

Recordkeeping in Human Resources Electronic Storage and the Use of Electronic Signatures

By PAUL S. COWIE AND DORNA MOINI

Many companies want to move their human resource documentation systems into the electronic age but are concerned about inadvertently violating some law or regulation. While employers are required to keep various records related to their employees, this can be achieved electronically almost as easily as in hard copy. The key to any paperless recordkeeping system is to ensure that it meets the legal requirements. Frequently asked questions include: What documents must be kept and for how long? In what form—hard copy, electronic or both? When can electronic signatures be used? What are the risks of paperless recordkeeping versus hardcopies? While this is an emerging and developing area of law, this article seeks to answer these questions.

Electronic Recordkeeping

An electronic recordkeeping system can be as simple as creating a process to keep scanned versions of hard copy documents, or as robust as a fully paperless system that electronically creates and stores original documents. Contrary to common misconception, it is permissible to keep almost all required records electronically, provided that the storage systems are secure and reliable, and appropriately limit access. Indeed, California's Uniform Electronic Transactions Act¹ and the fed-

eral E-SIGN Act² provide that records cannot be invalidated solely because they are in electronic form.

However, different types of records are subject to different recordkeeping requirements. For instance, there are few concerns about keeping electronic copies of documents such as employee handbooks—they must only be accurate copies of the original and accessible to those who need access to them. On the other hand, electronic storage of the federal I-9 immigration form is subject to strict access restrictions and requires the ability to record and track when the forms are accessed, and an inspection program to verify the security of the storage system. Accordingly, employers sometimes choose to retain certain documents in hard copy to avoid these additional burdens.

Employers considering switching to an electronic record retention system should also ensure that it is reliably backed up and can prevent “hacking” or other unauthorized access. Such precautions are necessary to protect the integrity of the data in the event of an audit or litigation. There is also an increased need for robust document destruction and retention policies when electronic storage is the primary method of recordkeeping. Additional issues include providing employees with adequate access to their own records and appropriately segregating records (and access) to protect sensitive personnel information. Many vendors specialize in providing this type of data storage; the key is to select a provider that can meet all of these requirements and your businesses needs.

Using Electronic Signatures

What is an electronic signature? An electronic signature is a record of a person's actual intent to sign a document, conveyed electronically rather than by ink. It is not the signature at the end of an email or an image of someone's signature. While there is no specific mandate on what constitutes an electronic signature, federal law defines the term as “an electronic sound, symbol, or process, attached to or logically associated with a

¹ CAL CIV. CODE § 1633.7 (2008).

Paul Cowie is a senior associate in the Labor and Employment practice group in Sheppard Mullin's Palo Alto, Calif., office. Dorna Moini is an associate in the Labor and Employment practice group in the firm's San Francisco office. They can be reached at (650) 815-2648 or pcowie@sheppardmullin.com and (415) 774 2974 dmoini@sheppardmullin.com, respectively.

² 15 U.S.C. § 7001 et seq. (2006).

contract or other record and executed or adopted by a person with the intent to sign the record.”³ Essentially, it is the equivalent of a real signature indicating the employee’s agreement to the document in question.

In practice, an electronic signature can be a unique code embedded into an electronic form, a checkbox, or even biometric data attached to an agreement. The key is that the signature must be capable of being tied to a specific person, and must be secure enough not to be invalidated by questions of tampering and authenticity.

Risks associated with using electronic signatures. Although electronic signatures have been approved by federal and state law, employers should be aware that the use of electronic signatures has been subject to legal challenges. These challenges, however, generally arise from the practical application of obtaining electronic signatures, rather than the legality of the signatures themselves.⁴ Therefore, employers can minimize these risks by using methods that demonstrate the electronic signature could only have been obtained with a particular employee’s consent. Employers should learn from decisions in prior cases and develop their processes accordingly.

In one employment case, *Kerr v. Dillard Store Services*,⁵ a court refused to enforce an arbitration agreement because of questions regarding the authenticity and integrity of an electronic signature, finding that the employer did not have adequate security procedures to restrict unauthorized access to the execution of electronic documents. In another case,⁶ the employer avoided these issues by requiring the employee to affirmatively agree to arbitration through an e-signature before she could move from one electronic form to the next in order to complete her hiring process. Compelling arbitration, the court reiterated the acceptability of electronic signatures, especially given the clear instructions on the electronic form that negated the employee’s claim that she did not understand. A third case reached a different result, where the court denied arbitration not only because the employer’s security procedures were inadequate to prove who had written the employee’s full legal name, but also because the document title did not disclose that it contained an arbitration agreement.⁷ Similarly, another court refused to consider an electronic document with names, but no “sound, symbol, or process” designating an electronic

signature needed for a valid contract.⁸ By contrast, a court enforced an arbitration agreement where the employer required the employee to click “I agree” to continue the new-hire orientation, and offered an alphanumeric code as proof.⁹ In another case, an employee’s electronic signature was held to be binding where the arbitration agreement was presented in the context of a series of legally important tax and financial forms, and the employee’s personal information was required for the electronic completion of the forms.¹⁰

These cases demonstrate the importance of security and transparency in obtaining electronic signatures from employees. Employers should ensure that there are adequate security procedures in place to prevent allegations that the employee did not sign the document. Such procedures include restricting unauthorized access to the forms and requiring the completion of personal information to complete an electronic signature. Additionally, employers should ensure that it is objectively apparent that the employee is signing a legally binding document. This can be confirmed by conspicuously labeling documents, such as arbitration agreements, and including separate “I Agree” buttons for each document.

