



6 NDA - Requisite Questions for In-House Counsel

Any business that hires employees or works with contractors and business partners will need to exchange proprietary information to conduct business. Non-disclosure agreements, NDAs, ensure this information is protected. NDAs are contractual documents structured to prevent employees, contractors, vendors or other parties receiving your proprietary information from using it against your business's interests. The two common types of NDAs are one-sided NDAs, which impose usage burdens and restrictions on the party receiving confidential information; and mutual NDAs, which govern how all parties in a business relationship can share and use proprietary information they exchange with each other. Regardless of the NDA used, effective ones should do the following:

- Identify the parties bound to the agreement
- Define when information is considered confidential and what other types of information should be excluded
- Describe how parties receiving confidential information should use and

protect it

- Include terms covering the NDA's expiration and detailed procedures for returning classified information to the sender
- Describe the remedies that could result from breaching the NDA

While NDAs can be helpful for your business, poorly-drafted ones can set your organization up for liability. Here are some NDA drafting and litigation considerations in-house counsel should consider when creating and reviewing NDAs:

Is my NDA too broad? Some organizations make the mistake of using NDAs that impose broad restrictions and limitations on recipients. While some states permit this, others could find them unenforceable. In *Fay v. Total Quality Logistics, LLC*, an Ohio-based company made a South Carolina employee agree to a NDA that treated all information he received as confidential and prohibited him from starting a competing business or working for competitors anywhere in the United States indefinitely. The South Carolina Court of Appeals, however, found this corporation's NDA to be unenforceable on public policy grounds even though the agreement was supposed to be governed under Ohio's NDA-friendly laws. Naturally, companies operating in multiple states should consider state-level enforceability issues when drafting NDAs.

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2. Is my information truly confidential? While parties should be as upfront as possible regarding what types of information should be considered confidential, this isn't always the case. In *Vision-Ease Lens, Inc. v. Essilor International SA*, the plaintiff shared a manufacturing schematic of an eyeglass lens with the defendant that it marked as confidential. Under the parties' NDA, however, this wasn't enough to merit protection; the information must *also* not have been "generally known to the public." Because the plaintiff was unable to show this at trial, the defendant was free to market competing lenses based on the schematic—even though the schematic it received was marked "confidential." NDAs that cover detailed exclusion and residuals clauses can help resolve this.
3. Could cross-border considerations cause enforcement issues? - NDAs that are enforceable stateside may not have the same impact in certain jurisdictions. China, for example, is known to rarely enforce American-styled NDA and arbitration clauses despite being a New York Arbitration Convention signatory. It's best to check jurisdictional rules and trends in the countries you're doing business in to learn more about possible enforcement issues.
4. Will NDAs affect my data security procedures? While all businesses today need to defend against cybercrime, organizations that have agreed to use "best efforts" or "best endeavors" to protect another party's confidential data may need to upgrade their data security safeguards to ensure compliance. This is true when conducting business abroad. Canada's *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.* and England's *Rhodia International Holdings Ltd v. Huntsman International LLC* state that the "best efforts" and "best endeavors" standards require parties to explore all reasonable options and leave no stone unturned when pursuing contractual objectives. Treating data breaches as *force majeure* events and using "commercially reasonable" efforts over "best efforts" can help your organization avoid potentially-burdensome responsibilities.
5. Will my information be disclosed during legal proceedings? NDAs unfortunately cannot prevent recipients from disclosing your information in response to legal actions. In addition, whistleblowers who divulge trade secrets under seal during legal proceedings now have immunity *under the Economic Espionage Act*. You must therefore ensure your NDAs include EEA whistleblower immunity notices and procedures allowing their

companies to contest disclosure requests.

6. How should I manage multiple NDAs? As your company grows, you'll need to manage multiple NDAs with their own renewal dates and confidentiality policies. Naturally, disorganized management approaches can result in legal and compliance complications down the road. Using NDA management platforms and internal searchable databases can help make NDA searching easier and help streamline your workflows.

These, of course, are only a few examples of NDA-related issues that in-house counsel may encounter. Nonetheless, companies should still use NDAs when sharing proprietary information with business partners. When used and drafted correctly, NDAs can be invaluable tools for protecting your proprietary information as you grow your business.