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Dunner Law PLLC

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Do Not Tell Anyone: An Overview of Non-Disclosure Agreements

You have an invention, a creative work, or some other kind of intellectual property and you want to partner with another company to do business — maybe to produce your proposed invention or product, maybe to provide a specific component, or maybe just to handle marketing for your idea. How do you reach out to different companies confidentially and still protect your intellectual property? Ideally, you and the company you approach would enter into a written Non-Disclosure Agreement (NDA) that would allow you to openly discuss your business plans without fear of the other company taking your ideas and putting them to practice before you do.

What Exactly Is a NDA?

A NDA is a contract between two parties in which both parties (or just the party receiving the information) agree to keep specific information confidential. The benefit of a reciprocal NDA is that it facilitates open communication between the parties as the proposed business deal is being discussed.

Not everything can be kept confidential under a NDA. Marketing plans, business plans, financial information, correspondence between the parties, and information designated confidential by either party can be protected. However, a NDA will not protect information that becomes publicly available,

confidential information a party discovers through legal independent means, information that a party deems not confidential, nor any information ordered disclosed due to a court order.

Key Elements

There are certain key terms in a NDA, and these terms should be tailored to best protect your business. Here are some of those important terms:

Your Business Name

Ideally, the agreement should be between your company (as opposed to you as an individual) and the company you approach. This assumes that your company owns the intellectual property at issue. Having the agreement in your company name versus your individual name minimizes your personal liability should you be accused of breaching the agreement.

Description of Your Intellectual Property

Your intellectual property or your business idea, which is the subject of the NDA, should be described as broadly as possible. A broad description will help to maintain confidentiality around your assets as well as potentially cover any broadly related ideas that you discuss. The agreement is only as good as the terms, so the terms must be clear and unambiguous.

A NDA allows you to openly discuss your business plans without fear of the other company taking your ideas and putting them to practice before you.

Defining “Confidential Information”

This term determines the scope of what can and cannot be kept confidential, so it should be clear and concise.

Duration

The duration of a NDA is mutually determined by the parties. You can structure the agreement to end in conjunction with the business relationship, or if the relationship is ongoing, it can last for a specific agreed-upon period. Generally, however, a NDA lasts anywhere from two to five years, but the term may vary with the nature of the disclosed ideas. For example, the term for trade secrets can be indefinite, protecting the information until it is no longer secret. In contrast, a NDA covering information that will be disclosed publicly in the future, like information covered in a patent application, would have a more limited duration.

Governing Law

This term refers to the body of law of a particular jurisdiction that will apply should the parties end up in a dispute. Parties can choose which law will govern the NDA, and typically, courts will uphold the parties' choice of law provision.

What If the Other Business Has Its Own NDA?

Many companies you approach may want you to sign their NDA. In that event, make sure the NDA is reciprocal

(e.g., any restrictions on your disclosure should also apply to them). Also, have an attorney review the other company's NDA before you sign it to ensure that you will be adequately protected.

Conclusion

Some companies will not sign any NDA, whether it is yours or theirs. You should be leery of proceeding under such circumstances, because any information you disclose will not be protected. If you value your intellectual property and your proposed ideas, then you really should only proceed under an adequate NDA.