Update on Validity of Electronic Communications and Employee Electronic Signatures: Not A Disfavored Method Of Obtaining Employee Consent (Yet)

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Introduction

The courts continue to be receptive to electronic employee signatures on agreements, applications and acknowledgements (as distinct from original "hard copy" signatures). However, some courts have declined to enforce such "electronic" agreements where important policies or agreements are not called to the affected employees' attention in a prominent manner.

Employers that move toward a system of electronic communication, recordkeeping and signatures are well-advised to follow some practical steps that may help ensure the validity of their employees' electronic signatures and the electronic records they maintain. To avoid challenges to an electronic document or signature once it has been created, often the key is to demonstrate its trustworthiness by demonstrating the trustworthiness of the system that creates and manages the record or signature. Sufficient and appropriate systems documentation is critical in this regard. Employers should require employees to affirmatively indicate assent to electronically-distributed policies, such as by clicking a button that says "I agree," and an employer should have a records management system that permits consistent, complete, and accurate preservation, retrieval, presentation, printing, and identical replication of the electronically signed and stored documents stored in its database. Time-stamping may also be a beneficial practice. In addition, when an employer distributes or announces a new policy via email, it should clearly indicate the importance of the policy in the subject line of the email, and should allow employees the time and opportunity to review and print the document before they are bound by it.

After a brief discussion of the Uniform Electronic Transactions Act and the Electronic Signatures in Global and National Commerce Act, this article provides summaries of recent cases regarding the enforceability of electronic communications and employee electronic signatures. By reviewing the case law in this emerging area of law, which tends to be very fact-specific, one can glean valuable practical guidance for employers seeking to enforce electronic communications and signatures. Some such guidance for employers follows the case summaries below.

Uniform Electronic Transactions Act ("UETA") and the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). Under the Uniform Electronic Transactions Act ("UETA") and the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), for an electronic transaction to be valid, both parties must agree to conduct the transaction electronically.[1] In the employment context, courts have not had occasion to fully define the parameters of what constitutes an *agreement* to conduct a transaction through electronic means. The prefatory note to the UETA provides some insight. It explains that the construction of the term "agreement" must be broad, to ensure that the UETA applies whenever the circumstances show that the parties intend to transact business electronically, regardless of whether the intent rises to the level of a formal agreement. Although the term "agreement" may be construed broadly, it may be advisable to seek an employee's agreement to both the form and substance of the document—that is, by asking the employee to "agree" to both: (1) the substantive terms of the document, and (2) the use of an electronic method of signature to demonstrate the employee's acceptance of the terms of the document. Once an employee has clicked "I agree" to a clear authorization statement and has affirmatively consented to the use of an electronic record or signature, the employee cannot, under most circumstances, later revoke the agreement (save for challenges that the agreement is revocable based on traditional principles of contract law). Also important is the UETA's definition of an "electronic signature." The UETA defines an "electronic signature" as an "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."[2] Clearly, not all electronic communications involve the use of electronic signatures.

Practitioners should note that every state permits and enforces electronic signatures in one form or another in the transaction of business. Both the UETA and E-SIGN endorse electronic records when they are created in a trustworthy manner.[3] However, UETA and E-SIGN, along with most of the UETA's state-adopted counterparts, are technology-neutral: that is, they do not define "signature" in specific technological terms, nor do they mandate the adoption of any particular hardware or software application for effectuating a valid electronic signature. *In theory, in most jurisdictions, the critical factor is that the*

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1. Parties also have the freedom to decline to sign a document electronically. UETA provides that even though a person has agreed to conduct a transaction electronically, that person is not obligated to conduct all transactions electronically. E-SIGN is found at 15 U.S.C. § 7001 et seq.

2. UETA, Section 2(8). E-SIGN defines an "electronic signature" with only a slight modification: it is defined as "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." 15 U.S.C. § 7006(5).

3. The only states that have not adopted the UETA (in some form) are Georgia, Illinois, New York and Washington.

party seeking to enforce the electronic signature must be able to demonstrate the trustworthiness of the process that created and preserved the records in question.