Implementing a Paperless Process?

Despite legal questions surrounding electronic document management and the use of electronic signatures, these cases demonstrate that it is possible to successfully move to a paperless system. While there may be no one-size-fits-all solution, these early cases show that making forms clear and understandable is an important step to achieving compliance. Moreover, a secure and identifiable signature device, such as a unique alphanumeric code, could prove invaluable. Employers wishing to make this switch should undertake an individual assessment to determine what options are right for them.

Table of Commonly Kept Documents

The following table lists many types of documents that employers are required to keep related to their employees. Although not exhaustive, this table provides employers with much of the information they need when considering going paperless. It sets forth which documents can be stored electronically and whether e-signatures are permissible. It also includes details of how long documents must be retained. Employers should be aware that the baseline requirements apply to storing all of these documents, including having a secure and reliable electronic recordkeeping system, and

³ 15 U.S.C. § 7006 (2006).

⁴ Forms and contracts cannot be invalidated merely because they have been signed electronically. CAL CIV. CODE § 1633.7 (2008); 15 U.S.C. § 7001 *et seq.* (2006).

⁵ *Kerr v. Dillard Store Serv., Inc.*, No. 07-2604-KHV, 2009 ILRC 2449 (D. Kan. Aug. 17, 2009).

⁶ *Bell v. Hollywood Entertainment Corp.*, No. CV-566642, 2006-Ohio-3974, 2006 BL 152457 (Ohio Ct. App. Aug. 3, 2006) (unpublished).

⁷ *Adams v. Superior Court.*, No. G042012, 2010 BL 65105 (Cal. Ct. App., Feb. 22, 2010) (unpublished).

⁸ *Kaminski v. Land Tec, Inc.*, No. F059896, 2011 BL 77072 (Cal. Ct. App., March 23, 2011) (unpublished).

⁹ *Shimkus v. O’Charley’s Inc.*, No. 1:11-CV-122-TLS, 2011 BL 211893 (N.D. Ind. Aug. 16, 2011).

¹⁰ *Rosas v. Macy’s Inc.*, No. CV11-7318PSG, 2012 BL 216913 (C.D. Cal., Aug. 24, 2012).

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a process for using electronic signatures that can withstand challenges like those discussed above. Although this table seeks to provide an overview for use of electronic documents, this is a developing area of law, and employers considering making the switch to electronic recordkeeping should seek specific legal advice.¹¹

¹¹ On January 1, 2012, California's Wage Theft Prevention Act went into effect. The new law requires notice to new em-

ployees about job terms such as rates of pay and overtime, the regular payday, and employer contact information; it also requires that employers notify all employees of changes to the same within seven days. Further, the law requires employers to retain pay records for three years. The recordkeeping requirements are reflected in this table, but other provisions of this new law are beyond the scope of this article. If you have questions about compliance with this law, you should seek legal advice.

Type of Document	Can It Be Kept Electronically?	Can An Electronic Signature Be Used?	Minimum Retention Requirements
Employee pay stubs, including withholdings [‡]	Yes. Note: must have employee consent to provide employee's copy of pay stub electronically ^Δ	N/A	3 years minimum, but statute of limitations extends to 15 years for tax purposes
Tax Form W-2	Yes. Note: must have employee consent to provide employee an electronic W-2 in lieu of a printed copy [†]	Yes	4 years minimum, but up to 15 years given applicable statute of limitations on IRS enforcement
Tax Form W-4	Yes. Employees can submit electronically, but paper forms should be available. [†]	Yes	As long as it is in effect plus 4 years
California tax records	Yes	Yes	6 years
Immigration Form I-9	Permissible, but note specific requirements*	Yes, but note specific requirements.	During employee's entire employment, but at least 3 years or 1 year after termination, whichever is later
Employee time sheets or time cards [‡]	Yes, but should ensure they are unalterable	Yes	2 years, but recommend minimum of 4 years given statute of limitations for wage claims. Consider keeping up to 6 years given the statute of limitations for ERISA claims
FICA and unemployment records	Yes	Yes	4 years
Authorization for credit checks	Yes*	No, ink signatures required	2 years
Insurance beneficiary forms	Yes*	May be possible, but many insurance companies still require wet-ink signatures	7 years, but permanent if pension-related
Fair Labor Standards Act documents (e.g., payroll records, collective bargaining agreements, contracts, employee notices) [‡]	Yes	Yes, where applicable	3 years minimum, but recommend 6 years due to statute of limitations for ERISA claims
Fair Labor Standards Act Supplementary Documents (E.g., wage-rate tables, records of additions to or subtractions from wages) [‡]	Yes	Yes, where applicable	2 years minimum, but recommend 6 years due to statute of limitations for ERISA claims
Labor Management Reporting and Disclosure Act records (union-related records)	Yes	Yes, where applicable	5 years
Records required for contractors on public projects (e.g., employee information and wages for those on specific projects)	Yes	N/A	No statutory standard, but recommend as long as project is active plus 4 years given statute of limitations for contracts
Records required by California wage orders [‡]	Yes, subject to location requirements and availability for employee inspection	N/A	4 years
Records of Deductions from Cash Wages	Yes	N/A	4 years

