

## ESIGN & UETA

*What you need to know about electronic signature regulations*

### Are electronic signatures legally binding?

The short answer: yes. There are two key pieces of legislation that outline the do's and don'ts of electronic signing.

#### ESIGN

The federal Electronic Signatures in Global and National Commerce Act (ESIGN) was enacted on June 30, 2000. The law was intended to facilitate the use of electronic signatures and other electronic records as they pertained to interstate and foreign business transactions. ESIGN laid out several requirements, or standards, used to determine the validity and legal enforceability of electronic agreements in these circumstances.

#### UETA

The Uniform Electronic Transactions Act (UETA) was adopted by the National Conference on Uniform State Laws in 1999 and has since been adopted by 47 states. UETA predates ESIGN, but both lay out requirements for electronic signatures and electronic records to be afforded the same treatment as that of their paper counterparts - UETA at the state level, and ESIGN at the federal level.

### Do clickwrap agreements comply with ESIGN and UETA requirements (outlined on the flip side)?

Yes. Clickwrap agreements fall under the umbrella of electronic signatures. To refresh, electronic signatures are defined as "any electronic sound, symbol or process with the intent to sign the record or perform a legally significant act."

Clicking a button or checking a box in order to manifest assent to contract terms falls under the "process" part of this definition. In fact, UETA commentary expressly states that the definition of an electronic signature includes "the standard webpage click through process."

When a user clicks a button labeled "I agree" as part of a clickwrap agreement, the user demonstrates the active intent to "sign" (i.e., bind themselves to a legal obligation).

There is not much case law applying ESIGN and UETA principles to clickwrap agreements explicitly, but the cases that do exist unequivocally state that the electronic click of a button or checkbox is enough to form a contract and is considered an electronic signature. For example, in *Taylor v. Dolgencorp, Inc.*, the court explains that "electronic acceptance through, for example, a 'click-to-accept' box... is enough to form a contract."

## What are the key takeaways from ESIGN and UETA?

Both ESIGN and UETA clearly define certain standards for compliance. We went ahead and pulled those out of the text and summarized them for you:

### Intent to sign

- Like traditional (ink on paper) signatures, electronic signatures are only valid if each party intended to sign.
- Based on UETA commentary and case law application, entering some sort of identifying information coupled with affirmatively taking some action (e.g., clicking “agree”) indicates the intent to sign.
- What does this mean for your business? You should follow industry best practices to ensure the design of your electronic agreements makes it obvious that the signer is actively signing the agreement.

### Consent to contract electronically

- Parties who contract electronically must agree to conduct the transaction by electronic means.
- This is shown either expressly (explicitly clear language in the contract indicating that the consumer is entering into a contract electronically) or implicitly (the context through which the agreement was signed, e.g., having the consumer sign obviously legal documents via electronic means).
- For consumer contracts, certain disclosures must be made to the consumer prior to when (or at the time) the contract is electronically signed in order for the consent requirement to be met.

### Association of the electronic signature with the record

- The electronic signature must be linked or logically associated with the record and the signer.
- UETA commentary suggests that attribution can be established by:
  - Security procedures to authenticate the signer;
  - Information within the record links the record to a particular person (including numerical codes, personal identification numbers, public and private key combinations, etc.);
  - Showing that, of necessity, the user could only have gotten the information or made the transaction through the process at the website.
- Having a third party system that manages and stores this information has been shown to bolster the immutability of the record in court.

### Retention of contracts and records

- If a law requires retention of records, electronic records may fulfill this requirement if they are:
  - Accurate;
  - Reproducible; and
  - Accessible to the sender and signer (as well as any other “entitled parties.”