A number of states have adopted specific approaches to analyzing the trustworthiness of electronic signatures. For example, the Illinois Electronic Commerce Security Act creates a class of trustworthy signatures called "secure" electronic signatures that enjoy a rebuttable presumption that the signature is that of the person to whom it correlates.[4] States such as Washington now legally recognize the use of "digital signatures."[5] The Washington Electronic Authentication Act defines a "digital signature" (a particular type of electronic signature) as "an electronic signature that is a transformation of a message using an asymmetric cryptosystem" such that information can be obtained relating to whether the transformation was created using the private key that corresponds to the signer's public key and whether the initial message has been altered since the transformation was made.[6] Initiatives such as Washington's provide an employer the opportunity to implement technological measures that may reduce the risk of challenges of admissibility and trustworthiness and even create a presumption of trustworthiness. In addition, Nebraska's digital signature law approves of the use of Public Key Cryptography and Signature Dynamics for creating valid digital signatures,[7] and Nevada's Digital Signature Law creates a rebuttable presumption about the validity of a certificate that has been digitally signed by a recognized certification authority and published in a recognized repository or otherwise made available by the certification authority that issued the certificate or the subscriber identified in the certificate.[8] Finally, Pennsylvania's Attribution of Records and Signatures law provides rules that apply if there is a security procedure between the parties with respect to an electronic signature or electronic record.[9]

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4. 5 ILCS 175/1-101 et seq.; 14 Ill. Admin. Code 100 et seq.
5. Rev. Code Wash. § 19.34.010 et seq.; Wash. Admin. Code § 434-180.
6. *See* Rev. Code Wash. § 19.34.020(11).
7. Neb. Rev. Stat. § 86-611 et seq.; Neb. Admin. Code Tit. 437, Ch. 4 § 001 et seq.
8. Nev. Rev. Stat. § 720.010 et seq.; Nev. Admin. Code § 720.
9. 73 Pa. Stat. § 2260.701 et seq.

Summaries of Cases Involving Electronic Communications and Electronic Records

***Hudyka v. Sunoco, Inc.*, 474 F. Supp. 2d 712 (E.D. Pa. Jan. 26, 2007)**. The employee, Daniel Hudyka, sued his employer, Sunoco, in federal court, alleging that Sunoco unlawfully terminated his employment based on his age and race. Sunoco unsuccessfully sought to compel arbitration of Mr. Hudyka's claims; the district court determined that Sunoco did not adequately communicate the arbitration terms, in part by its email notification of its new mandatory arbitration policy.

Mr. Hudyka began his employment with Sunoco in August 2000. Three months before Sunoco terminated Mr. Hudyka's employment for alleged poor performance, it adopted a mandatory mediation and arbitration program, which it called the "Employee Resolution in Action ('ERA') Program." According to Sunoco, it distributed a booklet describing the ERA Program, and an email announcing it (dated April 29, 2004) to all of its non-union employees. Sunoco supported its motion to compel arbitration with an email from its Senior Vice President of Human Resources and Public Affairs, addressed to all non-represented employees, announcing that it was "From the office of Rolf Naku" (without explaining who Mr. Naku was), and briefly describing the ERA Program. Although Sunoco claimed that this email provided a link to the company's intranet that posted a copy of the booklet explaining the ERA Program, the court found that "the [email] message does not identify such a link, nor is the link apparent on the face of the email."[10] Sunoco also relied on another email, dated June 16, 2004, which reminded employees that the ERA Program had become effective 45 days earlier. Again, Sunoco contended "that this email also provided a link to the ERA Program booklet."[11] But the court disagreed again: "Like the earlier email, this one does not direct the reader to such a link."[12]

Mr. Hudyka asserted that he never received either the April 29, 2004 email or a copy of the booklet explaining the ERA Program. He also asserted that Sunoco never requested that he attend any "overview sessions" discussing the ERA Program, that he never attended any such sessions and never signed an arbitration agreement. Sunoco presented no evidence to demonstrate that Mr. Hudyka ever received the booklet or attended an "overview session."[13]

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10. *Hudyka*, 474 F. Supp. 2d at 715.

11. *Id.* at 715.

