
Non-Disclosure and Confidentiality Agreements

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**Debevoise
& Plimpton**

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HELPING COMMUNITIES THRIVE, ONE ENTREPRENEUR AT A TIME

Agenda

- Introduction to Start Small Think Big
- Select Issues in Non-Disclosure and Confidentiality Agreements
 - Overview
 - Types of NDAs
 - Elements and Key Provisions
 - Commonly Negotiated Terms
 - Practical Considerations in Negotiations
 - Confidentiality Provisions

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Introduction to Start Small Think Big

Overview

Who We Are

- Start Small Think Big is a nonprofit organization focused on pairing small business owners positioned to grow their businesses with top pro bono attorneys and financial and marketing experts, at no cost to our clients
- We believe that access to high-quality legal, financial management, and marketing services is an essential part of starting or growing a successful small business

Who We Serve

- We work with under-resourced small business owners

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Client Eligibility Criteria

Eligible Business Stage & Size

- Currently selling goods and/or services (sales over the past 3 months of at least \$500) *OR* have a legal impediment that is keeping them from doing so
- Where sales have dropped because of COVID-19 crisis, we consider evidence of sales during the 3 months prior to March 2020
- No more than \$1M in business revenue over previous 12 months

Eligible Under-Resourced Business Owners

- Household income generally less than 500% of the Federal Poverty Guidelines
- Household assets generally less than \$50,000
- Focus on entrepreneurs from traditionally under resourced communities (identifying for example as people of color, immigrants, women, LGBTQ+, with disability, veterans, etc.) and small businesses helping to create jobs in or provide services to under-resourced communities

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What We Offer

Legal

- Legal information in-house and legal assistance through tailored referrals to volunteer pro bono attorneys and workshops
- Issue areas include business entity formation, corporate governance guidance, contract review and drafting, commercial lease review, intellectual property issues, employment law matters, etc.

Business and Financial

- In-house and pro bono financial advisors for assistance with small business financial management (bookkeeping advice, business and financial modeling, etc.) and workshops

Marketing

- In-house and pro bono marketing advisors and workshops
- Connection to vending opportunities such as online features, tastings, pop up shops, markets and fairs, business-to-business sales, etc.

What We Offer

Capacity Building for Small Business Owners

- **Free 12-month client engagement** with access to SSTB staff and resources
- **Free classes and workshops** on financial, legal and marketing for small businesses, often offered in collaboration with top industry and community partners
- **Agenda and links** to programming available at <https://www.startsmallthinkbig.org/workshops-classes>

Start Small Think Big Client Application

<https://www.startsmallthinkbig.org/become-a-client>

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Response to COVID-19

COVID-19 Rapid Response Program (“RRP”)

- **Fast tracked, walk-in style** support for small business impacted by COVID-19 and in need of immediate assistance (contract and legal compliance issues, loan/grant applications, financial statement review, website audit, etc.)
- **RRP assistance request form** available at <https://covid19.startsmallthinkbig.org/request/>

COVID-19 Online Resource Hub

- Links to webinars, presentation, articles, and other small business resources in light of COVID-19 collected on website and regularly updated
- **Online resource hub** available at <https://www.startsmallthinkbig.org/covid19>

Select Issues in Non-Disclosure and Confidentiality Agreements

Non-Disclosure and Confidentiality Agreements

- **What are they?**
 - Legal contracts between parties that define “confidential information” and limit the way it can be used
- **Why do you need them?**
 - To protect information which you don’t want generally known, but may have to disclose in the ordinary course of your business

Different Types of NDAs

- Employee
 - Scene 1: Employee tells his friend (who is also his landlord) about a new deal his food company has with a major distributor to put them in 1000 stores, in exchange for free rent for a year.
- Vendor
 - Scene 2: Vendor is not able to sell you the baseball caps you ordered in time under your contract. You already rented a stand to sell them near Yankees Stadium. Vendor is threatening to go to the local paper and social media with how much you are raising the price before selling the baseball caps to Yankees fans.
- Client
 - Scene 3: Client has access to your name and logo, and sells your golf balls through their shop under a written agreement. Client decides to put your company name on a cheaper golf ball that it starts to sell.

Elements and Key Provisions of NDAs

- Parties
 - Legal contract between two or more parties that outlines confidential information.
- Definition of “confidential information”
 - Any non-public information or material disclosed or provided by one party to the other, either orally or in writing or obtained by the recipient party from a third party or any other source concerning any aspect of the business or affairs of the other party or its affiliates.
- Disclosure and use of confidential information
 - All use of confidential information by the receiving party must be used for the sole benefit of the disclosing party.

Elements and Key Provisions of NDAs

- Term
 - Typically the confidential information is protected for one to three years but is up to the parties involved to decide on the length of confidentiality.
- Breaches/Remedies
 - If NDA has been breached the wronged party can sue for breach of contract seeking legal action under the state law that governs the contract.
 - Monetary damages.

Commonly Negotiated Terms of NDAs

- **Representatives/Agents**

- If confidential information will be disclosed to a third party, this person/entity should be specifically listed in the NDA.
- *Examples of third parties: Business partners, financial advisors, accountants, etc.*

- **Term**

- This is the period of time that the agreement remains in effect and is dependent upon the industry and type of confidential information shared.

Commonly Negotiated Terms of NDAs

- **Return of confidential information**

- Parties often ask for confidential information to be returned or destroyed once it is no longer necessary. If any information is kept, the agreement should state that the confidentiality obligations are still in effect.

- **Non-solicitation**

- This restricts one party from poaching employees from the other party.
- *Examples of restrictions: Employee type, Geography, Time*

Practical Considerations in Negotiations

- Provide necessary protections under the circumstances, but not more.
 - Have an attorney present to review contract.
 - Understand the length of protection and what information it protects.
- Consider whether other provision, or special protections are advisable (i.e. client's industry or any other particular concerns)
 - For example
 - » In the Food industry provisions related to recipes and non-compete clauses are often heavily negotiated.
 - » In the Technology industry protections for copyrights, trademarks and patents are often heavily negotiated.

Confidentiality Provisions

- How to apply basic principles of an NDA
 - Parties
 - Definition of “confidential information”
 - Disclosure and use of confidential information
 - Term
 - Breaches/Remedies
- Who you should and should not share information with
 - Advisors, Data Sellers and Restricted Persons
 - Back-to-Back Restrictions
- How to restrict but not ban the sharing of information
 - Need-to-Know Basis
 - Notice vs. Approval
 - Inability to maintain confidentiality under law

Questions?

Thank you