

COVID-19: Use of E-Signatures and Remote Online Notarizations

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In the wake of the continued havoc caused by COVID-19, many businesses, under mandatory shelter-in-place orders or voluntary social distancing measures, have been forced to encourage or mandate remote working for their employees and restrict in-person meetings or gatherings in order to reduce the spread of COVID-19.

As a result, businesses have become more dependent on remote technology to accomplish essential tasks typically carried out through face-to-face interactions. Inevitably, this has raised questions in the legal community as to how documents and contracts endorsed with a traditional “wet ink” signature may be effectively endorsed electronically as well as how documents and contracts traditionally witnessed and signed in the physical presence of a notary public may be remotely notarized.

Electronic Signatures

Electronic signatures are sounds, symbols or other forms of data in digital format that are connected to an electronic document by a person intending to sign. As it currently stands, electronic signatures are regulated by both federal and state law.

At the federal level, electronic signatures are regulated by the Electronic Signatures in Global and National Commerce Act (E-SIGN). E-SIGN, which was passed by Congress in 2000, authorized the use of electronic records and signatures for transactions in or affecting interstate or foreign commerce.

At the state level, electronic signatures are regulated by the Uniform Electronic Transactions Act (UETA) or comparable electronic signature law such as New York’s Electronic Signatures and Records Act. Presently, every state except New York and Illinois have adopted UETA in some form or fashion.

Regardless of whether E-SIGN, UETA or some other comparable state electronic signature law apply, the effect is that electronic signatures, when allowed, have the same legality and validity of “wet ink” signatures. However, prior to using an electronic signature, it is important to discuss with experienced counsel whether the document(s) is of the type that may be signed electronically as not

all types of documents may be covered under the laws of your jurisdiction.

For example, each of E-SIGN and UETA exclude electronic signatures for wills, trusts and other estate planning documents and nearly one-third of the states exclude electronic signatures for real estate recording purposes.

In addition, E-SIGN expressly does not cover the use of electronic signatures for court filings. Whether electronic signatures are appropriate to use for documents filed in a court depends solely on the court rules and evidentiary rules applicable in that court's jurisdiction. As it currently stands, most courts do not permit the use of electronic signatures in court filings.

Remote Online Notarization

Remote online notarization (RON) is the use of live audiovisual technology to notarize a document by a remote notary public who is not in the same physical location as the signatory of the document.

The RON process typically works as follows: (i) the person or entity needing documents notarized uploads the documents to the RON platform used by the notary; (ii) notice is sent to the signer(s) of the documents by the RON platform; (iii) the signer(s) go through an authentication process that includes ID verification; (iv) the notary and signer(s) join a live audiovisual call to complete the authentication process and notarization of the documents; (v) upon completion of the notarization, copies of the executed documents are returned to the person or entity who uploaded the documents and to the signer; and (vi) the notary deposits a copy of the audiovisual recording of the RON in his or her electronic journal.

Currently, 23 states have passed laws allowing for the use of RONs: Arizona, **Florida**, **Idaho**, Indiana, Iowa, **Kentucky**, Maryland, Michigan, **Minnesota**, **Montana**, Nebraska, **Nevada**, **North Dakota**, **Ohio**, **Oklahoma**, **South Dakota**, **Tennessee**, **Texas**, Utah, Vermont, **Virginia**, Washington and Wisconsin.

Of those 23 states, only the 13 states highlighted above have taken the necessary steps to begin actively conducting RONs under their passed legislation. The other 10 states have either laws that go into effect later this year, or have not promulgated the necessary regulations required to conduct RONs in their state.

In addition, measures allowing for temporary use of RON during this crisis have been enacted in states such as Alabama, Colorado, Connecticut, Illinois, New Hampshire, New York, Pennsylvania, Vermont and Wyoming. Moreover, states such as Iowa, Washington and Wisconsin, which each have RON laws going into effect later this year, have authorized the temporary use of RON under the same guidelines set forth in each state's statute.

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On March 19, 2020, US Senator Mark R. Warner (D-VA) and US Senator Kevin Cramer (R-ND), introduced the bipartisan Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2020 to combat the inaccessibility of RON.

If passed, this legislation would immediately authorize every notary in the United States to perform RONs and set minimum standards for the use of RONs nationwide. It would also help mitigate some of the social distancing-based disruptions many businesses are facing due to COVID-19. On March 23, 2020, US Representative Guy Reschenthaler (R-PA-14) introduced a substantially similar bill in the US House of Representatives. We are currently monitoring the status of both of these bills and will provide updates as they become available.

As the spread of COVID-19 continues, signing documents using an electronic signature or having documents notarized remotely may become a necessity rather than a convenience. Using electronic signatures and RONs are both fast and convenient and businesses should be aware of how to use both processes. Given that the laws of each of these processes may vary widely by jurisdiction, businesses should take every step to ensure their compliance with the laws applicable in their state. Bailey Glasser stands ready to help you implement these remote processes during these challenging times to ensure the lasting sustainability of your business.