12. *Id.*

In denying Sunoco's motion to compel arbitration, the court sharply criticized Sunoco's email and other communications with its employees (including Hudyka) regarding the essential terms of the arbitration agreement. According to the court, "there is no arbitration agreement to enforce as to Hudyka"[14]:

> Sunoco relies solely on its sending the April 29, 2004 email to establish notice to Hudyka of the arbitration terms. *It has offered no confirmation that the plaintiff opened the email and does not allege that it ever distributed the ERA booklet to the plaintiff.* In short, Sunoco has not attempted to rebut Hudyka's claim that he never received notice. [¶] *There was nothing in the email heading that would have compelled an employee to open it.* The email advised that it was from "Sunoco Leadership" and that the subject was "From the office of Rolf Naku." *It did not announce that the message was important and affected employees' rights. It assumed that employees knew who Rolf Naku was, giving them a clue about the potential topic of the message. In short, employees were given no idea why this message among the company-wide email traffic was significant.*[15]

The court relied on the First Circuit's decision in *Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005), in which the court held that a similar company-wide email announcement regarding the implementation of a new dispute resolution policy did not provide adequate notice to employees of crucial aspects of the arbitration agreement, which rendered it unenforceable.[16]

The court also determined that, "[e]ven assuming Hudyka received and read the April 29, 2004 email, it did not clearly advise him that arbitration was mandatory and the only avenue to resolve employment disputes."[17] The ERA Program was poorly drafted, implying "that arbitration was only an option."[18]

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13. *Id.*

14. *Id.* at 716.

15. *Id.* (italics added); *see also* *id.* at 717 ("Because the email failed to convey the essential arbitration terms, ...").

16. *Campbell*, 407 F.3d at 547-58. *See* Tyler Paetkau and Diane T. Lucas, *Employee Electronic Signatures: Can Employment Law Keep Up With Technology, and Will Employers Keep Up With the Law?* 2006 Bender's Calif. Labor & Emp. Bull. 261 (July 2006) (includes a discussion of the First Circuit's *Campbell* decision).

17. *Hudyka*, 474 F. Supp. 2d at 717.

18. *Id.*

Notably, this case involved the use of electronic records and communications, but did not involve an electronic signature.

***Capone v. Electric Boat Corp.*, 2007 U.S. Dist. LEXIS 36768 (D. Conn. May 18, 2007).** On December 2, 1982, the plaintiff, Frank Capone, began his at-will employment with the defendant-employer, Electric Boat. In July 2001, Electric Boat instituted an alternative dispute resolution policy ("DRP") for its non-union employees, including Mr. Capone. According to Electric Boat, which "[g]enerally invoke[ed] the FAA" (Federal Arbitration Act) in not requiring its employees to "sign any agreement designating their acceptance of the DRP," the company took the following steps: 1) it mailed a copy of the DRP to the homes of each employee, along with a letter explaining the program; 2) it sent a bulletin regarding the implementation of the DRP via intra-company email to each employee's email address; 3) it posted the DRP on its website, allowing employees to access the DRP on their work computers; and 4) it distributed bulletins explaining the DRP to its affected employees. Mr. Capone opposed Electric Boat's motions to compel arbitration and stay the court action by arguing that, because he had never received, read or in any way learned of the DRP before he brought suit, he never consented to the terms of the DRP.

The district court originally denied Electric Boat's motions to compel and stay on the ground that, by denying receipt of the DRP, Mr. Capone had created a material issue as to whether he had sufficient notice of the DRP's terms under Connecticut's "mailbox rule." The court subsequently held a bench trial under Section 4 of the FAA on the issue of arbitrability, *i.e.*, whether Mr. Capone had notice of the DRP's terms. The court ruled that Mr. Capone did receive adequate notice of the substantive terms of the DRP, based in part on Mr. Capone's "deposition correction" (regarding his earlier deposition admission that he "read" the DRP "on-line"). Accordingly, the court granted Electric Boat's motions to compel arbitration and to stay the court action.

***Bell v. Hollywood Entertainment Corp.*, 2006 Ohio 3974 (Ohio App. Aug. 3, 2006).** Hollywood is a video chain that had implemented mandatory arbitration for employees. Beginning in July 2003, Hollywood required all new employees to consent to arbitration as a condition of employment. Hollywood did not consider for employment any applicant who declined to consent to the mandatory arbitration program.

Ms. Bell applied to work at Hollywood, using Hollywood's electronic application process, through which applicants could apply for employment online through the company's website or at an electronic kiosk. Hollywood hired her in November 2003.

