



## NON-DISCLOSURE AGREEMENT (Mutual)

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## 1. Overview

Non-disclosure agreements (also called NDAs or confidentiality agreements) have become increasingly important for businesses of all sizes, serving as the first line of defense in protecting company inventions, trade secrets, and hard work. These agreements are critical not only when confidential information has been wrongly disclosed, but also when such disclosures have not yet occurred.

At their core, non-disclosure agreements build relationships of trust between two or more parties. The agreements contemplate situations in which at least one party is sharing confidential and proprietary information with the other, and protect the immediate and future security of the disclosed information. Once signed, a non-disclosure agreement allows for open dialogue between parties, creating an environment in which information can be discussed freely and the true objectives of the meeting or relationship can be met ( e.g., a company can be funded, a strategic partnership can be established, etc.).

There are two key types of non-disclosure agreements: unilateral and mutual. Unilateral non-disclosure agreements should be used when only one party will be sharing confidential information, as when you are seeking funding for or investment in your company. Mutual non-disclosure agreements (like the agreement contained in this packet) should be used when each side will be sharing confidential information, as when the parties are considering the creation of a partnership, joint venture, or merger.

## 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:

- Protecting proprietary information should be the rule and not the exception. Get in the habit of using a non-disclosure agreement any time there is a possibility sensitive information will be disclosed.
- Instruct all company employees about the importance, security, and protection of confidential information. Wrongful disclosure can happen at any level of your organization.
- Many business owners hesitate to use non-disclosure agreements, fearing they imply suspicion of or doubt about the other party. This is a mistake. Non-disclosure agreements are common in modern business, and most people won't blink if asked to sign one. If someone does object, ask yourself if you truly want to be in business with that person.
- Make at least two copies of the signed agreement, one for you and the remainder for the other parties to the agreement.
- Keep the signed non-disclosure agreement in a safe place. An executed agreement is useless if it can't be found.
- Don't rely on oral promises of confidentiality. They are hard to prove and are harder to enforce.

- In addition to using a non-disclosure agreement, write **“CONFIDENTIAL”** in bold letters on any documents with proprietary information. This will remind everyone of the nature of the information and of their obligation to protect it.
- Review the non-disclosure agreement carefully. One size does not fit all.

### 3. Mutual Non-Disclosure Agreement Instructions

The following provision-by-provision instructions will help you understand the terms of your mutual non-disclosure agreement.

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

- **Introduction of the Parties.** Identifies the parties and the date of the agreement. An additional blank is provided for each party to identify their company’s structure and state of formation (if applicable). If a party is not a corporation, ignore the additional blank.
- **Section 1: Purpose.** Identifies the specific purpose for which the confidential information is being disclosed. By identifying the agreement’s purpose, the parties ensure any information provided will be used only to achieve authorized objectives. Note that because this is a “mutual” non-disclosure agreement, multiple parties are disclosing information. Thus, either party can be a “disclosing party” or a “receiving party,” depending the occasion. Don’t get hung up on labels; both parties are subject to the same rules. If confidential information will be provided by one party only, use a unilateral non-disclosure agreement and not the enclosed form.
- **Section 2: Confidential Information.** Defines “confidential information” for agreement purposes.).
- **Section 3(a): Recipient’s Treatment of Confidential Information.** Explains how a recipient will treat the confidential information. Note two important details: (1) A recipient can use the information only for purposes intended by the agreement (e.g., if the information was disclosed to determine whether to enter into a joint partnership, the information can be used only for that purpose); and (2) A recipient can give the information only to certain individuals in its own organization.
- **Section 3(b): Tangible Confidential Information.** Indicates how a recipient must handle physical representations of confidential information (e.g., drawings, disks, or reports, and not conversations or presentations).
- **Section 3(c): Exceptions.** These are listed exceptions to the general rules in a non-disclosure agreement. This section details four situations in which a party’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 receiving party. Second: if the “confidential information” had been provided to the receiving party in a non-confidential manner previously. In other words, the information was provided to the receiving party 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 receiving party is legally compelled to provide

confidential information. If this is the case, however, the receiving party must alert the disclosing party immediately, so that it may limit potential damage. Fourth: if the confidential information was independently developed by the receiving party without breaching the agreement. In other words, the receiving party generated the same information without reference to protected data. The fourth exception is included because many financiers, investors, and business owners will require it.

- **Section 4: Term.** States that the receiving party must treat the confidential information as confidential for five years after it is provided.
- **Section 5: No License.** Restates that the confidential information is being communicated for a specific business purpose only. In other words, the receiving party does not receive any ownership rights to the information through this agreement.
- **Section 6: No Publicity.** Indicates the parties will keep their dealings confidential. This is typically used for joint ventures, acquisition, mergers, and similar arrangements, where disclosure of the relationship could diminish the value of a company or its business.
- **Section 7: Governing Law and Equitable Relief.** Allows the parties 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. The provision also allows the parties to seek equitable relief (i.e., court remedies requiring a party to perform or refrain from performing certain acts) for any violation of the agreement.
- **Section 8: Entire Agreement.** The parties' agreement that the document they're signing is "the agreement" about the confidential information. In other words, if previous agreements or promises surface, the signed agreement will control. The clause also requires any changes to be in writing and signed by all parties.
- **Section 9: No Assignment.** Indicates that no party can assign transfer his or her obligations under the agreement to a third party.
- **Section 10: 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 choice-of-law provisions, it will not undo the entire agreement. Instead, only the section dealing with choice of law would be invalidated, leaving the remainder of the agreement enforceable.
- **Section 11: Notices.** Lists the addresses to which all official or legal correspondence will be delivered.
- **Section 12: No Implied Waiver.** Explains that if the disclosing party ignores or allows the receiving party to break an obligation related to the confidential information, it does not mean the disclosing party waives future rights to enforce the same obligations.
- **Section 13: Headings.** Notes that the headings at the beginning of each section are meant to organize the document, and should not be considered operational parts of the agreement.

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 employees, business partners, and customers. It takes only one disclosure to alter the landscape of your business permanently.

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MUTUAL NON-DISCLOSURE AGREEMENT

This Mutual Non-Disclosure Agreement (the "Agreement") is made and effective as of \_\_\_\_\_, 20\_\_ by and between \_\_\_\_\_ corporation and \_\_\_\_\_, a \_\_\_\_\_ corporation.

1. Purpose.

The parties wish to engage in discussions relating to: \_\_\_\_\_ (the "Authorized Purpose"). In relation with this Authorized Purpose, each party will disclose certain of its "Confidential Information" (defined below) to the other. Hereafter, with respect to any specific item of information, the party disclosing such information shall be referred to as the "Disclosing Party" and the party receiving such information shall be referred to as the "Receiving Party."

2. Confidential Information.

"Confidential Information" shall include all data, materials, products, technology, computer programs, specifications, business plans, software, marketing plans, business plans, financial information, and other information disclosed or submitted, orally, in writing, or by any other medium from the Disclosing Party to the Receiving Party. Confidential Information disclosed orally shall be identified by the Disclosing Party as such within thirty (30) days of disclosure. Nothing herein shall require the parties to disclose any of their information.

3. Recipient's Obligations.

(a) Recipient's Treatment of the Confidential Information