

ELECTRONIC SIGNATURES IN The Netherlands

WHAT IT MEANS FOR HR?



What is an electronic signature?

- ▶ An electronic signature is a technical process logically associated with a document in which two (or more) individuals or organizations (the signatories) agree to rely on in order to express their intent to sign.
- ▶ Three components are necessary: a document, a signatory and an e-signature tool. While the tool most commonly used for handwritten signatures is a simple pen, electronic signature tools are more complex.
- ▶ The term "electronic signature" is a broad category that encompasses many types (or levels) of electronic signatures. Depending on the country it is used in, there are differences in purpose, technical implementation, legal and cultural acceptance of electronic signatures.
- ▶ Most civil law countries (including the EU and most countries in South America and Asia) support a "tiered" approach with higher levels of signature called digital or qualified electronic signatures.
- ▶ Most common law jurisdictions (US, Canada, Australia, etc.) are typically more technology-neutral.
- ▶ In addition, specific industries (e.g. healthcare or banking) or specific documents (e.g. marriage or adoption contracts) often require a higher level of e-signature or handwritten signature.



What are the laws and regulations in the Netherlands?

On July 1, 2016, Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the "eIDAS Regulation") came into force and replaced the former EU Directive on electronic signatures (1999/93/EC). The eIDAS Regulation, directly applicable in the member countries of the European Union, brought uniformity - and much needed clarity - among the EU member states' local legislation on electronic signatures.

The Electronic Signatures Act of 2003 (Wet elektronische handtekeningen) amended the Dutch Civil Code and adopted the provisions in the EU Directive (1999/93/EC).

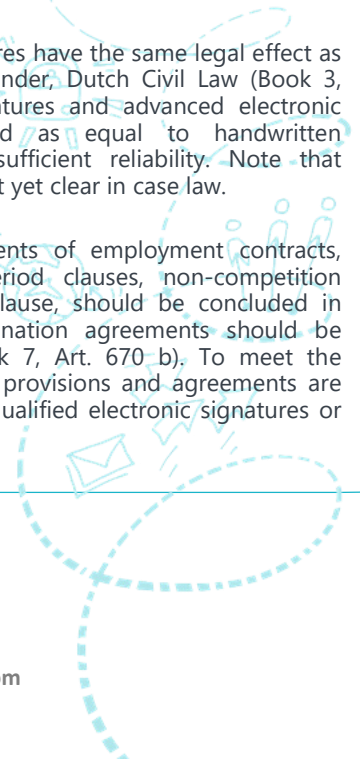
According to Dutch Civil Law, contracts do not have to be made in writing and can be offered verbally or via electronic means unless there is a separate statutory requirement (Book 3, Art. 37). Agreements can only be concluded electronically if (Book 6, Art. 227):

- (1) the contract is and remains accessible for all parties;
- (2) the authenticity of the contract is sufficiently guaranteed (via electronic signature);
- (3) the time which the contract was formed can be determined with sufficient certainty; and,
- (4) the parties can be identified with sufficient certainty.

Electronic signatures in the Netherlands have the same legal effect as handwritten signatures if the method used for authentication is sufficiently reliable, given the purpose for which the electronic data was used and the circumstances of the situation (Book 3, Art. 15a). When employee contracts are provided electronically, they should include electronic signatures which have been authenticated as sufficiently reliable.

Qualified electronic signatures have the same legal effect as a handwritten signature. Under Dutch Civil Law (Book 3, Art. 15a) electronic signatures and advanced electronic signatures are recognized as equal to handwritten signatures if they have sufficient reliability. Note that reliability as a concept is not yet clear in case law.

Certain clauses and elements of employment contracts, including probationary period clauses, non-competition clauses and the penalty clause, should be concluded in writing. In addition, termination agreements should be concluded in writing (Book 7, Art. 670 b). To meet the written requirement, these provisions and agreements are generally completed with qualified electronic signatures or wet-ink signatures.



Are electronic signatures valid?

Yes! Not only e-signatures are valid ...



Under eIDAS, a valid electronic signature may be **simple**, **advanced** or **qualified**.

All three levels of signature are legally **valid** and defensible in court.