Ms. Bell later sued Hollywood and others, alleging hostile work environment, sexual harassment and civil battery. Hollywood sought to compel arbitration of Ms. Bell's civil lawsuit on the ground that she had agreed to arbitrate claims arising out of her employment. The trial court granted Hollywood's motion to compel, and Ms. Bell appealed. On appeal, Ms. Bell argued that the arbitration agreement was invalid because it was not mutually binding and because Hollywood reserved the right to terminate the agreement at the end of any given year. The court rejected this argument, explaining that the arbitration agreement was mutually binding and that it limited Hollywood's ability to modify it.

Significantly, the court also found that the electronic format of the affected employees' consent did not impede enforcement. The court observed that both federal law and Ohio law authorize the use of electronic signatures and deem such signatures binding, citing E-SIGN, Ohio's UETA, and *Campbell v. General Dynamics*, 407 F.3d 546, 556 (1st Cir. 2005).

Several significant facts influenced the court's conclusion. Hollywood informed Ms. Bell of the arbitration requirement at the beginning of the application process. Indeed, among the very first questions posed as she began to apply were questions regarding arbitration. Specifically, she was presented with a screen explaining Hollywood's dispute resolution policy. The explanation was brief, and was written plainly and clearly, including examples of types of claims that would be subject to arbitration. Applicants were given the option of clicking on a link to access a summary of the policy or the arbitration rules, and they were notified that if they chose to click on the link, they could return to the application to complete it later. Finally, applicants were asked to check the appropriate box to indicate whether they understood how to access the site that contained the summary of the policy and the arbitration rules. Ms. Bell checked the box to indicate that she understood how to access the website, at which time she was directed to a screen asking her to agree to binding arbitration in exchange for being considered for employment with Hollywood. Ms. Bell clicked "yes," to confirm that she agreed to arbitrate any employment-related disputes with Hollywood.

***Verizon Communications Inc. v. Pizzirani*, 462 F. Supp. 2d 648 (E.D. Pa. 2006).** *Verizon Communications Inc. v. Pizzirani* involved the electronic execution of a noncompete and incentive agreement. In 2003, Mr. Pizzirani, who was a senior executive at Verizon, became eligible to participate in Verizon's Long Term Incentive Program, through which he was eligible to receive deferred compensation after a vesting period. In 2005, Verizon revised its Award Agreements to include a non-competition restrictive

covenant (the "non-compete"). In 2005 and 2006, Verizon attached the non-compete to its Long Term Incentive award agreements, and a plan participant was required to agree to abide by the non-compete and other restrictive covenants to receive the benefits of the long term incentive awards. In early March of both 2005 and 2006, Mr. Pizzirani received emails from Verizon's human resources department, advising him of the following, in bold language:

> **As you access your award online, it is important that you read and understand the terms and conditions of your Award Agreements. When accepting your award on-line, you acknowledge that you have read both the award agreements and Plan document, including the terms [sic] conditions regarding vesting, *restrictive covenants* and the provisions concerning award payouts.**[19]

In March 2005, Mr. Pizzirani clicked on a button at the bottom of the email, which read "I acknowledge," to indicate his understanding that in accepting the award, he would become bound by the award agreements and the attached non-compete and other restrictive covenants. Once Mr. Pizzirani certified that he understood the importance of reading the award agreements, he was able to access the agreements online. In 2006, after Mr. Pizzirani did not click the "I acknowledge" button, the Human Resources department contacted him regarding his failure to acknowledge his understanding electronically. In response, Mr. Pizzirani drafted and sent an email to the Human Resources representative, which stated "I will read and agree to the terms and conditions of the award agreement and Plan documents." Using an electronic review and acceptance process, Mr. Pizzirani expressly accepted the non-compete on three separate occasions in 2005 and 2006.

In December 2005, Mr. Pizzirani learned of an opening at Comcast and began interviewing for the position. He did not obtain the job, but in May 2006 Comcast contacted him about another opportunity. Comcast later offered Mr. Pizzirani the other position, which he accepted in August 2006. Before he did so, Comcast asked Mr. Pizzirani to confirm that he was not subject to a non-compete agreement. (Mr. Pizzirani had previously told Comcast that he did not have a non-compete agreement with Verizon.) Mr. Pizzirani contacted Verizon's Human Resources department to inquire, and was informed that he had a non-compete covenant with Verizon. Comcast ultimately revised its offer of employment to Mr. Pizzirani, instead offering him a newly created position.

