

# ARE NDAs RIGHT FOR YOUR BUSINESS? AN EMPLOYER'S 8-STEP PLAN FOR DEPLOYING LEGALLY SOUND NON-DISCLOSURE AGREEMENTS

Insights  
Jun 1, 2026

## Are NDAs Right for Your Business? An Employer's 8-Step Plan for Deploying Legally Sound Non-Disclosure Agreements

The White House's recent push to require all federal employees to sign non-disclosure agreements may have you wondering whether NDAs might be right for your organization. While they're one of your most powerful tools for protecting confidential business information, trade secrets, and competitive advantages, they're also one of the easiest agreements to get wrong. Here's an eight-step plan for deploying effective and legally compliant NDAs.

### 1. If an Employee Accesses Confidential Information, Use an NDA

If an employee has any access to confidential business information, then you should have them sign an NDA. They are your first line of defense against trade secret theft. These agreements are generally subject to far less scrutiny than non-compete agreements and can appropriately be used with a broader subset of employees. Trade secret laws require that employers take reasonable measures to protect the secrecy of their sensitive information, and having an NDA in place could help you make such a case. NDAs also have educational value if they list the information that is most important to your business. An employee reading the agreement will know what your company values.

### Related People



**Jonathan Crook**

Partner

704.334.9313



**Michael P. Elkon**

Partner

404.240.5849

## 2. Consider Timing When Asking Employees to Sign an NDA

An NDA presented to a new hire as a condition of employment generally stands on solid legal ground. But if you're asking a current employee to sign one for the first time, you may need to provide something of value in exchange (like a raise, a bonus, a promotion, etc.), depending on state law. Before you assume your agreements are protecting you, confirm that each one was supported by adequate consideration at the time of signing.

## 3. Don't Go Overboard in Defining What's "Confidential"

You may be tempted to define "confidential information" as broadly as possible in your NDAs to get the greatest amount of business protection. That can backfire. Some courts will treat overly broad NDAs as "de facto" non-compete agreements, particularly where they seek to prevent the employee from using publicly available information that anyone in the industry has access to. Be sure to include appropriate definitions that protect what you need to protect, without going so far as to threaten the enforceability of the entire agreement.

## 4. Treat Non-Disparagement Clauses Separately

Employers often bundle non-disparagement provisions into NDAs, particularly in severance agreements. But these carry their own distinct legal risks and should be treated accordingly. The National Labor Relations Board (NLRB) has taken an aggressive stance on non-disparagement clauses that could be read to chill protected concerted activity among non-management employees, and several states have enacted their own restrictions. So don't lump non-disparagement language into your NDA without careful thought and approval from your counsel.

## 5. Include Required Carve-outs and Whistleblower Protections

Although NDAs may seem "standard," they trigger a minefield of state and federal regulations that could impose substantial liability for noncompliance.

- [Federal law](#) and several states prohibit employers from attempting to limit the disclosure of information relating to sexual assault and harassment.

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- Some state laws go even further and prohibit NDAs from stifling discussion of conduct that the employee believes is unlawful.
- Several federal agencies (including most notably the Securities and Exchange Commission) impose strict whistleblower requirements on these agreements and can impose hefty penalties on employers who fail to include them in their agreements.
- The NLRB pays attention to NDAs with non-management employees that could potentially discourage discussions about terms and conditions of employment.
- And the federal Defend Trade Secrets Act requires a specific disclosure in employee NDAs in order to allow the employer to win exemplary damages and attorneys' fees in misappropriation cases brought under the statute.

**This list isn't exhaustive.** Before you develop NDAs for your business and your specific employees, work with your FP counsel to make sure you have crafted your agreements to account for these and other laws.

## **6. Get Specific with AI Restrictions**

The AI revolution has created a new front in the battle against trade secret theft, and you need to keep up. The NDAs you used even a few years ago are likely insufficient to address the myriad risks related to AI use in the workplace. Your NDAs should contain AI-specific guardrails that address what information can be used in prompts, steps needed to ensure AI systems don't train on your company's confidential information, who owns AI-created work product, and other provisions specific to your organization's AI uses.

## **7. Build Reminders Into Your Offboarding Process**

An NDA can be strengthened with thoughtful practices at the exit door. Employers should provide written reminders of ongoing obligations, demand the return of their property (in physical and electronic form), and document that these conversations happened. These practices can help detect issues early and strengthen a case that goes sideways. A structured offboarding checklist that reinforces confidentiality obligations and creates a paper trail should be standard practice.

## 8. Review Your NDAs With Counsel Regularly

NDAs are not a “set it and forget it” project. With new regulations being considered at the state and federal level, as well as a patchwork of current privacy and AI laws, it is inevitable that your agreements will need to be updated in the future. You should revisit your NDAs with your FP counsel at least annually to ensure that they continue to fulfill their purpose of protecting your business while not subjecting your company to liability.

### Conclusion

We will continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions about this decision, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#).