



EMPLOYMENT CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

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Employment Confidentiality & 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).

A comprehensive employee confidentiality (or non-disclosure) agreement is thus critical to protecting your information, giving notice to all of your staff members that they have a serious and ongoing duty 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 an employment relationship alerts a prospective employee that your company considers this a tremendously important matter. By signing the agreement, the employee acknowledges that the disclosure of confidential information is a breach of his or her employment 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 employment, 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 an employee confidentiality agreement is of the first of many steps in establishing a healthy, professional, and dispute-free workplace. The following tips will provide additional guidance about protecting your company and its employees:

- Allow applicants 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 the applicant did not understand the agreement's terms.
- Sign two copies of the agreement, one for you and one for the employee.
- Employment agreements, including confidentiality agreements, should be signed before an employee starts working. However, if the employee has been with the company for some time, a confidentiality agreement should be signed in conjunction with a raise, bonus, or promotion.
- A confidentiality agreement should be kept in the employee's file, together with other important personnel documents (including employment agreements, invention assignments, progress reports, and disciplinary actions).

- It is important to remind employees 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. As a part of your workplace’s “best practices,” instruct your human resources department to hold annual meetings to review important employee policies, including those governing confidentiality. Make and file a list of meeting attendees. In addition, 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 employment. At the end of an employment relationship, your company should conduct an exit interview. At this meeting, the employee 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 employment period.
- Review the employment confidentiality agreement carefully. One size does not fit all.

3. Employment Confidentiality and Non-Disclosure Agreement Instructions

The following provision-by-provision instructions will help you understand the terms of your employment confidentiality and 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 Parties.** Identifies the parties (i.e., the company and the employee). 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 employer “gets” the employee’s promise not to disclose secrets, and the employee “gets” employment (or continuing employment) from the company. It is best if the agreement is signed prior to the commencement of employment. If that’s not possible, the agreement should be signed in conjunction with a raise, bonus or promotion.
- **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 employee’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 an employee’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 employee. Second: if the “confidential information” had been provided to the employee in a non-confidential manner previously. In other words, the information was provided to the employee 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 employee is legally compelled to provide confidential information. If this is the case, however, the employee must alert the employer immediately, so that it may limit potential damage.

- **Section 1(c): 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 employee 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 incoming employees of both their new obligations to you and of their continuing obligations to their former employers.
- **Section 1(d): Third-Party Information.** Informs the employee that third-party confidential information (in other words, not that of the company, but information learned in the course of employment 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 an employee's termination, it may not be as obvious to your employees. It is thus essential to communicate your return policy in the agreement (and reiterate it in your employee handbook, exit materials, and severance agreements), stating specifically that employees must return all company property before leaving your employ.
- **Section 3: Notification of Future Employer.** As noted above, even after an employment relationship has ended, an employee may have continuing obligations to a former employer. His or her duty to protect proprietary information does not conclude at the end of their employment. This provision makes clear that the company can inform an employee's future employers about these continuing duties.
- **Section 4: 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 employee or other party from distributing additional information. For example, if a former employee 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 5: 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 the employee'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 6: Continuing Obligations.** This provision reminds the employee that after termination, he or she must maintain the confidentiality of protected information and return any company documents.
- **Section 7: 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 8: 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 9: Governing Law.** Employees may work in one state and their employer in another. A governing law provision allows the employer 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.

A company that uses the tools provided in this package can foster a work environment that stresses employee obligations and duties about confidentiality. This knowledge and awareness can limit careless disclosures and protect your business. The greater the employee's understanding of the consequences of a breach, the more seriously they will take their duties and obligations. And if your confidential information is disclosed, you will have taken a large step towards defending your company and providing the documentation needed to protect your business.

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**EMPLOYEE CONFIDENTIALITY AND
NON-DISCLOSURE AGREEMENT**

FOR GOOD CONSIDERATION, and in consideration of my employment and continued employment by _____ (the "Company"), I, the undersigned employee, hereby agree to the terms of this agreement (the "Agreement").

1. CONFIDENTIAL INFORMATION

(a) **Company Information.** I agree at all times during the term of my employment 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. I understand that "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 programs, inventions, processes, formulas, technology, designs, drawings, engineering, hardware configuration information, marketing, finances or other business information disclosed to me by the Company either directly or indirectly.

(b) **Exceptions.** The foregoing obligations and restrictions do not apply to that part of the Confidential Information that I can demonstrate:

(i) was available or became generally available to the public as a result of a disclosure by me; or

(ii)