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19. 462 F. Supp. 2d at 652 (italics in original).

During the negotiations for the new position, Mr. Pizzirani continued to learn and develop Verizon's confidential and proprietary business information. Immediately upon his resignation from Verizon to accept the Comcast position, Verizon sought a temporary restraining order to bar Pizzirani from working for Comcast until the expiration of the non-compete agreement.

Mr. Pizzirani conceded that he executed the award agreements by his electronic signature. However, he argued that the court should invalidate the non-compete covenants because Verizon misrepresented the essential terms of the award agreement. The court refused to invalidate the non-compete agreement. It explained that "[u]nder New York law, a valid contract is formed by manifestation of assent, including checking a box or clicking a button on a computer screen, as in this case."[20] The court determined that the act of clicking the "I acknowledge" button constituted a manifestation of Mr. Pizzirani's assent and intent to be bound by the award agreements, including the non-compete and other restrictive covenants.

Regarding the alleged misrepresentation, Mr. Pizzirani argued that the court should invalidate the award agreements because Verizon failed to notify him that it had revised the award agreements to include a non-compete covenant and because it did not describe the non-compete agreement in its summaries of the award agreements. The court rejected this argument, finding that Mr. Pizzirani had a reasonable opportunity to read and understand the character and essential terms of the award agreements. Several factors led to this conclusion: (1) for each award agreement, Verizon encouraged Mr. Pizzirani to read the agreement, by sending him an email to warn him that his acceptance would constitute certification that he had read and agreed to be bound by the award agreement and its restrictive covenants; (2) to execute the agreement on his computer, Mr. Pizzirani was required to click on a box on the screen to affirm that he had read and understood the document, which he did in both 2005 and 2006; (3) Mr. Pizzirani was given more than a month to read and electronically sign the agreements; and (4) contrary to Mr. Pizzirani's argument that he was only able to view the agreement in a small box on the computer screen, the evidence demonstrated that he had the ability to print the document, save the document to his hard drive, or expand the default size of the document viewing screen.

The court also noted that Mr. Pizzirani was a sophisticated businessman who had read and revised contracts in his job, and that in light of the amount of money at stake for him

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20. 462 F. Supp. 2d at 655 n. 3.

personally, Mr. Pizzirani should have been personally motivated to read the award agreements. The court proceeded to grant Verizon's motion for a preliminary injunction prohibiting Mr. Pizzirani's employment by its rival, Comcast.

***Peruta v. Outback Steakhouse of Florida, Inc.*, 913 A.2d 1160 (Conn. Super. Aug. 2006)**. In *Peruta v. Outback Steakhouse of Florida, Inc.*, a group of former restaurant servers brought a purported class action, alleging various claims for unpaid wages against Outback Steakhouse, their former employer. In deciding on the plaintiffs' motion for class certification, one piece of evidence highlighted by the court was the means by which the plaintiffs declared the tips that they had received. Testimony indicated that employees declared their tips through electronic means in the computer when they clocked out of work on a daily basis. Outback Steakhouse argued that the process of logging in constituted a "signed statement" under the Connecticut Uniform Electronic Transactions Act. The court explained that whether the employer's system of logging in and entering time constituted a signature under the UETA was a question of statutory interpretation. As a question of law, the issue was to be decided by the court at trial, not on a motion for class certification. The court did not indicate whether it would find the procedure adequate to constitute a binding employee electronic signature.

