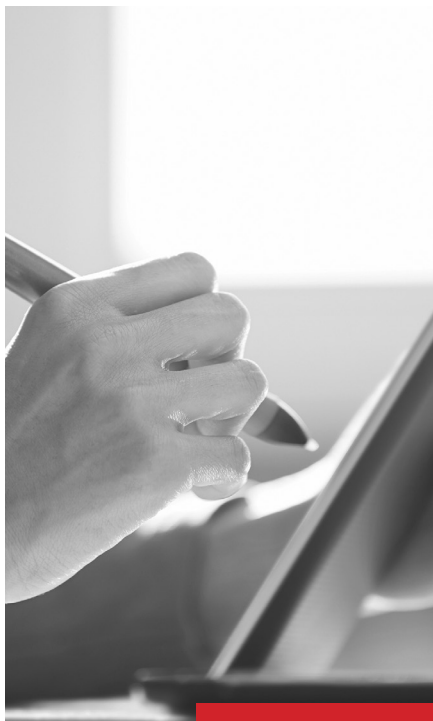




white paper

THE ESIGN ACT

Harnessing New Hiring Efficiencies
with Electronic Signatures



PURPOSE

This white paper will explain how the passage of The Electronic Signatures in Global and National Commerce (ESIGN) Act, along with a subsequent Federal Trade Commission (FTC) ruling, have rendered electronic signatures an acceptable form of written authorization for background checks conducted for employment-related purposes.

This paper will also outline how electronic signatures may be integrated into a Web-based employment application management system, providing improved efficiencies in authorizing and ordering background checks.

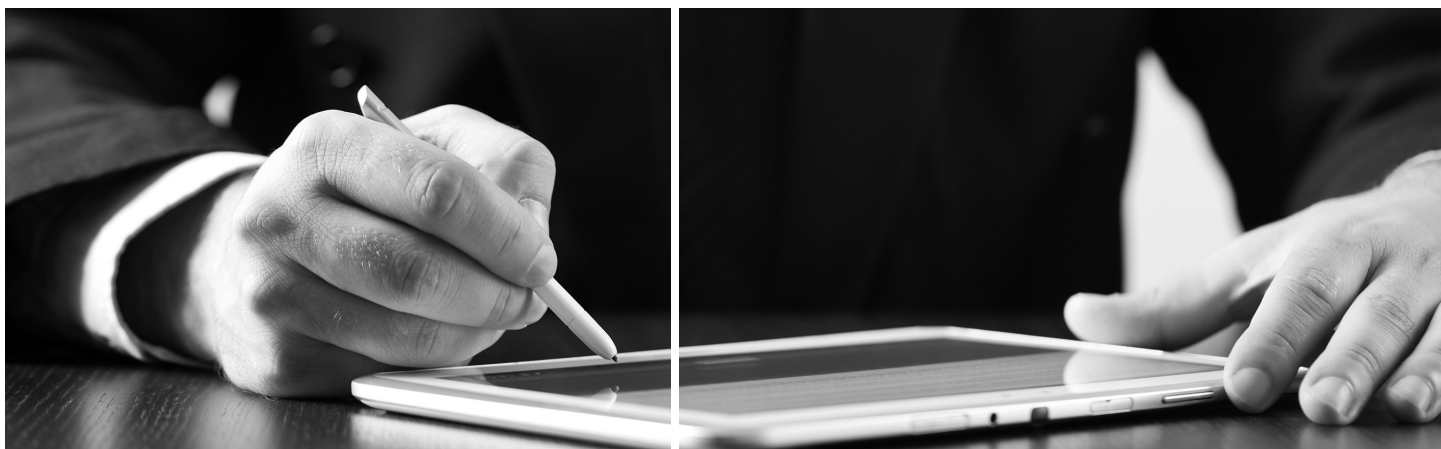
PART 1: LEGAL OVERVIEW

What is The ESIGN Act?

The Electronic Signatures in Global and National Commerce (ESIGN) Act, which became law in June 2000, was designed to further the growth of electronic commerce; the Act provides electronic signatures on electronic contracts with the same legal force as handwritten signatures on paper contracts.

