



The Non-Disclosure Agreement Review Checklist

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Whether you are raising funds, considering M&A, or entering into a strategic partnership non-disclosure agreements (NDAs) are a necessary part of doing business. They help to facilitate the exchange of ideas or information while minimizing the risk of your company's private information being misappropriated. This guide is designed to help you and your team better navigate the execution of the NDA process.

What Is an NDA, and Why Is It Important?

A non-disclosure agreement (NDA), also known as a confidentiality agreement, is a legal document that creates a legal obligation to secrecy and privacy between the parties who sign it. According to the terms of the agreement, one or more parties will receive access to sensitive or confidential information but must agree not to share that information with unauthorized third parties.

This information may include:

Trade Secrets: Any valuable commercial information that provides a business with an advantage over competitors who do not have that information.

Proprietary Research: Information/Research that is not public knowledge (such as financial data or research results) and that is viewed as the property of the holder.

Intellectual Property: Any product of the human intellect that the law protects from unauthorized use by other individuals or organizations.

NDAs are often signed when two parties who want to be business partners need to know more information about each other in order to begin the relationship. NDAs allow your organization to preserve its competitive advantage and ensure that you have legal recourse should your potential partner violate the terms of the NDA.

"A company with trade secrets or protected information always has to balance the advantages of collaboration (shared research and development, new sources of investment, expanded markets, a potential sale of the company or its ideas) against the risks that the collaborating party will carelessly disclose the company's secrets or even misappropriate them."

How to Use the Checklist

Below, we've assembled a list of the most valuable elements to include when writing an NDA, along with an explanation of why they're important. Before sending an NDA to the receiving party, make sure you either mark off each item on the checklist or understand why it's not necessary for your situation.



NON-DISCLOSURE AGREEMENT REVIEW CHECKLIST

- ☐ **Signing Parties:** Identify exactly which entities are bound by the terms of the agreement. Use the full legal names of all individuals and organizations.
- ☐ **Type of NDA:** NDAs can take several formats, including:
 - ☐ **Unilateral:** One party (the "disclosing party") releases confidential information to the other party (the "receiving party").
 - ☐ **Bilateral:** Both parties agree to exchange confidential information with each other.
 - ☐ **Multilateral:** Three or more parties anticipate some kind of sharing agreement for confidential information between all of them
- ☐ **Definition of Confidential Information:** This is one of the most important sections of the document. You need to specify exactly what you consider "confidential information" so that the terms of the agreement are valid. For example, a restaurant's definition of confidential information might include lists of customers, payment card data, recipes and financial reports. You must also exclude certain information from this definition, such as information that's already public or that the recipient already has.
- ☐ **Stated Purpose:** The document should explicitly say for what purposes information is being shared and restrict its use to only the provided reasons. For example, if two companies are considering a merger, then the confidential information that they share (such as financial reports) should be used only for each party to make the final decision about the merger.



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- ☐ **Confidentiality Safeguards:** The disclosing party should clearly denote whether information that it sends to the receiving party is confidential or not. The receiving party must take reasonable measures to protect the confidentiality of the information, such as strong IT security. In addition, the disclosing party may wish to take certain measures, such as audits, to ensure that the receiving party is not inappropriately sharing the information.
- ☐ **Start and End Dates of the Partnership:** Your NDA can't take effect if you never specify the agreement's start or end dates. The start date should be on or before the day that the parties began to exchange confidential information.
- ☐ **Length of Time for Secrecy:** If your partner can spill the beans immediately after ending the business relationship, your NDA won't be very effective. Most NDAs remain in force for a period of at least several years after the relationship concludes, but this may vary depending on what type of information you share. Confidential information about certain technologies may be worthless after a year or two, while other information remains valuable for much longer.
- ☐ **Disclosure of the Agreement:** Some NDAs are self-referencing - they prohibit the signers from acknowledging that they've even signed the document. Decide whether you want to add such a clause.
- ☐ **Jurisdiction:** An NDA is useless if it's not valid in the jurisdiction in which it's meant to take effect. You should clearly define which city or state will handle disputes and legal cases.
- ☐ **Termination:**
 - ☐ What are the conditions that lead to the agreement's termination?
 - ☐ What happens if any party wants to leave early?
 - ☐ How will the parties return confidential information to each other?
 - ☐ What are the receiving party's obligations to the disclosing party once the agreement is no longer in effect?



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- ☐ **Injunction:** If the receiving party plans to breach the NDA, then monetary damages may not be enough compensation. Including an injunction clause allows the disclosing party to get a court order to stop the disclosure of confidential information.
- ☐ **Remedies:** The costs of a breach can be devastating for the disclosing party, up to and including the closure of the business.
 - ☐ What are the penalties, financial or legal, for disclosure of confidential information?
 - ☐ Do they vary depending on whether the breach was accidental or intentional?
 - ☐ Are there penalties for early termination?
- ☐ **Non-Compete Clause:** In addition to an NDA, many disclosing parties may want the receiving party to sign a non-compete agreement as well. This may be a separate document or included as part of the NDA. The non-compete clause prohibits the receiving party from using the confidential information to go into business against the disclosing party or hiring any of the disclosing party's employees.

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