***Godfrey v. Fred Meyer Stores*, 124 P.3d 621 (Or. App. 2005)**. *Godfrey v. Fred Meyer Stores* involved the interpretation of a state workers' compensation law that requires employees to give their employer notice of an accident resulting in injury or death. The facts underlying the case occurred in 2001, when Ms. Godfrey verbally notified her supervisor that she had injured her wrist at work. Her supervisor entered an Employee Incident Report into the employer's computerized database, in which he described the events leading to the injury and the nature of the injury. A paper copy of the report was not printed. More than one year later, in early 2003, Ms. Godfrey sought medical attention and made a written claim for her injury. The employer denied the claim on the ground that Ms. Godfrey had failed to file timely written notice within 90 days of the injury (or within one year of its occurrence for circumstances in which the employer was aware of the injury), as required by the applicable Oregon statutes. The Workers' Compensation Board held that Ms. Godfrey did not give proper notice, and Ms. Godfrey appealed to the Oregon Court of Appeals. The employer argued that the statute required notice of an injury to be given in writing. Ms. Godfrey argued that notice of an injury need not be in writing, so long as the employer learned the relevant facts.

The court analyzed the text of the relevant statute, which did not directly answer whether the employee must provide "written" notice to her employer of an injury. After

reviewing the context and other background information, the court ultimately concluded that verbal notice was sufficient.

For those considering the related issue of whether to transition from hard copies to electronic records and e-signatures, Judge Armstrong's concurring opinion is helpful. Judge Armstrong agreed with the majority that the notice need not be in writing, but expressed his opinion that even if the statute requires a writing, the employer's electronic record of Ms. Godfrey's injury report satisfied that statutory requirement. Judge Armstrong explained that although entering Ms. Godfrey's statement into an electronic database may seem to be qualitatively different from using a pen and paper to write a statement, it is a "distinction without a difference."[21] Judge Armstrong cited Oregon's Uniform Electronic Transactions Act ("UETA"), which provides, in pertinent part, that if a law requires a record to be in writing, an electronic record satisfies this requirement. Judge Armstrong explained that the employer's electronic record of Ms. Godfrey's injury report satisfied the core provisions of the UETA: the record reflected a transaction relating to business affairs, and both parties agreed to conduct the transaction by electronic means. In particular, the "transaction" required by the UETA consisted of the reporting and recording actions by Ms. Godfrey and her employer. Ms. Godfrey's on-the-job injury was a business affair, and the actions by her and her employer were related to it. Accordingly, the electronic record was a record of a transaction for purposes of the UETA. Moreover, it could be inferred from the conduct of the parties that both agreed to conduct the transaction by electronic means, such that the reporting and recording of Ms. Godfrey's injury was a transaction within the scope of the UETA. Thus, according to Judge Armstrong, the electronic record that the employer created of Ms. Godfrey's statement was, in fact, a writing.

***On Line Power Technologies, Inc. v. Square D Co.*, 2004 U.S. Dist. LEXIS 9655 (S.D.N.Y. Apr. 20, 2004).** In *On Line Power Technologies, Inc. v. Square D Co.*, the plaintiff, On Line, sought commissions allegedly earned in connection with selling products and services. In March 1997, On Line entered into a sales representative agreement with PDS, under which On Line was to sell PDS products and services on commission. The agreement was to be effective through 1997, but would be automatically renewed unless cancelled by one of the parties. The agreement provided that either party could terminate the agreement immediately for cause, or without cause on 30 days' notice. Another contract provision required written consent for assignment of the agreement. Finally, the agreement contained arbitration and choice of law provisions,

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21. 124 P.3d at 631.

providing that disputes arising out of the agreement or its breach would be arbitrated in accordance with the rules of the American Arbitration Association in Hamilton, Ohio.

In 1998, Square D acquired all outstanding stock of PDS, and notified On Line in writing that it was incorporating PDS into Square D. In this written correspondence, Square D stated that commissions would be paid as outlined in On Line's sales representative agreement with PDS, until that agreement was terminated and replaced with a Square D representative agreement. The letter also stated that Square D would pay full commissions, as outlined in the agreement, on orders booked by On Line, even when the parties terminated their relationship during the life of the order. The parties never replaced the PDS agreement with a Square D agreement, and instead operated under the PDS agreement until early March 2002, when Square D terminated the agreement without cause. In late March 2002, Square D provided On Line with an accounting of past and pending commissions owed, and informed On Line that Square D was current with respect to its obligations. Square D also advised On Line that a new proposed agreement was being reviewed, but that in the meantime, Square D's sales representatives and On Line would work out a commission arrangement on a project-by-project basis. After the PDS agreement was terminated, On Line continued to broker sales for Square D.

