

Confidentiality and Privacy

By Brian Kirkpatrick

Confidentiality and privacy clauses are important, but what is the difference and when are these clauses necessary? At first glance these clauses may seem appropriate and helpful. After all, shouldn't every company want to protect its information? However, there are some important distinctions and considerations when reviewing these clauses.

Confidentiality clauses are usually related to information exchanged between the parties. Privacy clauses are usually related to data of individuals.

When reviewing a confidentiality clause, a few important issues to consider include:

1. How is information defined?
2. What is confidential and what it not?
3. Is the clause mutual or favoring one party?
4. Does confidential information have to be labeled?
5. What happens if confidential information is disclosed?

Once a business determines whether these issues are addressed, the next step is to determine whether the answer makes sense in light of the transaction.

A privacy clause usually relates to protecting individuals who may be customers of one of the parties. Examples of such information can be credit card data, medical data, and loan information. Service providers can make a more professional presentation if it has the appropriate clauses in its agreements based on its customer, rather than relying on the customer to have to review an agreement and then propose certain required clauses be added. Common businesses that may have special requirements include:

1. Financial institutions
2. Hospitals
3. Automobile dealers

It can be helpful to consult an attorney when contracting with other businesses to assist in determining whether an agreement includes the appropriate confidentiality and privacy clauses based on the needs of the business.



About the author Brian Kirkpatrick:

Brian practices exclusively in intellectual property and technology law. He has drafted and negotiated hundreds of software contracts with a wide breadth of complexity including large-scale master services agreements (MSA's), software as a service (SaaS) agreements, and End-User License Agreements (EULA's). Before entering the legal profession, Brian was a licensed securities representative and Vice President level middle-market commercial banker.

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