



INDEPENDENT CONTRACTOR UNILATERAL CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT & GUIDE

Included:

Overview

Dos and Don'ts Checklist

Independent Contractor Unilateral Confidentiality and Non-Disclosure Agreement Instructions

Sample Independent Contractor Unilateral Confidentiality and Non-Disclosure Agreement

1. Overview

Almost all businesses have confidential and private information, from product plans and customer lists to software and blueprints. In many cases, disclosure of such confidential information could seriously damage a company, particularly if that information falls into the hands of competitors. Moreover, in our technological world, data can span the entire globe within hours (if not minutes).

These concerns may be acute in an independent contractor relationship, in which loyalties are not as clear as in the employer-employee context. A comprehensive independent contractor confidentiality (or non-disclosure) agreement is thus critical to protecting your information, giving notice to all of your contractors and potential contractors that they have serious and ongoing duties of confidentiality to the company.

The simple act of stating the importance of protecting such information can be valuable. A confidentiality agreement signed at the start of a contractual relationship alerts a prospective independent contractor that your company considers this a tremendously important matter. By signing the agreement, the contractor acknowledges that the disclosure of confidential information is a breach of his or her contract, a fact that has serious and wide-ranging consequences. Moreover, the agreement's existence allows the parties to enter into an open discussion about company business. Questions can and should be answered before a service contract is signed, and parties should have the opportunity to discuss those questions with full information on both sides.

A company has little to lose and much to gain by using confidentiality agreements. Enclosed is a sample confidentiality agreement, which includes essential provisions with user-friendly instructions. The agreement should prove useful to your business and, if you follow the suggestions provided, can help you gather the tools necessary to protect your company and its information.

2. Dos & Don'ts Checklist

Creating a non-disclosure agreement is the first of many steps in maintaining and protecting your business's confidential information. The following tips will provide additional guidance about protecting your company:

- There are two key types of non-disclosure agreements: unilateral and mutual. Unilateral confidentiality and non-disclosure agreements (like the agreement contained in this packet) should be used when only one party will be sharing confidential information, as when you are discussing the hiring of an independent contractor to assist your company. Mutual non-disclosure agreements should be used when both sides will be sharing confidential information.
- Allow potential contractors ample time to review and sign the confidentiality agreement, preferably a few days. This will reduce the likelihood, or at least the efficacy, of a claim that it did not understand the agreement's terms.
- Sign two copies of the agreement, one for you and one for the independent contractor.

- Independent contractor agreements, including confidentiality agreements, should be signed before you begin negotiations with an independent contractor. However, if the contractor has been working with the company for some time, a confidentiality agreement should be signed in conjunction with a change in services or terms.
- It is important to remind your independent contractors that the materials they are handling are proprietary and confidential. Months after signing a confidentiality agreement, its warnings and instructions may be far from their thoughts. When your company distributes copies of confidential information, write the word “CONFIDENTIAL” in bold letters on the face of the documents.
- Nothing lasts forever, and this is certainly true of contractual relationships. At the end of an independent contractor arrangement, your company should meet with your contractor. At this meeting, the contractor should be reminded of his or her continuing obligations to the company, including that to maintain the confidentiality of information beyond the termination of the governing agreement.
- Review the independent contractor confidentiality agreement carefully. One size does not fit all.

3. Independent Contractor Unilateral Confidentiality and Non-Disclosure Agreement Instructions

The following provision-by-provision instructions will help you understand the terms of your independent contractor unilateral confidentiality and non-disclosure agreement.

The numbers and letters below (e.g., Section 1(a), Section 2, etc.) correspond to provisions in the agreement. Please review the entire agreement before starting your step-by-step process.

- **Introduction of Parties.** Identifies the parties (i.e., the company and the independent contractor). Notice the phrase “For good consideration.” Simply put, for an agreement to be enforceable, each party must benefit from it (in the agreement, this is called “consideration”). In this agreement, the company “gets” the contractor’s promise not to disclose secrets, and the independent contractor “gets” to discuss the potential of starting (or continuing) a contractual relationship with the company. It is best if the agreement is signed prior to the commencement of service contract. If that’s not possible, the agreement should be signed in conjunction with a change in contractual terms.
- **Section 1: Confidential Information.** Review this section very closely to ensure that it provides sufficient security for your company and its proprietary information.
- **Section 1(a): Company Information.** This is the “meat” of the agreement, explaining not only what the company’s confidential information is but also the contractor’s duty not to disclose that information.
- **Section 1(b): Exceptions.** These are listed exceptions to the general rules of non-disclosure. This section details three situations in which a contractor’s disclosure of “confidential information” does not violate the agreement. First: if the “confidential information” has already been made public by someone other than the contractor. Second: if the “confidential information” had been provided to the contractor in a non-confidential manner previously. In other words, the information was provided to

the contractor before he or she signed the agreement, during which time the information either was not considered confidential or was provided in a manner suggesting it was not confidential. Third: if the contractor is legally compelled to provide confidential information. If this is the case, however, the contractor must alert the company immediately, so that it may limit potential damage.

