

# Non-disclosure agreement

A **non-disclosure agreement (NDA)**, also known as a **confidentiality agreement (CA)**, **confidential disclosure agreement (CDA)**, **proprietary information agreement (PIA)**, or **secrecy agreement (SA)**, is a [legal contract](#) or part of a contract between at least two [parties](#) that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to. [Doctor–patient confidentiality](#) (physician–patient privilege), [attorney–client privilege](#), [priest–penitent privilege](#) and [bank–client confidentiality](#) agreements are examples of NDAs, which are often not enshrined in a written contract between the parties.



Many [banking institutions](#) maintain client privacy through confidentiality agreements. Some, akin to [attorney–client privilege](#), offer [banker–client privilege](#).

It is a contract through which the parties agree not to disclose any information covered by the agreement. An NDA creates a confidential relationship between the parties, typically to protect any type of confidential and proprietary information or [trade secrets](#). As such, an NDA protects non-public business information. Like all contracts, they cannot be enforced if the [contracted activities are illegal](#). NDAs are commonly signed when two companies, individuals, or other entities (such as partnerships, societies, etc.) are considering doing business and need to understand the processes used in each other's business for the purpose of evaluating the potential business relationship. NDAs can be "mutual", meaning both parties are restricted in their use of the materials provided, or they can restrict the use of material by a single party. An employee can be required to sign an NDA or NDA-like agreement with an employer, protecting trade secrets. In fact, some employment agreements include a clause restricting employees' use and dissemination of company-owned confidential information. In legal disputes resolved by [settlement](#), the parties often sign a confidentiality agreement relating to the terms of the settlement.<sup>[1][2]</sup> Examples of such agreements are The Dolby Trademark Agreement with [Dolby Laboratories](#), the Windows Insider Agreement, and the [Halo CFP](#) (Community Feedback Program) with [Microsoft](#).

In some cases, employees who are dismissed following their complaints about unacceptable practices ([whistleblowers](#)), or discrimination against and harassment of themselves, may be paid

compensation subject to an NDA forbidding them from disclosing the events complained about. Such conditions in an NDA may not be enforceable in law, although they may intimidate the former employee into silence.<sup>[3]</sup>

A similar concept is expressed in the term "non-disparagement agreement", which prevents one party from stating anything 'derogatory' about the other party.<sup>[4]</sup>

## General types

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A non-disclosure agreement (NDA) may be classified as unilateral, bilateral, or multilateral:

### Unilateral

A unilateral NDA (sometimes referred to as a one-way NDA) involves two parties where only one party (i.e., the disclosing party) anticipates disclosing certain information to the other party (i.e., the receiving party) and requires that the information be protected from further disclosure for some reason (e.g., maintaining the secrecy necessary to satisfy patent laws<sup>[5]</sup> or legal protection for trade secrets, limiting disclosure of information prior to issuing a press release for a major announcement, or simply ensuring that a receiving party does not use or disclose information without compensating the disclosing party).

### Bilateral

A bilateral NDA (sometimes referred to as a mutual NDA, MNDA, or a two-way NDA) involves two parties where both parties anticipate disclosing information to one another that each intends to protect from further disclosure. This type of NDA is common for businesses considering some kind of joint venture or merger.

When presented with a unilateral NDA, some parties may insist upon a bilateral NDA, even though they anticipate that only one of the parties will disclose information under the NDA. This approach is intended to incentivize the drafter to make the provisions in the NDA more "fair and balanced" by introducing the possibility that a receiving party could later become a disclosing party or vice versa, which is not an entirely uncommon occurrence.

### Multilateral

A multilateral NDA involves three or more parties where at least one of the parties anticipates disclosing information to the other parties and requires that the information be protected from further disclosure. This type of NDA eliminates the need for separate unilateral or bilateral NDAs

between only two parties. E.g., a single multiparty NDA entered into by three parties who each intend to disclose information to the other two parties could be used in place of three separate bilateral NDAs between the first and second parties, second and third parties, and third and first parties.

A multilateral NDA can be advantageous because the parties involved review, execute, and implement just one agreement. This advantage can be offset by more complex negotiations that may be required for the parties involved to reach a unanimous consensus on a multilateral agreement.

## Content

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A NDA can protect any type of information that is not generally known. They may also contain clauses that will protect the person receiving the information so that if they lawfully obtained the information through other sources they would not be obligated to keep the information secret.<sup>[6]</sup> In other words, the NDA typically only requires the receiving party to maintain information in confidence when that information has been directly supplied by the disclosing party

Some common issues addressed in an NDA include:<sup>[7]</sup>

- outlining the parties to the agreement;
- whether confidential information must be labeled as confidential
- the definition of what is confidential, i.e. the information to be held confidential. Modern NDAs will typically include a [laundry list](#) of types of items that are covered, including unpublished [patent applications](#), know-how, schema, [financial](#) information, verbal representations, customer lists, vendor lists, business practices/strategies, etc.;
- the disclosure period – information not disclosed during the disclosure period (e.g., one year after the date of the NDA) is not deemed confidential;
- the exclusions from what must be kept confidential. Typically, the restrictions on the disclosure or use of confidential data will be invalid if
  - the recipient had prior knowledge of the materials;
  - the recipient gained subsequent knowledge of the materials from another source;
  - the materials are generally available to the public; or
  - the materials are subject to a [subpoena](#)
- provisions restricting the transfer of data in violation of laws governing export control and [national security](#);
- the term and conditions (in years) of the confidentiality, i.e. the time period of confidentiality;

