensibly design their electronic HR workflow so that they are legally watertight?

I. Types of electronic signatures

The term electronic signature is uniformly regulated in the European Union since the entry into force of [the EU Regulation 910/2014](#) (eIDAS Regulation) which has direct effect in Germany. The legal conformity of digital signatures is regulated in conjunction with the Trust Services Act (Vertrauensdienstegesetz VDG) and the Civil Code (BGB). The eIDAS Regulation differentiates between three different types of electronic signature, the simple electronic signature, the advanced electronic signature and the qualified electronic signature where the security requirements increase with each level.

A simple electronic signature is the simplest form as it does not have any encryption requirements. For example, this includes an email signed with a name or a scanned signature in an application.

An advanced digital signature is a signature used with signature-creation data that is uniquely linked to the signatory so it is capable of uniquely identifying the signatory.

A qualified electronic signature which has the same legal effect as a handwritten signature is the strongest form of electronic signature and offers the highest level of security and legal validity in legal

matters, which is why it must fulfil strict technical requirements. It is basically an advanced electronic signature which has been created from a qualified electronic signature-creation device and is also based on a qualified certificate for electronic signatures which must be generated by a trusted service provider certified by the Federal Network Agency (Bundesnetzagentur). A qualified electronic signature is therefore first legally compliant when the intermediary certification provider guarantees the legitimacy of the signature.

II. Statutory form requirements

In principle there are no form requirements in employment law so that using a simple electronic signature is sufficient. It can therefore be used in the application process for jobs. However, there are also other HR documents, such as employment contracts, that are legally valid with this signature.

There are some **exceptions** to this rule. If an Act prescribes the written form, only a qualified electronic signature can replace a handwritten signature ([section 126 \(3\) BGB](#) in conjunction with [section 126a BGB](#)), provided this is not expressly excluded by the Act. The legislator has even envisaged an express right to substitute in the Works Councils Modernisation Act (Betriebsrätemodernisierungsgesetz) in some cases. Use of a qualified electronic signature is accordingly permitted for:

- Fixed-term employment contracts ([section 14 IV Act on Part-Time Work and Fixed-Term Employment \(Teilzeit- und Befristungsgesetz, TzBfG\)](#)) as well as
- Employment contracts with a post-contractual non-compete clause ([section 74 \(1\) German Commercial Code \(Handelsgesetzbuch, HGB\)](#))
- Works Agreements ([section 77 \(2\) sentence 3 Works Constitution Act \(Betriebsfassungsgesetz, BetrVG\)](#)), with the requirement that both parties must sign the same document
- Decisions of the Conciliation Panel ([section 76 \(3\) sentence 4 BetrVG](#))
- Reconciliation of interests in the case of alterations ([section 112 \(1\) sentence 1 at the end BetrVG](#))

In some places in individual employment law **replacement signatures are prohibited**, such as in the event of

- the termination of employment contracts (cf. [section 623 at the end BGB](#))
- providing references ([section 109 \(3\) German Industrial Code \(Gewerbeordnung, GewO\)](#), [section 630 sentence 3 BGB](#), [section 16 \(1\) sentence 2 Vocational Training Act \(Berufsbildungsgesetz, BBiG\)](#)) and
- evidencing fundamental provisions of employment ([section 2 \(1\) sentence 3 Law on Evidencing Fundamental Provisions of Employment \(NachwG\)](#); [section 11 \(1\) sentence 1 BBiG](#); [section 11 \(1\) sentence 1 German Law on Temporary Employment \(Arbeitnehmerüberlassungsgesetz, AÜG\)](#) in conjunction with [section 2 \(1\) sentence 3 NachwG](#)).

III. Comments

There are many reasons in favour of a digital workflow, most recently a reduction in time and money as the majority of HR processes can be carried out electronically without a problem. However, caution should be exercised

when choosing a provider of e-signature tools if a legal transaction requires a qualified electronic signature. Not all providers fulfil the strict statutory requirements as held by the Berlin Arbeitsgericht in its judgment dated 28 September 2021 ([case no. 36 Ca 15296/20](#)). In the case before the Berlin Arbeitsgericht, the written form requirement in the disputed section of the employment contract agreeing the fixed term period was not complied with as the electronic signatures were not created using a certified system. The legal consequence of this was an employment contract without a fixed duration. [The Berlin Arbeitsgericht](#) was concerned with the question of whether the e-signature process that was offered within the scope of the cooperation between DocuSign, one of the leading providers of digital signatures, and D-TRUST, the certification service provider of the Federal Printing Office (Bundesdruckerei), satisfied the high statutory requirements in the action against the fixed-term provision in the employment contracts of couriers of the delivery service Gorillas presented before the Court (case no. 20 Ca 8498/21 and 20 Ca 8500/21 – resolved without a judicial decision).

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstraße 164, 10623 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

HAMBURG

Alter Wall 20 – 22, 20457 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

COLOGNE

Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

MUNICH

Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90

FRANKFURT AM MAIN

Ulmenstraße 30, 60325 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27