

NON-DISCLOSURE AGREEMENTS (NDAs)

Stop! If you own a business and are thinking about selling it, do not provide any information at all to a prospective buyer, and do not even begin discussions with them, unless you first get a Non-Disclosure (NDA) from them. An NDA is a Must! You don't want to provide a potential buyer with any information that it or others could use to compete against you. You also want to make sure that word doesn't get out that you are considering selling your business--that could damage your customer and employee relations. You should have your attorney either draft the NDA or, if the buyer provides you a draft, have your attorney review it.

A thorough NDA would cover such matters as:

- A broad definition of what is "confidential information" (and not just information that happens to be marked "confidential"). It should cover "trade secrets," "know-how" and "other confidential information" concerning your business and affairs and should set forth a detailed (but not exclusive) list of trade secrets, know-how and other confidential information being protected.
- The confidential information can be used by the recipient only to evaluate the acquisition transaction and not for personal benefit.
- The disclosure by recipient can only be made to those representatives of recipient who need to know, and the potential buyer is liable for any disclosures by its representatives.
- The NDA should provide procedures if the recipient is ever compelled by law to make a disclosure.
- You should disclaim any representation about the accuracy of the confidential information (that would be addressed in the purchase agreement if the transaction proceeds that far).
- The NDA would include a covenant not to solicit for employment (or employ) your employees for a stated period of time.
- The NDA may have a "phased" type of disclosure, with the most competitively sensitive information being disclosed only upon or shortly before closing.
- Your recipient will probably want to include some exceptions in the NDA as to what will be treated as confidential. Typical exceptions are: (i) when information becomes generally available to the public other than as a result of disclosure by recipient or its representatives; (ii) when information becomes available to recipient on non-certified basis prior to its disclosure by disclosing party; (iii) when the recipient receives information from a third party not bound by any confidentiality obligation; (iv) when information is independently developed by recipient. However, the disclosing party should be careful with this last exception because it presents difficult proof problems for the disclosing party.
- The NDA should mention that the recipient must return (or destroy) the confidential information if the acquisition not consummated

We hope this newsletter has been helpful. If you are thinking about selling your business or buying a business, we can provide the experienced mergers and acquisition assistance you need.