- the term (in years) the agreement is binding;
- permission to obtain [ex-parte injunctive relief](#);
- description of the actions that need to be done with the confidential materials upon the agreement ending;
- what/when it can be modified by a court
- the obligations of the recipient regarding the confidential information, typically including some version of obligations:
  - to use the information only for enumerated purposes;
  - to disclose it only to persons with a need to know the information for those purposes;
  - to use appropriate efforts (not less than reasonable efforts) to keep the information secure. Reasonable efforts is often defined as a standard of care relating to confidential information that is no less rigorous than that which the recipient uses to keep its own similar information secure; and
  - to ensure that anyone to whom the information is disclosed further abides by obligations restricting use, restricting disclosure, and ensuring security at least as protective as the agreement; and
  - destruction or return upon request
- types of permissible disclosure – such as those required by [law](#) or [court order](#) (many NDAs require the receiving party to give the disclosing party prompt notice of any efforts to obtain such disclosure, and possibly to cooperate with any attempt by the disclosing party to seek judicial protection for the relevant confidential information).
- the law and [jurisdiction](#) governing the parties. The parties may choose exclusive jurisdiction of a court of a [country](#).
- whether or not juries, arbitration allowed
- who owns or has rights over the information

## Law and practice by jurisdiction

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### Australia

[Deeds](#) of confidentiality and fidelity (also referred to as deeds of confidentiality or confidentiality deeds) are commonly used in [Australia](#). These documents generally serve the same purpose as and contain provisions similar to NDAs used elsewhere.

## India

NDA's are used in [India](#).<sup>[8]</sup> They have been described as "an increasingly popular way of restricting the loss of R&D knowledge through employee turnover in Indian IT firms".<sup>[8]</sup> They are often used by companies from other countries who are [outsourcing](#) or [offshoring](#) work to companies in India.<sup>[9][10]</sup> Companies outsourcing research and development of [biopharma](#) to India use them, and Indian companies in pharmaceuticals are "competent" in their use.<sup>[11][12]</sup> In the [space industry](#), NDAs "are crucial".<sup>[13]</sup> "Non-disclosure and confidentiality agreements ... are ... generally enforceable as long as they are reasonable."<sup>[14]</sup> Sometimes NDAs have been [anti-competitive](#) and this has led to legal challenges.<sup>[15]</sup>

## United Kingdom

In the [United Kingdom](#), the term "back-to-back agreement" refers to an NDA entered into with a third party who legitimately receives confidential information, putting them under similar non-disclosure obligations as the initial party granted the information. [Case law](#) in a 2013 [Court of Appeal](#) decision (*Dorchester Project Management v BNP Paribas*) confirmed that a confidentiality agreement will be interpreted as a contract subject to the [rules of contractual interpretation](#) which generally apply in the English courts.<sup>[16]</sup>

NDAs are often used as a condition of a financial settlement in an attempt to silence whistleblowing employees from making public the misdeeds of their former employers. There is law, the [Public Interest Disclosure Act 1998](#), which allows "protected disclosure" despite the existence of an NDA, although employers sometimes intimidate the former employee into silence despite this.<sup>[3][17]</sup>

In some legal cases where the conditions of a confidentiality agreement have been breached, the successful party may choose between [damages](#) based on an account of the commercial profits which might have been earned if the agreement had been honoured, or damages based on the price of releasing the other party from its obligations under the agreement.<sup>[18]</sup>

Commercial entities entering into confidentiality agreements need to ensure that the scope of their agreement does not go beyond what is necessary to protect commercial information. In the case of *Jones v Ricoh*, heard by the [High Court](#) in 2010, Jones brought an action against the photocopier Ricoh for breach of their confidentiality agreement when Ricoh submitted a [tender](#) for a contract with a third party. Ricoh sought release from its obligations under the agreement via an application for [summary judgment](#), and the court agreed that the relevant wording "went further than could reasonably be required" to protect commercial information. The agreement was held to be in breach of [Article 101 of the Treaty on the Functioning of the European Union](#), which prohibits

agreements which had the object or effect of distorting competition, and was therefore unenforceable.<sup>[19]</sup>

## United States

NDAs are very common in the United States, with more than one-third of jobs in America containing an NDA. The [United States Congress](#) passed the [Speak Out Act](#) in 2022, which prohibits them in regard to [sexual harassment](#) and [sexual assault](#), and the bill was signed into law by President [Joe Biden](#) on December 7, 2022.<sup>[20]</sup>

Some states, including [California](#), have special circumstances relating to NDAs and [non-compete clauses](#). [California's courts](#) and [legislature](#) have signaled that they generally value an employee's mobility and entrepreneurship more highly than they do protectionist doctrine.<sup>[21][22]</sup>

## See also

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- [Arrow information paradox](#)
- [Attorney–client privilege](#)
- [Bank–client confidentiality](#)
- [Due diligence](#)
- [Gag order](#)
- [Non-compete clause](#)
- [Physician–patient privilege](#)
- [Severance package](#)

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## Further reading

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## External links

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- Confidentiality and Confidential Disclosure Agreements (CDA) (<https://web.archive.org/web/20051025082007/http://www.patent.gov.uk/patent/info/cda.pdf>) booklet edited by the UK Intellectual Property Office - (2005-01)
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