

Non-Disclosure Agreements

What is a Non-Disclosure Agreement (NDA)?

Imagine you are pitching a business idea to a potential partner. As part of the pitch, you will be sharing an innovative marketing strategy you have developed. If the partnership doesn't work out, how can you ensure the other party won't disclose your strategy to others or use it to start a competing business? This is where a non-disclosure agreement, or NDA, can play a role.

An NDA is a legally enforceable contract between a person or entity who has sensitive information (the "disclosing party"), and another party who will gain access to that information (the "receiving party"). By signing an NDA, the receiving party agrees to keep the shared information confidential, meaning they will not disclose it to unauthorized third parties. NDAs may also be referred to as "confidentiality agreements", "confidential disclosure agreements", or "proprietary information agreements".

What forms do NDAs come in?

An NDA may take the form of a stand-alone contract, or it may be one part of a larger contract that deals with other matters.

When should you require another party to sign an NDA?

In general, NDAs are useful in situations where you plan to share something valuable or sensitive about your business or idea, and you want to prevent the recipient from distributing the information or using it for themselves. Ideally, the NDA should be signed before the sensitive information is shared.

Common situations in which people use NDAs include the following:

- When presenting or sharing a business idea or invention with a potential partner or investor;
- When sharing financial, marketing, or technology information with a potential partner, investor, or buyer;
- When interviewing or hiring an employee, independent contractor, or consultant, to protect any trade secrets or confidential information that is shared;

- When giving employees access to sensitive information or customer information in the course of their work;
- When receiving services from a business that may gain access to sensitive information in the course of providing their services; and
- When negotiating a merger or acquisition, licensing agreement, or other arrangement, to allow both sides to share information freely knowing that it is safe to do so.

What kinds of information can be protected by an NDA?

Information can generally be considered “sensitive” if it could cause financial, legal, or reputational risks if disclosed to a third party. You may wish to consider protecting the following kinds of information in an NDA:

- Business and marketing plans or strategies;
- Customer lists and information such as contact information, preferences, and purchasing history;
- Employee and contractor information such as duties, salaries, and performance evaluations;
- Supplier and vendor lists and information;
- Trade secrets and proprietary information. This can include things such as research, devices, manufacturing processes, formulas, recipes, blueprints, and software development tools; and
- Intellectual property such as patents, trademarks, or copyrights.

What are the types of NDA?

There are two main types of NDA: unilateral and mutual.

In a **unilateral (or one-way) NDA**, one party shares sensitive information with another, and the party receiving the information agrees not to disclose it to non-authorized parties. A common scenario is when a new employee is hired and agrees not to reveal sensitive information they learn on the job.

In a **mutual NDA**, both parties share sensitive information with each other, and both have a duty to keep the information confidential. A common scenario is when one company merges with or acquires another company, as both parties may be sharing sensitive information with each

Why is having an NDA beneficial?

- **Provides clarity.** Having an NDA helps parties to clarify what information they can and cannot disclose to others.
- **Builds trust.** Signing an NDA can signal a commitment to protecting the other party's confidentiality, which can enhance trust between the parties.
- **Provides remedies.** If one party breaches an NDA, the other party may be able to pursue legal remedies, such as "breach of contract", that would not otherwise be available without an NDA.
- **Protects patent rights.** For inventions that are under development, publicly disclosing information about the invention may void the inventor's right to patent it. Having an NDA can help protect an invention's patentability while the inventor continues to develop and communicate with others about their invention.

What are some risks of asking someone to sign an NDA?

While there are multiple benefits to having an NDA, there are also potential risks to consider.

- **Decreases trust.** On the one hand, signing an NDA can communicate a party's dedication to protecting the other party's sensitive information, which builds trust. On the other hand, asking another party to sign an NDA could lead to increased suspicion. To help preserve the business relationship between parties, it can be helpful to evaluate whether an NDA is too broad or one-sided.
- **Limits growth and innovation.** The free sharing of information can help to promote creativity and business development. Although people might assume that it's best to create NDAs that offer the strictest protection for the most information possible, making NDAs overly restrictive can have negative consequences for business growth.