Once the parties' relationship finally ended, On Line filed two lawsuits against Square D: one for commissions allegedly due on orders that were placed before the PDS agreement was terminated, and the other for commissions on sales that On Line allegedly brokered after the PDS agreement was terminated. Square D moved to dismiss both actions in favor of arbitration. In analyzing the claim for commissions on orders placed after the PDS agreement was terminated, the court looked to the communications between the parties in which Square D agreed to pay On Line certain commissions on the purchase of each order. Those communications did not reference binding arbitration. For two of the purchase orders, the communications between the parties about the commissions occurred through a series of emails. The emails were considered by the court to be sufficient evidence to suggest that the parties intended to enter into an agreement for the payment of commissions. The court relied on federal and New York law, including E-SIGN and New York's Electronic Signatures and Records Act, which recognizes the validity and enforceability of electronic signatures. Relying on those laws, the court concluded that Square D and On Line entered into valid new agreements for at least three of the four sales that occurred after the termination of the PDS agreement. Because none of the new agreements included an arbitration provision, no

enforceable agreement to arbitrate existed and the court denied Square D's motion to dismiss and to compel arbitration.

***Marlar v. Yellow Transportation*, 2004 U.S. Dist. LEXIS 26653 (W.D. Mo. Nov. 29, 2004).** In 1977, Mr. Marlar began employment with Yellow Transportation ("Yellow") as an account executive. In late 2001, the company instituted a dispute resolution policy ("DRP"), requiring binding arbitration of all employment-related disputes. Before the company implemented the DRP, it provided notice of the implementation to all employees, included Mr. Marlar, via email. The email stated, in bold letters, that the policy would become a condition of employment on November 8, 2001, and that by remaining on Yellow's payroll after that date, the employee and Yellow agreed to binding arbitration of all disputes or controversies arising out of the employee's employment or cessation of employment with the company. Yellow provided all employees, including Mr. Marlar, with a copy of the policy through email on October 29, 2001. An email verification, dated October 30, 2001, verified that Mr. Marlar had read the arbitration policy email.

Mr. Marlar's employment with Yellow terminated in 2002. He sued Yellow in court, alleging age discrimination in violation of federal and state law. Yellow sought an order compelling arbitration based on the DRP. In opposing Yellow's motion, Mr. Marlar argued that the DRP was unenforceable because of an asserted lack of acceptance, mutuality of agreement and consideration. Mr. Marlar argued that no competent evidence proved that he had read and assented to the arbitration provisions. In particular, he alleged that he did not signed the DRP, and that due to the large volume of emails he received, he did not even recall reading the email regarding the DRP. He also questioned the authenticity of the email verifying that he read the DRP.

Lacking authoritative Eighth Circuit guidance, the court looked to a similar Sixth Circuit case, *Mannix v. County of Monroe*,[22] where a former employee similarly attempted to disavow a binding arbitration policy that was made available online and through other methods. In *Mannix*, the court determined that even if there was no evidence of actual notice to the employee of the arbitration policy, there was sufficient evidence that reasonable notice had been given. Following the *Mannix* line of reasoning, and based on the evidence of the email verification, the *Marlar* court concluded that reasonable notice of the DRP was given, even though there was evidence to suggest that the existence of an email verification does not actually confirm that an email has been read.

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22. 348 F.3d 526 (6th Cir. 2003).

The *Marlar* court further distinguished the facts from those in *Campbell v. General Dynamics Government Systems.*[23] Unlike in *Campbell*, Yellow did not attempt to hide or shade the DRP by attaching it to a vague email. The announcement of the implementation of Yellow's DRP was made clear in the heading of the email. The email alerted readers to the effective date of the DRP and listed a number of types of covered disputes. It also stated, in bold print, that the DRP would become a condition of employment after its effective date.

The court went on to conclude that the DRP was supported by adequate consideration, mutuality of obligation, and was not an unconscionable contract of adhesion, and granted Yellow's motion to compel arbitration.

Lessons for Employers. The cases summarized above provide employers with additional guidance regarding enforcement of electronic communications and employee electronic signatures. Some tips based on these cases and practical experience include the following:

- When binding arbitration is a condition of employment, notify applicants of the requirement at the beginning of the application process.

