

ANIMAL HEALTH AND PET PRODUCTS

DRAFTING CHECKLIST

FOR A NONDISCLOSURE AGREEMENT BY NICOLE SNYDER

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

Whether you are negotiating your first or your hundredth NDA, here is a 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 or disclosed through no fault of the receiving party is not covered by the agreement.
- 3 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.
- 4 Don't forget about the The Federal Defend Trade Secrets Act.** This Act was passed in 2016. To preserve a party's right to sue for misappropriation of trade secrets in federal court (as opposed to state court), include the language required under this law.
- 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 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. If the parties are unable to agree, a common compromise is a neutral state, such as Delaware.
- 7 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.
- 8 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.

At Holland & Hart, we are proud to support veterinary clinics and suppliers with creating and distributing Nondisclosure Agreements. We have experience in this field and can help your business execute these agreements correctly. Contact us today if you would like to learn more about NDAs.