What are important sections to include in an NDA?

NDAs commonly include the following sections:

- (1) **The parties involved in the agreement.** This includes their names and addresses, and which party/parties will be sharing confidential information (the "disclosing party") and which party/parties will be receiving confidential information (the "receiving party").

- (2) Definition of “confidential information.”** This section should spell out what specific information qualifies as “sensitive”, “confidential”, or “proprietary information”. Be aware that if an NDA is too vague or too broad in the scope of information it applies to, it may not be upheld in court.
- (3) Exclusions from confidentiality.** If there are certain situations in which parties are allowed to share confidential information with third parties, these exceptions should be outlined in the NDA. Typical exclusions include the following:

 - a. Information that is public knowledge, or that becomes public knowledge through a method other than by the recipient breaking the NDA;
 - b. Information that was previously known or disclosed to a party before entering the business relationship;
 - c. Information that is received from a third party who is not bound by a separate NDA to the other party; and
 - d. Information that is developed independently by the receiving party without using confidential information.
- (4) Specific responsibilities.** An NDA should clearly define how the receiving party can and cannot use the confidential information, and what steps they must take to safeguard the information.
- (5) Timeframe.** NDAs vary in how long they last to protect sensitive information. Once an NDA expires, parties may be able to share information freely with others. Common timeframes for an NDA include anywhere from one to 10 years. For employment agreements, it is common for the agreement to last for the duration of the working relationship. It is important to specify a timeframe because if a party drafts an NDA that is indefinite, a court may find that the NDA is not legally enforceable.
- (6) Return of Information.** An NDA may specify that on the completion of business, the receiving party must verify that the sensitive information has been returned or destroyed.
- (7) Remedies.** This section describes what consequences will occur if a party breaks the NDA. Depending on the jurisdiction, this could include, for example, financial penalties, termination of a contract or employment, an injunction, or even jail time.

What should I do if I receive an NDA?

If you receive an NDA, read the entire document carefully from beginning to end. It is common for NDAs to contain sections that do not have to do with keeping information confidential, but relate to other matters such as assigning intellectual property rights, non-solicitation clauses, or non-competition clauses. Make sure you understand what you are being asked to sign. As well, be careful not to automatically assume that both parties are bound to keep information confidential (i.e. that it's a mutual NDA) – sometimes a party doesn't realize that an NDA only protects the other party's information!

How do I enforce an NDA?

- (1) **Limit sharing of sensitive information.** Remember that once information is disclosed, it is very hard to take it back. By limiting the confidential information you share, you may avoid needing to enforce an NDA in the first place.
- (2) **Implement systems to detect potential breaches.** If you don't actively monitor for breaches, you may not realize your NDA has been violated. Regularly reviewing communications and documents can help to identify any breaches that may occur.
- (3) **Send a cease and desist letter.** If you believe another party has broken an NDA, you can send a "cease and desist" letter describing the breach and demanding an end to any ongoing or future disclosures.
- (4) **Pursue a legal remedy.** If the other party continues to violate the NDA, the next step may be to seek a remedy through the courts. Parties can request an injunction to prevent additional disclosures and/or seek monetary damages for harm caused to their business' profits or reputation. Alternatively, parties could pursue arbitration or mediation to avoid the cost and time of going to court.

How can I show that I'm fulfilling my obligations as a receiving party?

There are a number of best practices that can help defend against accusations of breaching an NDA. These include keeping records of all instances when sensitive information was accessed or received, in order to demonstrate that no disclosures were made to unauthorized third parties in violation of the NDA. As well, it can be helpful for businesses to create retention and destruction policies, such as not keeping confidential information for longer than is absolutely needed.

Summary

In business, there are many situations in which it is useful or necessary to share sensitive information with another party. Non-disclosure agreements can help to protect such sensitive information by limiting how it can be shared and who it can be shared with.

If you would like assistance in reviewing, drafting, or understanding an NDA, please fill out an [online intake form](#) with the L. Kerry Vickar Business Law Clinic.