- Where an employer's entire dispute resolution policy or arbitration agreement is not in the text of the email or on the screen for viewing, provide a link to it and instructions as to how to access additional information regarding the policy or agreement, and require employees or applicants to indicate that they understand how to access the information.

- Use clear and concise language.

- Notify employees in the text of the email of the primary items to which they are agreeing; peripheral items can be included in an attachment or link.

- Require employees to take affirmative steps, such as clicking, checking a box, replying to an email, or other similar action, to affirm that they have read and understood the document.

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23. 321 F. Supp. 2d 142 (D. Mass. 2004). Note that the *Marlar* decision was issued before the First Circuit's decision in *Campbell*. *See* Tyler Paetkau and Diane T. Lucas, *Employee Electronic Signatures: Can Employment Law Keep Up With Technology, and Will Employers Keep Up With the Law?* 2006 Bender's Calif. Labor & Emp. Bull. 261 (July 2006) (includes a discussion of both *Mannix* and *Campbell*).

- Give employees the opportunity to print, save, and fully view the document.

- When distributing policies by email, avoid relying exclusively on email programs that automatically send a return email when the email containing the notice is opened, such as “read receipts.” Instead, require an employee to take affirmative steps to indicate that s/he has read the policy and agrees to it (or that the employee understands that by remaining employed after the policy’s effective date, the policy will be binding).

- When making a new policy a condition of employment, ensure that the email distribution or electronic posting of the policy indicates in bold letters that the policy will become a condition of employment. Also consider sending and posting hard copies if the new policy is sufficiently important (*e.g.*, a mandatory arbitration program or change in benefits).

- In addition to electronic distribution, consider other means of notifying employees of new significant policies, such as through employee meetings, web-based seminars, and postings on company bulletin boards.

- When distributing a new policy or agreement by email, indicate the nature of the communication in the subject line of the email.

- Ensure that your technology works. For example, if you say that you are providing a link to the company’s new policy on the intranet, test and confirm that the link actually works! Similarly, ensure that appropriate proof of employee electronic signatures exists.

- While different employers may use electronic signatures for different purposes, below is sample language that may be considered when seeking an employee’s electronic signature:

  > By clicking the “I Accept” button below I hereby acknowledge that I have read, fully understand, and agree to the terms and conditions stated in this [insert document name here (*e.g.*, Employment Application)]. I understand that I am not obligated to conduct business by electronic means, and I understand and agree to the use of an electronic method of signature to demonstrate my acceptance of the terms of this [insert document name here (*e.g.*, Employment Application)].

Electronic Signatures in Global and National Commerce Act ("E-SIGN"), 15 U.S.C. § 7001 et seq.

Hudyka v. Sunoco, Inc., 474 F. Supp. 2d 712 (E.D. Pa. Jan. 26, 2007)

Capone v. Electric Boat Corp., 2007 U.S. Dist. LEXIS 36768 (D. Conn. May 18, 2007)

Bell v. Hollywood Entertainment Corp., 2006 Ohio 3974 (Ohio App. Aug. 3, 2006)

Verizon Communications Inc. v. Pizzirani, 462 F. Supp. 2d 648 (E.D. Pa. 2006)

Peruta v. Outback Steakhouse of Florida, Inc., 913 A.2d 1160 (Conn. Super. Aug. 2006)

Godfrey v. Fred Meyer Stores, 124 P.3d 621 (Or. App. 2005)

On Line Power Technologies, Inc. v. Square D Co., 2004 U.S. Dist. LEXIS 9655 (S.D.N.Y. Apr. 20, 2004)

Marlar v. Yellow Transportation, 2004 U.S. Dist. LEXIS 26653 (W.D. Mo. Nov. 29, 2004)

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This commentary is a companion article to the following: Tyler Paetkau and Diane T. Lucas, *Employee Electronic Signatures: Can Employment Law Keep Up With Technology, and Will Employers Keep Up With the Law?* found at 2006 Bender's Calif. Labor & Empl. Bull. 261 (July 2006). To order a subscription to *Bender's California Labor & Employment Bulletin*, go to Online Bookstore: Bender's California Labor & Employment Bulletin. To order a subscription to our national labor and employment newsletter, *Bender's Labor & Employment Bulletin*, go to Online Bookstore: Bender's Labor & Employment Bulletin.

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