OSHA and Cal/OSHA Records	Yes*	Yes	5 years
Hazard and Safety Training Records	Yes	Yes, if necessary	1 year, but recommend at least as long as employment lasts
Employee HAZMAT exposure monitoring records	Yes, but long retention time may make hard copy a better option.	Possible, but long retention time may make ink signature a better option.	Duration of employment plus 30 years
Workers' compensation claims and related records	Yes, but original paper files MUST be kept for a minimum of 2 years after close of claim*	Yes, but the need to keep paper copies means ink signatures may make more sense	5 years total. Paper files must be kept for 2 years after the close of a claim, but can be converted to electronic form for the remaining 3 years
Records of Title VII related actions (e.g., hiring, promotion, transfer, termination, etc.) [‡]	Yes	Yes, where applicable.	Minimum 1 year, but recommend 2 years due to statute of limitations under Lily Ledbetter Fair Pay Act
Age Discrimination in Employment Act records [‡]	Yes*	Yes	Employee identity information, 3 years; other records (e.g., position descriptions, seniority lists, etc.), 1 year. Although recommend 3 years due to statute of limitations for discrimination claims
California Fair Employment and Housing Act records (E.g., referral records, employee information, employee action records) [‡]	Yes	Yes	2 years
Sexual harassment training records	Yes	Yes	2 years minimum, but recommend holding at least as long as employment lasts
Affirmative action records required of government contractors	Yes*	N/A	3 years, but requirement depends on size of company
Family Medical Leave Act records	Yes*	Yes	3 years
California Family Rights Act records (e.g., maternity leave records)	Yes*	Yes	2 years
ERISA and pension records [‡]	Yes, but long retention time may make hard copy a better option.	Yes, if needed, though long retention time may make ink signature a better option	6 years for plan documents, but permanently for documents used to determine benefits due to employees
Health insurance (HIPAA) records	Yes*	Yes, if needed	While the document is in effect, plus 6 years
Record of employer property issued to employee	Yes	Yes	While employee is employed, plus 4 years
Non-compete agreements	Yes	Permissible, but recommend wet-ink signatures because courts look with more scrutiny on these agreements	While they are in effect, plus 4 years
Binding arbitration agreements	Yes	Permissible, but recommend ink signatures because courts look with more scrutiny on these agreements	While they are in effect, plus 4 years
Company-specific contracts	Yes	Yes	While they are in effect, plus 4 years
Employee policy and handbooks	Yes	Yes	While they are in effect, plus 4 years
Application for employment	Yes	Yes	While employee remains employed, plus 4 years

Offer letters	Yes	Permissible, but recommend ink signatures due to logistics required in giving prospective employees access to electronic systems	While employee remains employed, plus 4 years
Performance evaluations	Yes	Yes	While employee is employed, plus 4 years
Copies of recommendations or verification of references	Yes*	N/A	While employee is employed, plus 4 years
Requests for transfer or reassignment	Yes	Yes	While employee is employed, plus 4 years

‡ Many laws and regulations require the retention of the same types of records, particularly wage and hour records, employee identity information, withholding records, and employment action (e.g., hiring, promotion, or termination records). Before implementing a records system, you should consider the various overlapping requirements for these records.

△ Employees must have access to a computer and printer on the job if they receive electronic pay stubs. If employees do not regularly use computers, it is acceptable to provide them access to a common computer terminal on the jobsite. If employees do not work on a regular jobsite (i.e., are drivers or otherwise transitory), a printed, mailed copy of the paystub may be preferable, though employees without computer access may still agree to electronic delivery.

† Electronic version may be supplied, but specific disclosure requirements apply to adequately obtain employee consent to receive the electronic version.

* These documents should be kept separate from other documents due to sensitive employee information that may lead to discrimination claims if improperly accessed by managers or supervisors who do not otherwise need access to this information. Note that certain of these documents *must* be stored separately, due to regulations.