



Key Issues in Non-Disclosure Agreements (Receiving Side)



Are you being asked to sign a confidentiality or non-disclosure agreement (NDA)? These agreements can be several pages long and have lots of boilerplate language. But companies are often asked to sign dozens of them per year, and those companies do not want to waste a lot of time or legal resources reviewing them. Below are the key provisions to look out for when reviewing a NDA.

Description of Confidential Information

When signing a NDA, try to specify and limit the types of information which are to be covered by the NDA. A narrow tailoring of the definition of confidential information will help head off misunderstandings and allow for more effective monitoring of your obligations.

Term

Every NDA you sign should have a specified term after which you no longer have any responsibility. The idea is not that you plan on disclosing confidential information of a party, but that after a significant period of time, it become difficult to monitor and police dissemination of information. Also, confidential information tends to go stale, and a party should not have to worry about safeguarding stale information.

Liability of Employees and Agents

Watch out for NDAs that purport to establish personal liability for unauthorized disclosures by employments or agents, or which require the receiving company to get specific signed acknowledgements from employees and agents. The receiving company should be responsible for disclosures by its employees and agents, but those employees and agents should have no personal liability.

Required Disclosure

Every NDA you sign should have a provision that allows you to disclose confidential information if required by law or legal process. Many proposed NDAs do have this provision, but add troubling provisions requiring a "written opinion of counsel" before disclosure or that the receiving company seek a protective order or confidential treatment of the information. Written opinions are expensive and difficult to obtain; "written opinions of counsel" should be changed to "advice of counsel." Protective orders and confidential treatment are acceptable so long as reasonable and at the expense of the party whose confidential information is to be disclosed.

No Punitive Damages

Make sure every NDA you sign has a provision that explicitly disclaims punitive, incidental, exemplary, consequential, special or indirect damages. No company wants to be fighting about punitive or consequential damages with respect to an inadvertent disclosure that caused no direct damages.

Obviously, there are potentially many other subtler points to discuss in the context of NDAs, depending on the size and scope of the contemplated disclosure. However, paying attention to the points addressed above will maximize your company's legal protection with minimal expenditure of resources.

For more information, please contact:



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