



## Tech Whistleblowing Essentials: What To Know About Non-Disclosure Agreements (NDAs)

*This resource is meant to help you make informed decisions, to give a balanced and concrete overview of the possibilities and pathways, and to remove some of the uncertainty that so many former whistleblowers experienced in order to build your own overall strategy.*

“Today, NDAs come in two flavors: nondisclosure and non-disparagement. A nondisclosure typically limits what someone can say about their work and to whom, while a non-disparagement restricts workers from describing their employer or business partners in a negative light — a tricky tightrope that’s hard to define.” **Matt Drange, *Insider*, July 27th, 2021**

### What Should You Know About NDAs?

- “Talking to a lawyer about private company matters is never a breach of your NDA. What you say to a lawyer, from your first words, is protected by the client-attorney privilege.” - **Mary Inman, Partner at Constantine Cannon LLP**
- “It is not always safe to communicate government misconduct to your lawyer. It is especially risky to reveal any information that is classified as intelligence information by the government to a lawyer, unless they have an appropriate government clearance. If you do approach a lawyer about concerns related to government business, it is important to pin down in advance what can and can’t be lawfully disclosed, both to the lawyer and to third party audiences. Experienced organizations like GAP are good at deciphering these issues and are open to speaking about concerns relating to government business.” **Tom Devine, Legal Director of the Government Accountability Project**
- Nondisclosure agreements meant to protect confidential trade secrets are often so broad they cover information an employee learns outside work, such as personnel matters and information not necessarily marked as "confidential" internally. **Matt Drange, *Insider*, July 27th, 2021**
- Some NDAs say explicitly that the confidentiality provisions never sunset, effectively making them lifelong agreements. **Matt Drange, *Insider*, July 27th, 2021**
- “If you aren’t getting any compensation or benefits when you exit, don’t sign an NDA. If they are offering compensation or benefits, it’s up to you to decide if it’s worth it to sign.” **Ifeoma Ozoma, Pinterest whistleblower**

*The Signals Network is a 501(c)(3) non-profit organization that enables whistleblowers and international journalists to work seamlessly together to hold powerful interests accountable. As you read these legal considerations, remember that there is no one right way to speak out. This resource doesn't and is not intended to provide specific legal advice, and the considerations discussed herein are not universally applicable. This is not a roadmap to bring the whistleblowing path to zero risk.*



- “When negotiating your end of contract NDA, you can ask them to include names of people who aren’t allowed to speak poorly about you. This provides protection against disparaging you, while still allowing you to speak to regulators about the company’s wrongdoing, which is always a protected right even if you have an NDA.” - Steve Kohn, Whistleblowing Lawyer and Founding Partner of Kohn, Kohn and Colapinto

## What is not enforceable in a NDA?

NDAs are not binding when it comes to information that is related to a crime or information that is manifestly in the public interest. Any language in a NDA that prevents you from going to the government with information on a violation of federal law or regulation is not enforceable. While this is subject to interpretation, a lawyer can help you assess the NDA language and the nature of the violation.

“NDA is a very broad term. Some clauses are legitimate and enforceable, like the ones related to the disclosure of business information. Some are less likely to be enforceable like the ones related to your experience at work.” **Peter Rukin at Rukin Hyland Riggin LLP**

“Fraud is not a trade secret.” **Tyler Shultz, Theranos whistleblower**

“The SEC has fined 10 companies for including in their various types of employment agreements language that seeks to undermine a whistleblower’s ability to communicate with the SEC about wrongdoing, thereby silencing or chilling whistleblowers’ speech. The SEC is incredibly proactive in protecting its whistleblowers.” **Mary Inman, Partner at Constantine Cannon LLP**

“Many of the agreements you see aren’t actually enforceable, but they never make it into court. Companies are able to enforce them through private means,’ said Jodi Short, a professor at UC Hastings law school in San Francisco who has studied NDAs. Short said the threat of going to court is enough to silence most employees. And of the few who pursue legal action, she said, many are able to bring claims only through mandatory arbitration, a process also shrouded in secrecy.” **Matt Drange, *Insider*, July 27th, 2021**