

## **BUYING OR SELLING A BUSINESS NON-DISCLOSURE AGREEMENTS**

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Buying or selling a business is often a significant event, financially and otherwise, for both buyer and seller. Therefore, a buyer needs information about a seller's business to evaluate and decide whether to buy the business. However, a seller wants to protect its business and is often reluctant to disclose confidential information, especially to a business competitor.

This reluctance is understandable when one considers that the deal, for one reason or another, may fall through and a buyer will have possession of and may use the seller's confidential information to its advantage and the disadvantage of the seller. However, in order for a deal to happen, a buyer will need to review financial, customer and technical information about the seller's business.

A non-disclosure agreement (also known as a confidentiality agreement) provides a mechanism for a seller to release its confidential information to a buyer while minimizing the risk that the buyer will misuse the information or hire away a seller's key employees. It is usually the first document signed by the parties when buying or selling a business.

A non-disclosure agreement will begin with the buyer acknowledging that the information being provided to it by the seller is confidential and that the buyer will maintain the confidentiality of the information in accordance with the agreement. Next, the agreement will define the confidential information. Typically, the

definition is broad enough to include all information that the seller discloses to the buyer.

The agreement will identify who has access to the confidential information and how the information can be used by the buyer. For example, the buyer may disclose the information only to those employees and representatives who actually need the information to evaluate the business, and the information may be disclosed only after the buyer advises them that the information is confidential and subject to the non-disclosure agreement. Finally, the buyer should agree that it will not use the information for any purpose other than its evaluation of the business.

The seller may fear that its business may be harmed if its competitors, suppliers, employees and customers know that the company is for sale. If so, the non-disclosure agreement should include a provision prohibiting the buyer from disclosing the fact that it is interested in buying the business.

The agreement will include certain limited exceptions to a buyer's obligation to maintain the confidentiality of the information. For example, the buyer will no longer be required to maintain the confidentiality of the information if it becomes publicly available through no fault of the buyer. The agreement will also address the buyer's return or destruction of

the confidential information if it doesn't purchase the business.

Sometimes, a buyer's evaluation of a seller's confidential information alone may not provide it with enough information to make a decision whether to buy the business. In such situations, a buyer may want to speak to the seller's key employees and even its major suppliers and customers. The seller, however, may not want anyone to know about a possible sale of the business. A non-disclosure agreement will address how a buyer can speak with a seller's employees, customers and suppliers.

In the event that the deal falls through, the agreement will also include provisions prohibiting the buyer from hiring the seller's employees for a period of time, and prohibiting the buyer from soliciting the seller's customers or disrupting the seller's relationships with its suppliers.

In order to make a deal happen, a buyer and a seller must ask their attorneys to prepare and negotiate a non-disclosure agreement to address these important issues.

For more information on non-disclosure agreements, or on buying or selling a business, please contact Franco at [gpietrafesa@archerlaw.com](mailto:gpietrafesa@archerlaw.com) or 201-498-8559.



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