

# What is a Confidentiality Agreement?

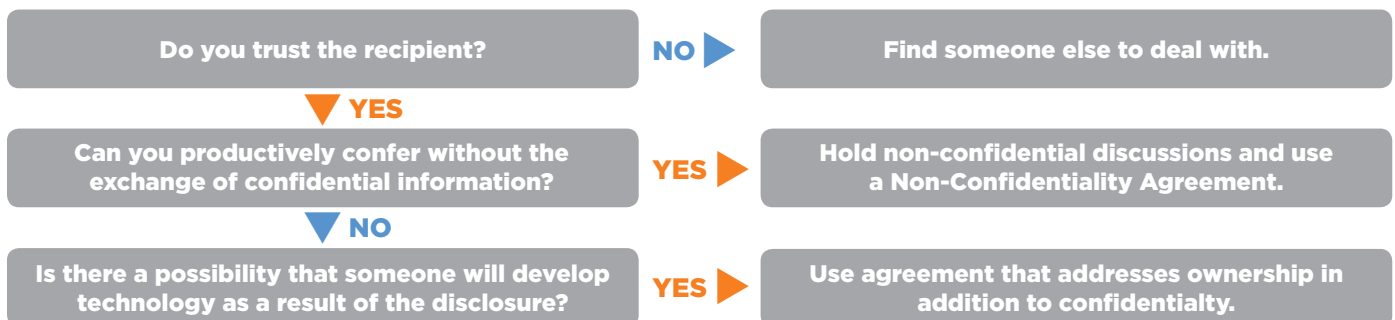
A confidentiality agreement is a promise to keep disclosed information secret. Having a confidentiality agreement also allows the discloser to protect the information as a trade secret, proving that he or she took reasonable steps “under the circumstances” to protect the information, as is required by both state and federal law for bringing a trade secret lawsuit. Disclosing information without a confidentiality agreement generally means that that information can no longer be protected.

A confidentiality agreement does not prevent the disclosure of confidential information — it merely allows the discloser to sue someone who breaches the agreement. For this reason, one should only include information that is absolutely necessary to accomplish the purpose for which the disclosure is made. It also important to remember that a confidentiality agreement is not going to magically transform an untrustworthy recipient into a trustworthy recipient. Disclosures should therefore only be made to parties who can be trusted.

At best, a confidentiality agreement only protects the secrecy of information, and may not be what the situation calls for. If a disclosure is made to a third party who could make inventions or improvements relating to the disclosed information, for example, a confidentiality agreement will need to be supplemented with an agreement that addresses the ownership of any subsequent inventions or improvements.

## OTHER KEY POINTS TO REMEMBER:

- Confidentiality agreements should be put in writing and be effective before any disclosure of confidential information is made.
- Even with a confidentiality agreement, you should only disclose what is absolutely necessary to accomplish your purpose, and only to those who absolutely need to know the information.
- Do not assume that a confidentiality agreement is what you need; the agreement may need to be broader to fully protect your rights.





# Confidentiality Agreement Checklist

- Is a confidentiality agreement appropriate for the purpose or is some other type of agreement, for example a development agreement, more appropriate?
- Are the parties correctly identified?
- Is the effective date of the Agreement clear?
  - Is it appropriate?
  - Any need to backdate the Agreement?
- Is the definition of the protected subject matter adequate?
- Are the requirements for protected information reasonable?
  - Marking?
  - Written follow up for oral disclosures?
- Is there an express promise not to *disclose* the protected information?
- Is there an express promise not to *use* the protected information?
- Are the permitted uses of the information clearly defined?
- How long does the Agreement last?
- How long do the confidentiality obligations last?
- Are the exceptions to the confidentiality obligations reasonable?
  - Publicly known information
  - Disclosed by third party
  - Independently developed
- Is there a choice of law?
  - Is it appropriate?
- Is there a choice of forum?
  - Is it appropriate?
- Is there an indemnity provision?
- Is there an obligation to return or destroy the confidential information?
- Is there a disclaimer regarding the information?
- Is there a reservation of rights clause?
- Does the signatory have the power to bind the party?
- Is the Agreement assignable?