



Nondisclosure Agreements **Protection for Your Confidential Information**

The protection of your business's confidential and proprietary information is critical. A nondisclosure agreement, which is also referred to as an NDA or a confidentiality agreement, is a contract in which a party agrees to maintain the secrecy of certain confidential and proprietary information of another party. NDAs should be used when individuals or entities are considering entering into a business relationship and need to better understand the other party's business. Also, NDAs restricting use and disclosure of a company's confidential information should be required to be signed by employees. An NDA can be mutual, meaning both parties are restricted in their use of information exchanged between them, or it can restrict the disclosure and use of information by the receiving party only.

Information that a party should consider protecting includes; customer lists; contract proposals; trade secrets; know-how; data; source code; software; intellectual property information; financial information; marketing strategies; hiring and training methods; client information; personnel records; investment policies; and pricing and cost information. Confidential Information should include information communicated orally and in writing.

Critical elements of an NDA include the following:

- **Parties:** An NDA must identify who is intended to be bound by the confidentiality requirements. The disclosing party should seek to expand the scope of the definition of "receiving party" to include breaches of the NDA by the receiving party's affiliates and by any legal, financial or other representatives to whom it provides information. Some NDAs will even go a step further and require the receiving party to obtain a separate NDA in favor of the disclosing party from any affiliate or representative who is provided confidential information.
- **Definition and Use of Confidential Information:** The disclosing party should include a broad list of types of information which will be covered by the NDA. Conversely, the receiving party may want to narrow the definition in order to reduce its exposure to liability for a potential breach of the agreement. The NDA should also clearly state the purpose or purposes for which the recipient can use the confidential information.

- **Exclusions from Confidential Information:** NDAs will not protect confidential information that (i) the receiving party had knowledge of prior to signing the NDA; (ii) the receiving party obtained from an independent third party without the intention to circumvent the NDA; (iii) was made generally available to the public (other than as a result of a breach of the NDA); or (iv) the receiving party is required to disclose as a matter of law. Unless explicitly agreed to otherwise in the NDA, the receiving party has no obligation to protect this excluded information.
- **Return of Confidential Information:** NDAs should include a provision requiring the receiving party to immediately return the disclosing party's confidential information upon the request of the disclosing party. The NDA should specify that the receiving party must return all information furnished to it and destroy all copies, notes, memoranda, analyses, and related documents created or based on the confidential information. The receiving party should certify in writing that such destruction has occurred.
- **Term:** Disclosing parties should require the receiving party to maintain the secrecy of the confidential information for as long as the information remains "confidential". Receiving parties should try to limit their obligation to maintain confidentiality to a specified period of time, which can be negotiated by the parties.
- **Damages for Breach:** In general, the legal remedy as a result of a breach of an NDA is that the breaching party will be liable for monetary damages (including legal fees) suffered by the disclosing party, although it could be virtually impossible to calculate the damages suffered by the disclosing party. NDAs should also provide for equitable remedies such as temporary restraining orders and injunctions.

As with any legal document, consult with an attorney in order to ensure that any NDA you enter into is tailored appropriately to your particular situation.

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