

Non-Disclosure Agreements

- Plan for business succession
- Reward your hard working staff

What is Non-Disclosure Agreement?

An NDA sets out how you share information or ideas in confidence. Sometimes people call NDAs confidentiality agreements. They work by ensuring both parties to a transaction or potential project (such as a joint venture) understand the confidential nature of information that is disclosed and the consequences of any breach of confidentiality. For example:

- The right of the discloser to receive compensation or
- The right of the discloser to obtain an injunction order to prevent further damage or loss arising from the breach of confidentiality



What should an NDA cover?

Prior to disclosing information about your business that you believe is commercially sensitive you need to consider:

- Does the information need to be shared or can you proceed in the absence of disclosure of the confidential information?
- Is the organisation that you are disclosing to subject to regulatory rules on confidentiality, such as solicitors who are regulated by the Law Society and who are subject to strict professional rules on client confidentiality?
- Use of a non-disclosure agreement if disclosure is needed to a third party and you don't believe that they are subject to professional confidentiality rules to give your business sufficient protection against a breach of confidentiality.

Ultimately, you should decide what your NDA covers. The clearer you are about what it covers the more likely you will be able to enforce it should the recipient breach their obligations. It could protect only information which is recorded in some form and marked 'confidential', or it could also protect information you share in meetings or presentations. What amounts to commercially sensitive information

varies from business to business, but the following are examples of where a non-disclosure agreement should be considered:

- Describing an invention, new product or technology to a potential partner that isn't patented or where you don't have intellectual property protection (for example as part of a potential joint venture agreement or for an investor).
- Sharing information about your business with a prospective buyer or franchisee as part of a franchise purchase agreement. This information could include your detailed management accounts, business plans, projected forecasts, or key clients.
- Giving information to a potential service provider, such as a freelancer or sub-contractor, to enable them to quote for work.
- A non-disclosure or a confidentiality agreement can either be:
 - An initial agreement as part of preliminary business discussions.
 - Form part of a substantive commercial contract, such as a joint venture or franchise agreement.
 - Form a stand-alone agreement between your business and a third party, complementing the main contract.

Types of NDA

NDAs can be one way or mutual. Only use a one-way NDA if you are disclosing information. If both parties are disclosing information then use a mutual NDA or, in other words, ensure that the rights and obligations apply to both parties.

One-way non-disclosure agreements only contain obligations on one of the parties. This type of agreement is common where you are developing a new product or service and seeking potential suppliers or partners. If the NDA is one-way only, it may need to be executed as a deed to make it enforceable. This is easy to do, so don't make what should be a one-way agreement into an artificial mutual agreement.

Mutual non-disclosure agreements work by imposing obligations of confidentiality on both parties to the agreement, a kind of a confidentiality tit-for-tat. Your recipient will not be able disclose your confidential information, and you won't be able to disclose theirs. These types of agreement are common in M&A and investment scenarios, where both sides will be sharing confidential aspects of their respective businesses.

What makes a good NDA?

A good NDA restricts the use of the ideas and information to a specific permitted purpose. This could be the evaluation of your idea or the discussion of a joint venture. Specify that purpose in the NDA as precisely as you can. You can always widen the permitted purpose later. You won't be able to narrow the restriction on the use of your ideas or information later. You should record what you disclose at meetings or in presentations. Ask people present to sign a paper copy of a presentation, or a technical drawing to prove they have seen it.

You should be realistic. The person you are talking to might need to share your information with others. This could be their employees or professional advisors. They may also need to copy your information for this purpose. Make sure that these disclosures to employees and professional advisers are made in confidence.

Think about how long the confidentiality should last. It's common to see it limited to 3 or 5 years. After that time, they will be able to use and disclose your information. Once information is made public in anyway, an NDA can't be enforced.

Some information could be kept confidential forever. Examples of these are:

- non-patentable know-how
- lists of customers
- personal information about the individuals involved in a project

Some companies or organisations could ask you to sign a document agreeing that they will not have a duty to keep your ideas or information confidential. If that is the case, you need to decide whether to risk disclosing your ideas to them.

Don't disclose your ideas or information until the recipient has signed and returned the NDA to you. Without an NDA, you are taking the risk that others could use your ideas or information without your permission.

Always check any NDA which another party asks you to sign. Make sure it doesn't unfairly restrict your future activities.

If you and the other party to the NDA are not both in the same country, the NDA will need to state which law governs the agreement, preferably English law. It is important that the courts of one country are not given exclusive jurisdiction. You may want to enforce the NDA in a different country if an unauthorised disclosure is made there.

What you need to check on an NDA

When looking at the enforceability of a non-disclosure agreement you need to consider the following:

- **Is the information really confidential?** If the information isn't secret, then it won't be protected.
- **Does the confidential information belong to you?** If the confidential information doesn't belong to you then you can't control its circulation. For example, if an idea has been developed by a supplier or contractor, it may not be your property to begin with.
- **Who is the contracting party?** You need to make sure that you are contracting with the correct legal entity, and that the document is signed by an appropriate director or officer in the case of an organisation. Note that your recipient may be operating under a trading name that's different from their legal name.
- **Is the information in the public domain?** Your agreement may not protect you if the recipient of the confidential information also gets the confidential information about your business from a third party or can show that the information was already publicly available.
- **Prior information.** Any information that you share with a third party prior to signing a confidentiality agreement will not be covered by its scope.
- **Can you prove a breach of confidentiality?** It can be difficult to prove that the recipient did, in fact, breach the terms of the non-disclosure agreement and it was them that released the information, rather than say a former employee of your business.

- **Is the agreement clear or over-reaching?** The definition of what information is confidential must not be so wide-reaching as to make the agreement too vague to comply with or mean that complying with it would be too onerous or restrictive.
- **Can the breaching party pay?** A business or individual may have limited funds to be able to pay damages for any losses you may suffer.
- **Non-solicitation:** do you wish to prevent the recipient from soliciting your employees to work for them? If not, then it's a good idea to include a non-solicitation clause.
- **Non-compete:** if you have concerns that a recipient might try to compete with you once they have your information, then provided you are trying to protect a legitimate business interest, such as a list of clients or suppliers or confidential information on the business finances and the clause is no wider than necessary to protect this interest (i.e. limited in time or geographical scope), then including a non-compete clause might be helpful. Do check that such a clause is reasonable and does not extend too far or it may be deemed void.

Where you have any concerns, then give the team at Farringford Legal a call or email them on info@farringfordlegal.co.uk.