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Drafting Checklist for a Nondisclosure Agreement

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Nondisclosure agreements—called NDAs—are one of the most common types of business contracts. They are used in many situations in the pet care industry—exploring the possibility of mergers and acquisitions of veterinary clinics or pet care businesses, new supplier agreements, joint ventures, and a whole array of other business relationships.

Whether you are negotiating your first or your hundredth NDA, you can use this checklist to make sure you are protecting your company:

1. **Include all party names.** Confirm that the party names are correct. In particular, consider whether you or the other party will be sharing information with or through an affiliated entity (such as a parent or subsidiary). If so, include it, or include an appropriate assignment provision.

2. **Double check your description of the protected information.** Make sure it is accurate. If you are the disclosing party, the description shouldn't be too narrow, and it should also cover any information subject to state and federal trade secret laws. If you are the receiving party, consider whether you want to require the other party to mark any information it gives you as “confidential” to be clear about what is confidential and what isn't. The receiving party should also insist on a provision stating any information that is already public, disclosed through no fault of the receiving party, or independently developed through no use of the disclosing party's confidential information is not covered by the agreement.

3. **Consider how the confidential information may be used by the receiving party.** If you are the disclosing party, you will likely be upset if you discover the receiving party is using your confidential information for purposes other than why you disclosed the information. Clearly describe the limited purposes for which the receiving party may use your information. If you are the receiving party, try to avoid use limitations to minimize the risk that you run afoul of the restrictions.

4. **Negotiate a term to benefit your company.** If you are the receiving party, shorter is obviously better. If your business routinely enters into NDAs, then you will want to mitigate the company's risk of a breach by negotiating terms that end within a reasonable amount of time, such as one or two years. If you are the disclosing party, consider when the confidential information will become stale and make sure the confidentiality obligation lasts for as long as that period from the time of disclosure. One option is for the term of the agreement to end after a few years while the term of the confidentiality obligation survives for a few more years in order

to protect information disclosed near the end of the term of the agreement.

5. **Consider how to keep your information private.** Most NDAs state that upon termination of the agreement, the receiving party will return the confidential information to the disclosing party or destroy it. With regard to destruction, it is important to think about the electronic footprint of information transmitted by email. Parties that are particularly concerned about electronic data should negotiate procedures for the receiving party to receive, store, return, and destroy it when the agreement term ends.

6. **Disclaim warranties.** While it is fine to represent you have the right to disclose the information covered by the NDA, any other warranty related to the accuracy, completeness, or utility of the information disclosed should be disclaimed.

7. **Decide which party gets the choice of law and venue.** There is no clear custom as to which party should get the home court advantage in the choice of law and venue clause. If only one party is disclosing information, it might argue that it deserves the advantage of having its state law and court venue apply. A common compromise is a neutral state where the parties have enough contacts that a court will enforce their selection.

8. **Determine remedies to include in your NDA.** If you are disclosing information, you will want to spell out various remedies in the NDA to aid you if the other party breaches. Injunctive relief—a court order to stop the disclosure by the other party—is key, along with a provision that grants the prevailing party attorney fees and costs in the event of a breach, which can be the primary damages suffered by a non-breaching party who must sue to enforce the NDA.

9. **Check for Unusual Terms.** Read each provision carefully. On occasion, an NDA can contain provisions that prevent the future hiring of the other party's employees, exclusivity provisions that prohibit negotiations with others while the agreement is in effect, and liquidated damages that apply in the event of a breach. Any of these can have significant implications.

10. **Don't forget about the Federal Defend Trade Secrets Act for Employee NDAs.** To preserve an employer's right to seek certain remedies under this law in federal court, include the language required under this law.

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