The History of ESIGN and Related Electronic Commerce Legislation

ESIGN is actually the third wave in a flurry of electronic commerce legislation that occurred in the 1990s and early 2000s. The first wave came from individual states: Utah's Digital Signature Act of 1995 was the first state law supporting electronic signatures to be passed, followed by legislation in California in 1995 and then in Illinois in 1998. Each of these state laws was unique in terms of its support for either a specific type of electronic signature or a specific type of electronic transaction.



The second wave of legislative activity was initiated by The National Conference of Commissioners on Uniform State Laws, who saw the disparities between the emerging state laws and sought to suggest a standard set of rules for electronic signatures that could serve in every state. The Commissioners released a legislative “blueprint” for the states to consider, called the Uniform Electronic Transactions Act (UETA), in 1999. This Act provides general validity to electronic records and signatures without changing any substantive laws. To date, more than three-quarters of the states have adopted UETA.

In 2000, amid many states’ initiatives to pass UETA, President Clinton signed E-SIGN into law, which grants

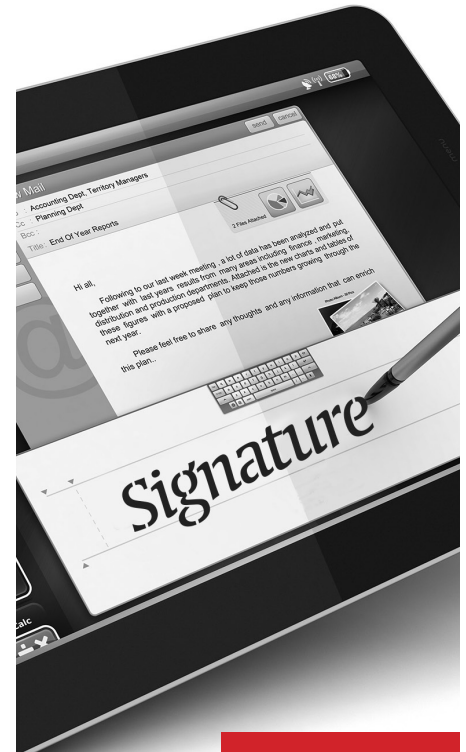
nationwide legality to electronic contracts and electronic signatures. It also endows consumers with the same rights they enjoy with paper contracts, and gives them the freedom to choose to conduct business electronically. The ESIGN Act defines an electronic signature as an electronic “sound, symbol, or other process” that is executed by a person “with the intent to sign a record.”¹ The Act purposely does not specify that any one technology defines an electronic signature, leaving the field open for developers to pursue a range of approaches to implementing electronic signatures as the industry evolves.

A Key ESIGN Ruling for Employers

One ESIGN advisory opinion issued by the FTC in 2001 holds particular significance for employers who conduct background checks as part of the hiring process. In response to an inquiry, the FTC confirmed that under the ESIGN Act, an electronic signature satisfies the Fair Credit Reporting Act (FCRA)’s requirement to obtain the consumer’s “written instructions” in order for a consumer reporting agency (CRA) to provide a consumer report for employment-related and other purposes.² In other words, an applicant or existing employee’s authorization to conduct a background check may be legally given via electronic signature.

The FTC’s advisory opinion hinges upon the clarification of several terms in the ESIGN and FCRA texts. First, the ESIGN Act establishes the legality of electronic signatures and contracts “with respect to any transaction.”³ The term “transaction” is defined in ESIGN as “an action or set of actions relating to the conduct of business, consumer or commercial affairs between two or more persons ...”⁴ In the FTC’s interpretation, this broad definition of “transaction” includes a contract or form that provides clear authorization to obtain a background check.

Furthermore, the ESIGN Act specifies that if, like the FCRA, a statute requires a contract relating to a transaction to be in writing, the electronic record of it must be in a form which can be retained and reproduced.⁵ The FTC concluded that the consumer’s electronic authorization for the background check would be valid as the FCRA’s definition of “written instructions” as long as the stipulations for retainability and reproduction were met.