However, the **probative value** (ie. how easily the validity of the signature can be proven in court) will vary depending on the type (or level) of electronic signature as illustrated by the graph.

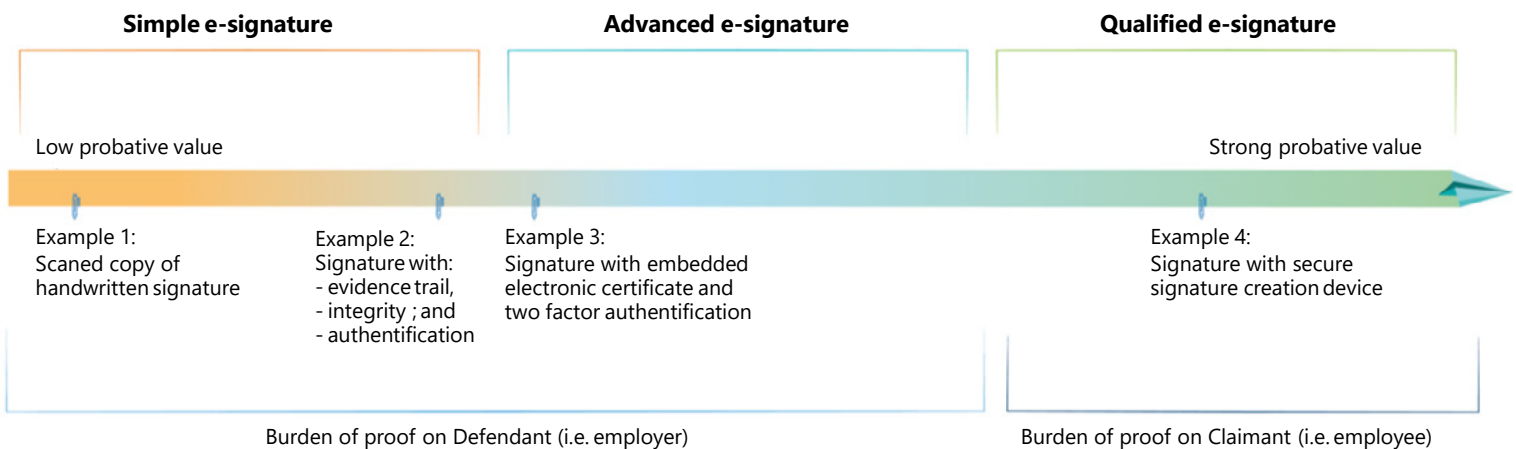
... But they are actually more secure

E-signatures almost always offer higher guarantees than handwritten signatures, regardless of the level of the e-signature being used:

-the **evidence trail** associated with superior electronic signature tools will allow defendant to prove the validity of the signature.

-the use of time-stamping and encryption technologies will provide a much higher level of confidence in the **integrity** of an electronically-signed document compared to the limited level of protection provided by a handwritten original (unless notarized).

Probative value scale



For **simple and advanced electronic signatures**, it is the employer's responsibility to bring evidence of the validity of the signature if an employee challenges the document.

Advanced signature solutions typically offer a more robust evidence file in that regard than simple e-signatures solutions.

Qualified electronic signatures offer the same probative value as a handwritten signature ▶ it is the responsibility of the party challenging the validity of the signature (most likely the employee) to bring evidence of the signature's invalidity.

What level of e-signature is recommended for HR documents?

The vast majority of HR-related documents are suitable for simple or advanced electronic signatures. Simple and advanced electronic signature are recommended for documents with a risk factor ranging from low to medium. These are often external documents with limited risk and typically include employment agreements, company policies, employee handbook, performance reviews, expense report, etc.

Qualified electronic signatures or handwritten signatures would only be justified in limited cases for very sensitive documents such as credit or life insurance agreements or when specifically required by law (e.g. specific healthcare documents).



HR Best Practices

Employers may elect to use different electronic signature solutions depending on the type of document being signed.

In Europe, customers typically use an advanced electronic signature for employment agreements as well as other HR-related agreements, and rely on a strong simple e-signature solution for other less sensitive HR documents such as policies and performance reviews.

However, this decision also depends on an employer's internal culture and its level of risk-adversity.



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