- **Section 1(c): Applicability to Employees and Subcontractors.** Permits the disclosure of the protected information to any employees or subcontractors of the independent contractor who need that information to perform duties on the company's behalf. If the information is disclosed, the contractor must emphasize that it is confidential and require those individuals to sign confidentiality agreements as well.
- **Section 1(d): Former Employment Information.** Keeping information confidential is important for all companies, and you must guard against the misuse of another company's protected information. If an individual uses a former employer's confidential information in the course of his or her work for you, your business could be tainted by this association. This former employment provision reminds your incoming contractors of both their new obligations to you and of their continuing obligations to their former employers.
- **Section 1(e): Third-Party Information.** Informs the contractor that third-party confidential information (in other words, not that of the company, but information learned in the course of the relationship with the company) is also protected under the agreement.
- **Section 2: Return of Property.** This is an extremely important provision, and although it may seem obvious to you that company property should be returned after a contractual relationship is ended, it may not be as obvious to your contractors. It is thus essential to communicate your return policy in the agreement (and reiterate it in your independent contractor agreement itself), stating specifically that independent contractors must return all company property before the contractual relationship is ended.
- **Section 3: No Company Liability.** Indicates that the information being provided is not guaranteed to be accurate, and that company isn't responsible to the independent contractor for the contractor's use of the information it receives.
- **Section 4: Independent Contractors.** Emphasizes that the parties are not (and will not be) in an employment relationship.
- **Section 5: Legal and Equitable Remedies.** Because of the nature of the damages it would suffer if its trade secrets were released, this provision allows the company to seek equitable relief (i.e., court remedies requiring a party to perform or refrain from performing certain acts) to prevent a contractor or other party from distributing additional information. For example, if a former associate of Coke® distributed the "secret formula," it would strike a serious blow against Coke® and its business. In all likelihood, Coke® would seek both damages and an injunction barring further distribution of their protected information.
- **Section 6: Successors and Assigns.** In the life of a company, there may be mergers, acquisitions, or sales of business divisions. On such occasions, the company may assign its agreement to a surviving entity or affiliate without obtaining its contractor's consent. Simply put, if the company is purchased, the new company will not need to renegotiate this agreement: it will continue to be effective as is.

- **Section 7: Continuing Obligations.** This provision reminds the contractor that after the end of the contractual relationship, he or she must maintain the confidentiality of protected information and return any company documents.
- **Section 8: Severability.** Protects the terms of the agreement as a whole, even if one part is later invalidated. For example, if a state law is passed prohibiting notification of future employers, it will not undo the entire agreement. Instead, only the section dealing with notification would be invalidated, leaving the remainder of the agreement enforceable.
- **Section 9: Counterparts/Electronic Signatures.** The title of this provision sounds complicated, but it is simple to explain: essentially, it says that even if the parties sign the agreement in different locations, or use electronic devices to transmit signatures (e.g., fax machines or computers), all of the separate pieces will be considered part of the same agreement. In a modern world where signing parties are often not in the same city - much less in the same room - this provision ensures that business can be transacted efficiently, without sacrificing the validity of the agreement as a whole.
- **Section 10: Governing Law.** Contractors may work in one state and the companies they work with in another. A governing law provision allows the company to choose the state laws that will be used to interpret the agreement. Note that this is not a venue provision: the included language will not impact where a potential claim can be brought. Please write the applicable state in the blank provided.

Remember: although the protection of your business starts with a well-crafted non-disclosure agreement, it doesn't end there. Be vigilant in protecting your intellectual property and deal intelligently with your contractors, business partners, and customers. It takes only one disclosure to alter the landscape of your business permanently.

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**INDEPENDENT CONTRACTOR UNILATERAL CONFIDENTIALITY AND
NON-DISCLOSURE AGREEMENT**

FOR GOOD CONSIDERATION, and in consideration of the contemplated contractual relationship with _____ (the “Company”), _____ (the “Independent Contractor”), hereby agrees to the terms of this agreement (the “Agreement”):

1. CONFIDENTIAL INFORMATION

- (a) **Company Information.** The Independent Contractor agrees at all times during the term of its contract with the Company (the “Term”) and thereafter, to hold in strictest confidence, and not to use, except for the benefit of the Company, or to disclose to any person, firm, or corporation without written authorization of the Company, any Confidential Information of the Company. “Confidential Information” means any Company proprietary information, technical data, trade secrets or know-how, including, but not limited to, research, product plans, products, services, customer lists, markets, software, developments, inventions, processes, formulas, technology, designs, drawings, engineering, hardware configuration information, marketing, finances or other business information disclosed to the Independent Contractor by the Company directly or indirectly.
- (b) **Exceptions.** The foregoing obligations and restrictions do not apply to Confidential Information that the Independent Contractor can demonstrate: