

August, 2011

Labor and Employment
Compliance Bulletin

Washington state appeals court creates confusion over electronic signatures

A recent appeals court ruling in the state of Washington has caused some confusion about electronic signatures. However, we remind all employers that the **federal Electronic Signatures in Global and National Commerce Act, or ESIGN, ensures the validity and enforceability of electronic signatures.**

The decision was handed down on March 22 by the Washington Court of Appeals, Division Three, in the case of Neuson v. Macy's Department Stores, 249 P.3d 1054. This decision appears, at first glance, to undermine the legitimacy of electronic signatures in Eastern Washington. However, the decision ignores ESIGN and the significant body of case law built up around that law since it took effect in 2000, as well as Washington's own "Electronic Authentication Act".

The case involves a worker who sought to sue her employer for disability discrimination, even though she was notified electronically, and in several mailings, that she needed to proactively opt-out of arbitration. The trial court judge granted summary judgment for her employer. She appealed, claiming that, among other things, she didn't remember affixing her electronic signature to the electronic notification. In granting her a new trial, the court said Macy's failed to show why the electronic signature "...is the same as or better than a traditional signature." While this was not the seminal point of the decision, it nevertheless calls into question electronic signature processes.

ESIGN clearly states: "...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." **Thus, under ESIGN Macy's did not have to show that the electronic signature is the same or better as a written signature.**

Other recent cases support the validity of electronic signatures. Most recently, a federal court in Michigan addressed a similar set of circumstances involving an electronic signature on an arbitration agreement. In that case, Martyn v. J.W. Korth & Co., 2011 U.S. Dist. LEXIS 59416, (June 1, 2011), a U.S. district court found in favor of the employer, citing the above-referenced portion of ESIGN and finding that the electronic signature was binding. The court also stated that "Failure to recall signing does not affect the validity of the signature." The disparity between this federal ruling and the Washington state position is worth noting.

The Washington Court of Appeals decision seemingly presents a challenge to the validity of electronic signatures, in direct conflict with federal law, as well as Washington's law governing electronic signatures. The state's "Electronic Authentication Act" asserts that its purpose is to ensure "that electronic signatures are not denied legal recognition solely because they are in electronic form." All 50 states have laws in place recognizing the validity of such electronic processes.

Federal agencies have in some cases created additional requirements related to electronic signatures for certain processes, such as agreeing to receive electronic W-2s or signing I-9 forms. But these requirements do not affect the principles set out in ESIGN.

Bottom line

We recommend you take steps to ensure the validity of electronic processes by selecting a secure and trustworthy vendor and limiting access to password and PIN reset mechanisms. An electronic audit trail that can't be altered by your users strengthens your position should you ever find an electronic signature challenged. However, you should bear in mind that **laws surrounding electronic signatures are well established and aberrant decisions should not deter you from pursuing a paperless agenda.**

For a copy of the decisions discussed in this bulletin, please send email to pkrieshok@talx.com with "electronic signature case law" in the subject line. To learn more about the power of electronic signatures to eliminate labor-intensive manual processes, please contact Pete Krieshok at (314) 214-7325 or pkrieshok@talx.com.