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The Perils of Electronic Signatures

By Michael Mishlove, Esq.

As discussed in last week's 60-Second Memo, the emergence and rapidly expanding universe of social networking/media vehicles, such as blogging, on-line discussion groups, Facebook, and Twitter, exposes companies to a broad spectrum of potential liabilities and reputational injuries. Employers are well-advised to update their Internet Use policies to incorporate social media policies. Somewhat ironically, many employers will disseminate their new policies to employees electronically via email and/or company intranets. In light of a number of judicial decisions in the developing area of electronic communication and employment law, this might be an appropriate time for employers to ensure that they are utilizing best practices with respect to electronic management of employment policies and practice.

A court ruling in a Kansas case last year highlights one of the most important issues that arises in connection with electronic management of employment policies. In that case, *Kerr v. Dillard Store Services, Inc.*, 2009 WL 385863 (D.Kan. 2009), a federal district court refused to enforce an arbitration agreement that an employer had required its employees to consent to through its intranet system. The basis for the court's ruling was its finding that the employer did not meet its burden of proving that the employee's "electronic signature" on its online arbitration agreement was valid. As a result, the court refused to enforce the arbitration agreement and denied the employer's motion to dismiss the employee's race discrimination claim.

It is now well-established that parties may enter into valid and enforceable agreements by executing written agreements via electronic signature. Under the federal "E-Sign" law, electronic signatures may take the form of a name typed at the end of an e-mail message by the sender, a digitized image (e.g., a JPEG file)

of a handwritten signature, a biometric identifier (e.g., fingerprint or voiceprint), a code or personal identification number, a digital signature in a public key cryptography system, or a mouse click on an "I accept" button.

But, as is the case with good old fashioned pen and paper contracts, in the event of a dispute over whether an electronic signature is valid, basic principles of contract law still apply. So, if an employee denies entering into an arbitration agreement that had been distributed and agreed to electronically, the employer bears the burden of proving that the employee did in fact knowingly and intentionally execute the agreement. On the facts of the *Kerr* case, the court found that the employer did not satisfy that burden noting, "The problem with the [employer's] position is that it did not have adequate procedures to maintain the security of intranet passwords, to restrict authorized access to the screen which permitted electronic execution of the arbitration agreement, to determine whether electronic signatures were genuine or to determine who opened individual emails."

As the *Kerr* case makes clear, it is absolutely essential that employers have adequate procedures in place for maintaining the security of intranet transactions, ensuring that employees have unique and secret passwords that are required to access the intranet system, restricting authorized access to screens on which electronic execution of agreements is requested, and determining the authenticity of electronic signatures. Best practices in this area also include having a system that not only records the employee's signature, along with the date and time of electronic execution, but also automatically generates an email or other notification to the employee requesting confirmation and advising the employee of procedures to follow if the employee denies that he or she electronically signed the agreement.

Regardless of whether agreements are posted on a company intranet or distributed via email, it is critical that employers have a means of unequivocally linking an employee's electronic signature to the pertinent agreement in such a way that if the agreement is subsequently altered, the electronic signature is invalidated. And, needless to say, employers must also have a means of subsequently reproducing the agreement. Furthermore, as a threshold matter, employers must obtain the consent and authorization of their employees to receive policies and agreements electronically and to enter into binding agreements via electronic signature. This consent/authorization should also be made a part of the employee's permanent employment file.

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