

## LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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# Can the section of an employment contract agreeing a fixed term period be legally valid if using a qualified electronic signature through DocuSign?

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In light of the recent significantly increased compliance requirements, businesses have understandably been calling for a drastic reduction in bureaucracy for a long time. In particular, this also includes the greatest possible departure from the strict written form ([section 126 German Civil Code \(BGB\)](#)), which continues to be the yardstick, particularly in numerous employment law provisions. As the written form requires a handwritten signature (also paraphrased as "*pen and paper*" / "*wet ink*"), written form requirements regularly oppose the (complete) digitalisation of company processes ([other issues with the digitisation of HR processes can be found here](#)).

The German cabinet has recently taken the first step in the right direction and announced the [Fourth Bureaucracy Reduction Act \(4. Bürokratieentlastungsgesetz, BEG IV\)](#). In multiple employment law provisions it intends to replace the written form with text form ([section 126b BGB](#)) or electronic form ([section 126a BGB](#)). In its current form it also affects the strict written form requirement in [section 2 \(1\) of the German Notification of Conditions Governing Employment Act](#) ([Nachweisgesetz, NachwG](#)). As part of concluding an employment contract, which as a general rule does not have any form requirements, this obligated employers to provide employees with a notification

containing the essential provisions of the employment contract, which must be made **in writing** ([further information on the Nachweisgesetz has been summarised for you here \(German only\)](#)).

The planned Fourth Bureaucracy Reduction Act, however, does not address all of the provisions under employment law that require the written form. One such point left unaddressed is regarding written form requirement for **fixed term** employment contracts ([section 14 \(4\) TzBfG](#)). Although the prevailing opinion in literature assumes that the electronic form is also sufficient in relation to fixed term contracts, until now the Labour Courts had not explicitly dealt with this matter (*though implicitly dealt in the judgment of the Berlin Labour Court (Arbeitsgericht, ArbG) dated 28/9/2021 – [36 Ca 15296/20](#); Berlin Brandenburg Regional Labour Court (Landesarbeitsgericht, LAG), judgment dated 16/3/2022 – [23 Sa 1133/21](#)*).

The Gera Labour Court (Arbeitsgericht, ArbG) was the first court to decide whether the section of an employment contract agreeing the fixed term period was concluded in a legally valid manner if concluded in electronic form, specifically using the program "**DocuSign**". With its judgment dated 7/3/2024 ([2 Ca 936/23](#)), the Gera ArbG has now expressly **agreed** this.

## Facts of the matter

The parties were in dispute, amongst other things, over the validity of the section of the employment contract agreeing a fixed term period without an objective reason. The contract documents were signed by the parties using a qualified electronic signature ("QES"), in the well known tool "DocuSign".

## Ruling

The Gera ArbG held that using a QES for the fixed term part of the employment contract that was the subject of the dispute was sufficient to meet the written form requirement of [section 14 \(4\) TzBfG](#). It held that it was necessary to adhere to the requirements of electronic form ([section 126a BGB](#)) which was the case with the QES offered by DocuSign.

The Gera ArbG thus followed the prevailing opinion already present in literature on this point. This view is based on the fact that in [section 623 BGB](#) the electronic form is only excluded when terminating an employment contract by notice of termination or separation agreement, but not, however, for fixed term contracts. Otherwise the Gera ArbG kept things brief. It found no indications to suggest that the requirements for the section of the employment contract agreeing a fixed term period being made in a legally valid manner were not fulfilled with a QES using the DocuSign program.

## Comments

The decision of the Gera ArbG is expressly welcome. It confirms the persuasive, long-held, prevailing opinion that the section of the employment contract agreeing a fixed term period may also be concluded using QES in a legally valid manner. If the legislature adopts the Bureaucracy Reduction Act proposed by the German cabinet, employers will be able to determine whether they would

want the process of concluding employment contracts to be digitalised in the future.

It remains important that the **requirements for the electronic form** in terms of section 126a BGB are actually met in each individual case. It must be ensured that a **valid, qualified electronic signature** is used.

### 1. Electronic form

The requirements for the electronic form are laid out in [section 126a BGB](#):

- It must be an electronic document
- The issuer must add their name to the declaration and
- The document must be signed with their **qualified electronic signature**.

For a contract both parties must sign an identical document in this manner [section 126a \(2\) BGB](#).

### 2. Validity of a qualified electronic signature

[EU Regulation no. 910/2014](#) ("eIDAS Regulation) regulates the characteristics that a QES must exhibit. There is a key difference between the types of electronic signatures proposed in the eIDAS regulation: the (simple) electronic signature, the advanced electronic signature and – relevant here – the qualified electronic signature ([for more information on the different types of signature and their requirements see section I here.](#)):

For a signature to be a QES it must be based on a qualified certificate that has been issued in Germany by the Federal Network Agency (Bundesnetzagentur) ([Art. 30 eIDAS Regulation](#) in conjunction with [section 17 of the Trust Services Act \(Vertrauensdienstegesetz, \(VDG\)\)](#)) and must have been created from a qualified electronic signature-creation device.

The Gera ArbG confirmed that by using DocuSign these requirements for a QES had been met. Lists

of providers who have the required certification can be found on the website of the [Bundesnetzagentur](#) and the [European Commission](#).

## Conclusion and follow-up questions

Although the position of the Gera ArbG has not yet been confirmed at the highest level of the judiciary, the strongest arguments are in its favour. Therefore, the judgment can be understood as a signal for employers to continue with their HR digitalisation projects for concluding (fixed term) employment contracts. The decision of the Gera ArbG may also be of importance in other areas, such as the written form requirement for post-contractual competitive restrictions ([section 74 \(1\) of the German Commercial Code \(Handelsgesetzbuch,](#)

[HGB](#)) ([for more information about form requirements in employment law see section II here.](#))

As a result, the partial approval of qualified electronic signatures to reduce bureaucracy may be criticised as insufficient, which is not necessarily unjustified in light of the practical hurdles described above for its use. However, it is the first step in the right direction. We hope that this is not the last step and further simplifications and clarifications by the legislature follow promptly, or, as seen here, result from case law.

### Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Alberto Povedano Peramato on +49 221 33660 508 or by email to [APovedano@goerg.de](mailto:APovedano@goerg.de) an. . For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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