



*Legal Strategies and Solutions  
to Protect and Grow your Business*

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## **LAYPERSON'S GUIDE TO NONDISCLOSURE AGREEMENTS**

Non-disclosure agreements (often referred to as NDAs or Confidentiality Agreements) are used at the early stages of various business transactions. For example, a NDA is entered into by a prospective buyer and seller of a business before entering into a definitive agreement to sell/purchase the business. The effect of the NDA is to prohibit a person from disclosing or using the other person's confidential information. The purpose of the NDA is to balance the conflicting interests of adverse parties to a proposed transaction. In the example of a prospective buyer and seller of a business:

- the **buyer** (the "**recipient**") does not want to risk his/her investment by entering into a binding agreement to purchase the seller's business without thoroughly reviewing the seller's business records; and
- the **seller** (the "**disclosing party**") does not want the buyer (who might be a competitor) to review the seller's confidential business records without having a remedy if the buyer discloses or uses such confidential information.

The typical NDA has the following seven primary components:

- (1) Description of the proposed transaction underlying the NDA and an obligation to limit the use of the confidential information solely for analyzing whether to enter into the proposed transaction.
- (2) Definition of confidential information (usually the definition is very broad).
- (3) Exclusions from the definition of confidential information:
  - (a) information that was publicly available before entering into the NDA;
  - (b) information that becomes publicly available during the NDA;
  - (c) information that is acquired by the recipient from another person who is/was not legally obligated to keep such information confidential; and
  - (d) information that is developed by the recipient without using any confidential information it obtained from the disclosing party.
- (4) Limit access of confidential information to recipient's employees and advisors on a need-to-know basis and impose liability on recipient for their breach.
- (5) Recipient's obligation to return any confidential information and/or destroy the confidential information (and certify the destruction of the confidential information).
- (6) Disclaims the accuracy of the information delivered by the disclosing party to the recipient and disclaims any obligation to consummate the proposed transaction underlying the NDA.
- (7) Acknowledgement that the disclosing party has the right to seek an injunction against the recipient (i.e., restraining the recipient from disclosing the confidential information) in case of breach, in addition to money damages and any other remedies available to the disclosing party.