¹ ESIGN, 15 U.S.C. § 7006(5). Section 106(5) “The term ‘electronic signature’ means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”

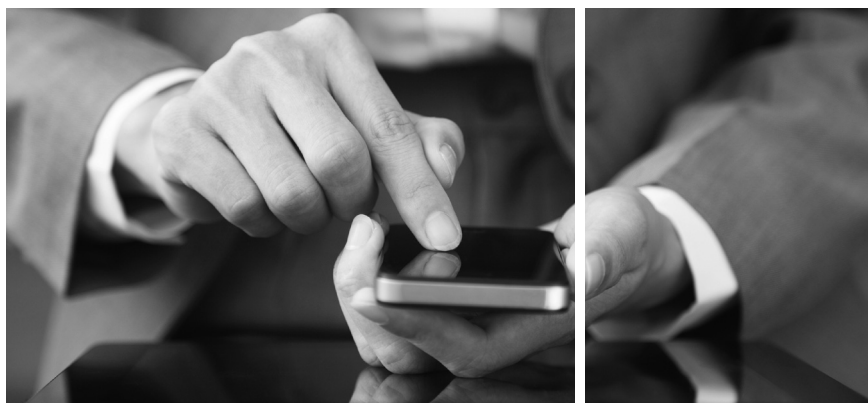
² FCRA, 15 U.S.C. § 1681b(a)(2). Section 604 (a) “...any consumer reporting agency may furnish a consumer report...”
(2) In accordance with the written instructions of the consumer to whom it relates...”

³ ESIGN, 15 U.S.C. § 7001(a). (a) “Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce--

- (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
- (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

⁴ ESIGN, 15 U.S.C. § 7006(13). Section 106(13) “The term ‘transaction’ means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct--
(A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.”

⁵ ESIGN, 15 U.S.C. § 7001(e) Section 101(e) “... if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.”



PART 2: TECHNOLOGY OVERVIEW

What Qualifies as an Electronic Signature?

By identifying an electronic signature as only an electronic “sound, symbol or process” used with the intent to sign a record, E-SIGN sets up a broad arena for the definition and evolution of the technology. Multiple approaches to electronic signatures have been developed and implemented over the past few years.

HR practitioners considering the use of electronic signatures to authorize background checks should keep this point in mind: under E-SIGN, any type of electronic signature is legally valid, as long as the applicant’s authorization is clear and the electronic record of the authorization can be retained and reproduced.

Integrating Electronic Signatures into the Applicant Authorization Process

The electronic signature technology provided in Certiphi Screening’s online applicant data capture tools comply with E-SIGN requirements by storing a clear indication of the applicant’s name, the date, and the applicant’s agreement and acknowledgement of background check disclosure and authorization via a check-box and mouse-based signature. Controls are in place to ensure that once this information is submitted, it cannot be changed.

Certiphi Screening’s applicant data capture tools are designed to assist clients by giving applicants a way to electronically provide required

information in a secure manner. This includes an electronic authorization and disclosure. The authorization section of the online application is where an electronic signature can be used to authorize a background check. At the bottom of the authorization form, there are fields where an applicant can enter his/her name; indicate agreement to the background check by clicking a check box next to the word “Agree”; enter the date and apply his/her mouse-based signature. Once a completed application is submitted, the applicant can view the document in Microsoft Word® format, and print out a copy for his/her records.



Can Electronic Signatures be Used with Other Records Involved in the Hiring Process, Such as Certifications on an Application?

The FTC's ruling on electronic signatures is limited to the authorization of background checks for employment purposes. The language of the ESIGN Act implies that an electronic signature could legally be used with other records involved in the hiring process, such as certifying the accuracy of an application. However, since a specific ruling on this usage has not been issued by the FTC, the legality of it is ultimately up to the courts to decide. HR professionals considering the usage of electronic signatures elsewhere in an employment application should consult with their legal departments.

In conclusion, the passage of ESIGN and the FTC's subsequent clarification of the usage of electronic signatures to authorize background investigations, allow employers to harness new levels of hiring efficiency. Online employment applications with integrated electronic signature technology allow even more steps in the applicant screening process to be integrated and managed electronically, saving time and reducing hiring costs.

As a general guide, employers who use an online employment application and electronic signature to allow an applicant to authorize a background check, should make sure to comply with the FCRA and the states' analogous laws:

- Provide the legally required "clear and conspicuous" disclosure and authorization by themselves without any other information;
- Make it clear that by signing the authorization, the applicant is authorizing a consumer report and/or an investigative consumer report to be obtained for employment purposes;
- Ensure that the applicant's name, agreement via signature and the date are retained and able to be accurately reproduced for later reference;
- Ensure that once the applicant's information is submitted, it cannot be tampered with or changed.