



2019 NDA Essentials (Primer) - An NDA Review Guide

What is a non-disclosure agreement ?

A non-disclosure agreement (NDA) is a legal contract between at least two parties to protect any type of confidential and proprietary information, trade secrets or non-public business information from third parties. It is also referred to as a confidentiality agreement, confidential disclosure agreement, proprietary information agreement or secrecy agreement.



Why is an NDA important ?

An NDA outlines confidential material, knowledge, or information that the signing parties wish to keep from being disclosed to outsiders.

In what situations does an NDA apply?

An NDA is used to protect inventions or business ideas that may be misappropriated once shared with a potential partner, investor, or distributor. It is also used for shielding a new product or technology from a prospective buyer or licensee; for safeguarding sensitive information from service providers or employees who may gain access to proprietary information of your business during the course of their job.

Is it important to periodically review NDAs?

Yes, reviewing and updating agreements is crucial to make certain your

company's confidential information remains protected. There are often significant changes in the law over time and it is good practice to ensure your NDA has the essential clauses it needs.

How to draft an ironclad NDA?

Here are some essential clauses you should consider:

Identify the parties: Outlining the parties to the agreement is the first and foremost step. In *Knight Capital Partners Corp. v. Henkel AG & Co.*, No. 18-2189 (6th Cir. 2019), KCP and Henkel entered into an NDA to aid in the negotiations of a distribution deal. KCP had provided Henkel with confidential information about the product. Following a year of exchanging information and engaging in negotiations, the NDA lapsed, and no deal was effectuated. KCP asserted that Henkel's parent company, Henkel KGaA, used confidential information it acquired through the NDA to develop the product on its own and also interfered with the potential distribution deal. The district court granted summary judgment in favor of KGaA. As to a breach of contract claim, the court found that KGaA was not a party to the NDA and could not be liable for its breach. As to a tortious interference claim, the court found that KGaA is the parent company of Henkel, so the parent-subsidiary privilege immunizes it from a tortious interference claim involving its subsidiary. The Sixth Circuit affirmed the decision of the district court. Therefore, it is important that the parties are well identified as contracting parties. In this case Henkel KGaA was not a contracting party despite receiving confidential information.[1]



A parent company agreeing to not misuse the confidential information it receives pursuant to the NDA executed between its subsidiary and another entity, is at most a Receiving Party and not a Contracting Party to the NDA.

1. Clearly define the term Confidential Information: It is imperative to have a very well-defined clause for confidential information. If the term confidential information is defined too broadly the Court may refuse to provide protection to the disclosing party of the confidential information. In *Food Marketing Institute v. Argus Leader Media*, 588 U.S. ___ (2019), the Supreme Court primarily held that Freedom of Information Act Exemption 4, which shields from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” applies to commercial or financial information that is customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.[2] The Court’s decision is believed to have significant ramifications for industries that provide important, valuable data to the government, particularly where the confidential information is subject to a mandatory reporting or disclosure obligation. Therefore, before disclosing confidential information, entities faced with a government request to disclose information should clearly identify and label confidential information as confidential and also seek to obtain written assurances from the government that such information will be treated as confidential. In addition, entities must also make proper internal policies and procedures to proactively identify information that warrant confidential treatment.[3]
2. Choice of Law: Since NDA is a contract, the laws governing the agreement must be clear. For instance, if the employees reside or are

working in California, it would be better to have a California choice of law term. Also, to comply with the Labor Code, businesses should specify that California law applies to the agreement for California employees and residents.[4]

3. Check for Enforceability: Cross-border considerations often cause enforceability issues. It would be best to check jurisdictional rules and trends in the countries you're doing business in to learn more about possible enforcement issues. For instance, in India, an NDA must be stamped to be a valid enforceable document. Furthermore, American style NDAs are not enforceable everywhere. One such country is China. A standard NDA would need to be completely revised to be enforceable in China. As an alternative, Chinese law allows for protecting trade secrets and for contracts that provide NNN (non-use, non-disclosure, and non-circumvention) protections. Even for an NNN agreement to be effective it would need to be written in Chinese, governed by Chinese law, and exclusively enforceable in a Chinese court.[5]
4. Term and Duration of NDA: Every non-disclosure agreement should have a clearly defined timeframe. Most jurisdictions will not enforce unrealistic time limits on the agreement.
5. Damages and Injunction: An appropriate damages provision may help in recovering minimum amount of damages in case of breach of the agreement. An injunction clause will further allow the disclosing party to get a court order to stop the disclosure of confidential information in the event the damages provision falls short.
6. Dispute resolution mechanism: The dispute resolution mechanism must be considered keeping the contracting parties in mind. China, for example, is known to rarely enforce arbitration clauses despite being a New York Arbitration Convention signatory. Also, some jurisdictions (e.g., China, Korea) do not provide for discovery similar to that allowed in the United States. [6]

To keep abreast with laws of all jurisdictions and to review NDAs periodically, is often not an easy task. At LegalEase we have the perfect solution to iron out these small creases. We have dedicated an expert team of attorneys, specialized in the NDA process, to serve as an extension to your legal department. Our attorneys scrutinize the data, derive the terms of the agreement, and deliver

incontestable NDAs, that abide by all the essential clauses specific to your requirements. If you have a project you need a hand with, feel free to reach out to us at contact@legaleasesolutions.com. Our team is happy to assist.

[1] <https://law.justia.com/cases/federal/appellate-courts/ca6/18-2189/18-2189-2019-07-16.html>

[2] <https://supreme.justia.com/cases/federal/us/588/18-481/>

[3]

<http://www.mondaq.com/unitedstates/x/822522/Trade+Secrets/Supreme+Court+Issues+Decision+Significantly+Expanding+The+Scope+Of+FOIAs+Confidentiality+Exemption>

[4]

<https://www.lexology.com/library/detail.aspx?g=08ec865e-0646-4cf8-87b6-fa56c992aefa>

[5] <https://www.chinalawblog.com/2016/02/china-unn-agreements.html>

[6] <https://www.natlawreview.com/article/do-not-give-ndas-short-shrift>