

# E-SIGNATURE REQUIREMENTS IN THE EMPLOYMENT CONTEXT

*As electronic signatures have become widely used, it is important to understand in which situations they are legally permitted and what requirements should be met, particularly concerning labour law documents.*

In our modern days, it has become increasingly common to replace wet ink signatures with electronic signatures. As such, it is important to understand the legal effects of electronic signatures, in what situations they are allowed and what are their requirements, particularly in the labour and employment context.

These are questions usually raised by our Clients.

Within the Portuguese legal framework, electronic signatures are governed by Decree-Law 12/2021 of 9 February, which ensures the implementation of Regulation (EU) 910/2014 into Portuguese law.

Regulation (EU) 910/2014 foresees that qualified electronic signatures have the equivalent legal effect of handwritten signatures and establishes the principle that an electronic signature should not be denied legal effect on the grounds that it is in an electronic form or that it does not meet the requirements of the qualified electronic signature.

## (A) Types of electronic signatures and their probative force

The different types of electronic signatures, explained below, correspond to different levels of security and trustworthiness, which has an impact on the probative force of each type of e-signature, particularly important in legal disputes, as follows:

- (1) **Simple electronic signatures** – e.g. handwritten scanned signatures or online drawn signatures with mouse or touchpad.

This type lacks cryptographic security measures, being the least secure form of e-signature.

These signatures have the probative force of a private document subject to the free discretion of the court.

- (2) **Advanced electronic signatures** – e.g. DocuSign or AdobeSign signatures.

To be considered as advanced electronic signatures, they must be uniquely linked to the signatory and capable of identifying him/her. Additionally, these signatures must be created using electronic signature creation data and must be linked to the data signed therewith in such a way that any subsequent change in the data is detectable.

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These signatures also have the probative force of a private document subject to the free discretion of the court.

- (3) **Qualified electronic signatures** – e.g. electronic signature with the Portuguese citizen card or the Digital Mobile Key provided by the Portuguese Government or by the trust service providers Multicert or DigitalSign certificates.

These signatures are created by a secure signature creation device and are based on a qualified certificate for electronic signatures.

Qualified certificates for electronic signatures are provided by qualified providers, whose status is granted by the competent national authority and made official in the "National Trusted List" of each EU member state. Therefore, in order for electronic signatures to be qualified, they must be issued by a qualified certification body.

A qualified electronic signature in an electronic document is legally equivalent to a handwritten signature, i.e., qualified electronic signatures have the probative force of a private document with recognized authorship.

## **(B) E-signatures in the employment context**

In light of the above, it is important to ascertain what types of electronic signatures are valid in the employment context and under what circumstances they can be used.

### **(I) When should qualified electronic signatures be used?**

According to the Portuguese Labour Code, open-ended employment agreements, as a rule, do not require a written form, allowing for their signature with simple, advanced, or qualified e-signatures.

However, several provisions under the Portuguese Labour Code require a written form, such as:

- a) Term employment agreements;
- b) Employment agreements with foreign employees;
- c) Multiple employer agreements;
- d) Temporary employment agreements;
- e) Part-time work arrangements;
- f) Teleworking agreements;
- g) Agreements to provide work with exemption from working hours;
- h) Disciplinary procedures;
- i) Termination of employment by mutual agreement; and

j) Non-competition agreements and permanence agreements.

For these agreements and arrangements, wet ink signatures from both the employer and the employee are required. Therefore, when electronically signed, it is advisable to use a qualified digital signature to confer equivalent legal effects as wet ink signatures.

**(2) When should simple or advanced electronic signatures be used?**

Simple and advanced electronic signatures are suitable for situations where the law does not mandate a written form, for instance:

- a) Communications to employees;
- b) Human resources policies;
- c) Employee handbooks;
- d) Performance evaluations;
- e) Promotion letters;
- f) Recommendation letters;

**(3) In what situations e-signatures cannot be used?**

Electronic signatures - even if qualified - cannot be used in legal transactions or documents requiring notarized documentation or notarization of signatures.

Also, if the documents need to be personally delivered to an authority (e.g., documents to be delivered by employees to Social Security to obtain unemployment benefits), only wet signature is allowed.

Overall, electronic signatures serve as a legally valid and efficient method for daily operations, especially for employer companies, emphasizing the importance of understanding their types and legal ramifications.

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