

Strictest confidence

How to effectively protect your company's confidential information

INTERVIEWED BY ROGER VOZAR

Think your company has no confidential information that needs to be protected? Think again.

"All companies have confidential information which, if compromised, could cause immeasurable damage," says Kate B. Wexler, an attorney in the Business, Corporate & Securities practice group at Brouse McDowell. "Confidential information can be tangible or intangible and of a technical, business or other nature."

Wexler says there are occasions where such information needs to be shared with employees, contractors, suppliers, customers, vendors, potential partners and others, and a confidentiality agreement should be put in place to protect the company's interests.

Smart Business spoke with Wexler about confidential information and situations when you might want a confidentiality agreement.

What needs to be kept confidential?

Any information not generally known to the public should be treated as confidential, provided that you take steps to keep your information confidential as well. When you are sharing your company's confidential information with any third party, you'll want to press for a definition of confidential information that is as broad as possible to avoid any argument later on that any particular piece of information was not covered by the confidentiality agreement. It can be as general as all information, whether written or oral, delivered by your company in connection with a contemplated transaction. Of course, as the recipient of such information, you'll want to limit this definition by requiring that all information disclosed be marked 'confidential.'

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Under what circumstances would you enter into a confidentiality agreement?

Contexts in which confidentiality agreements are used include agreements with individual employees to ensure they understand their obligations to the employer; agreements with potential partners in a joint venture; supplier agreements; and agreements between companies wishing to explore a potential acquisition or merger.

Although parties often rush through the step of entering into a confidentiality agreement when their new relationship begins, and sometimes omit it entirely, it's critical in defining the relationship's rules.

These rules not only include defining what's mine and what's yours, but they also address the level of care a receiving party must take with your confidential information; prohibitions against reverse engineering; disclosure to governmental entities; compliance with laws to which your company and your information is subject — e.g., HIPAA, GLBA, U.S. export laws; injunctive relief should a party breach the confidentiality agreement; and what happens to the information when discussions end.

Other issues often addressed in confidentiality agreements are confidentiality of the fact that the parties are even in discussion, and nonsolicitation, which prevents a potential partner from

attempting to poach your employees that they may meet in the course of exploring this potential relationship.

Are there restrictions?

Yes, there are many situations where the disclosure of confidential information is required by law. For example, judicial or governmental order or by deposition, interrogatory, request for documents, subpoena and civil investigative demand. These situations can be addressed in the confidentiality agreement as permitted exceptions. It is also interesting to note that there are certain non-U.S. jurisdictions that will not recognize an agreement that prohibits reverse engineering.

Are there occasions when you might want to terminate a confidentiality agreement?

One such situation would be when the parties enter into a definitive agreement whereby confidentiality obligations between the parties would be addressed. Another might be when one or both parties no longer wish to pursue the objective of the relationship. In that case, a well-drafted confidentiality agreement would anticipate that situation and while the parties may no longer share information, their obligations to maintain confidentiality with respect to the previously disclosed information continues for a certain period of time. ●