

Garden Leave: Helping Employers Control The Prickly Landscape Of Employee Departures

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When employees leave, companies often worry – and rightly so – about the loss of proprietary information and customer relationships, as well as the possibility of potential litigation, even if the departing employees are subject to non-compete agreements. So, why not look to another business culture for a solution to this thorny problem?

In England, the common practice of writing a garden leave provision into an executive's employment contract has given employers an effective tool to better control their proprietary information and customer relationships and to deter litigation. Gaining ground in the financial services industry here, this provision is worth considering.

What Is Garden Leave?

Garden leave, while evoking images of flower-filled paths and rose gardens, is actually an English legal doctrine in which an employer pays a departing employee to stay at home without performing any duties for a specified notice period. During this time, the individual remains an employee and cannot work for a competitor.

Garden leave is widely used in English executives' employment contracts. It usually comes into play when either the employer or the employee gives notice of dismissal pursuant to an employment contract. The notice period generally lasts between two and 12 months.

Garden leave serves three main functions. First, it prevents a departing employee from continued access to the employer's premises and to its confidential information. This reduces the likelihood of the employee misappropriating information and property, and minimizes the employee's opportunity to sabotage business operations. Second, it curbs an employee's ability to work for a competitor. Third, it prevents an employee from soliciting current employees and customers.

A Rose Of A Different Color

Garden leave bears some similarities to post-employment restrictive covenants, which are commonly used in U.S. executives' employment contracts. Both seek to prohibit employees from competing with their employers for a set period of time. And, both may require seeking an injunction to ensure an employee's compliance.

However, garden leave differs from post-employment restrictive covenants

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in several respects, because it is in force during the employment relationship. Importantly, employees generally owe their employers a duty of loyalty during their period of employment, the extent of which may vary depending upon their position. This duty imposes an obligation on employees not to act contrary to their employer's interests. For instance, employees cannot compete with their employers, divert business opportunities, solicit customers or disclose confidential information to third parties. Because garden leave restricts an individual during the employment relationship, breach of a garden leave provision also may violate this duty of loyalty, further deterring the employee interested in competing with the employer.

A garden leave clause also may discourage potential employers. Since the employee in question is still employed under garden leave, the likelihood of incurring significant legal costs to defend a lawsuit both in contract, for the employee's breach of the garden leave clause, and in tort, for the employee's breach of the duty of loyalty and/or the employer's tortious interference, is a real concern. Plus, with more potential claims comes an increased risk of a judgment against the employee and/or new employer.

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While garden leave clauses provide added protection to an employer, they come with a significant cost. Employees on garden leave are paid their salaries and benefits for the length of the garden

leave period, whereas workers generally are not paid any remuneration after their employment relationship ends in exchange for agreeing to post-employment restrictive covenants.

Planting The Seed

There are several issues to consider before including a garden leave clause in a contract.

Check State Law.

State law varies on enforcement of restrictive covenants. Therefore, verify your state's laws before including a garden leave clause in a contract.

Identify Key Employees.

Garden leave clauses are not necessary or appropriate for all employees. Because they restrict an employee and are costly to employers, they generally should be reserved for executives and other key employees who have the ability to cause significant harm to the employer through competition in the workplace.

Determine The Length Of The Leave Period.

How long a notice period is necessary to protect the employer? How long a notice period will the courts find reasonable? Is the notice period in addition to, or in lieu of, a post-employment non-competition clause? These are some questions employers must consider in deciding length of the garden leave.

Address The Bottom Line.

Obviously cost is an issue. How long does the employer want to pay a non-productive employee? Can and does the employer want to eliminate or reduce commissions or bonuses during the garden leave period? Consider that employers paying their employees' salaries and benefits while on garden leave still bear the risk of employees breaching their contracts. Moreover, policing employee compliance is difficult at best and may be quite expensive, particularly if the employer uses investigative services to ensure compliance.

Getting It Right.

It is critical that a garden leave provision cover all the appropriate bases. As a first step, employers should evaluate placing certain restrictions on the employee during the employment relationship to substantiate the need for a garden leave clause and to increase the likelihood of its enforcement. For instance, an employer may include clauses regarding the employee's duty of loyalty, the employer's expectation that the employee provide his/her full time and attention to the employment, a prohibition on the employee engaging in outside employment, a confidentiality clause, and a clause addressing use of and return of employer property. Employers also should consider whether they want to bar the employee from entering the company's premises during the garden leave period. Additionally, companies may want to address issues such as use of accrued time.

Other considerations apply if an employee is a director or officer. In these situations, the contract should pro-

vide that once the garden leave period is triggered, the employer may request the employee to resign his/her post(s).

How Prickly Is Enforcement?

When an employee breaches a garden leave clause, the employer has two possible remedies: seek an injunction to enforce the employee's compliance with the contract terms and/or seek monetary damages for the loss caused by the breach.

Injunctive relief is difficult to obtain. Courts require an employer to demonstrate irreparable harm should the injunction be denied. In addition, courts weigh an employer's legitimate interest in protecting its business against public policy restricting an employee's right to work — to ensure that employers do not unduly restrict competition in the marketplace.

And, money damages may be too little too late. The real value in having such a clause is the ability to prohibit the employee from competing or otherwise damaging an employer's business during the notice period.

So, would U.S. courts enforce garden leave clauses or would an employer be limited to seeking damages for any breach? While there is a dearth of reported cases, enforcement likely would be appropriate and legal in most states, as it merely prevents the employee from working for a competitor during the notice period. It would not, however, require the employee to perform any work against the employee's will. Moreover, the employee would be paid during the notice period, thereby reducing any claim of undue financial hardship. For this reason, courts may be more inclined to grant injunctions to enforce garden leave clauses rather than post-employment restrictive covenants.

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A Budding Addition To The Employment Landscape

While it is still relatively new to the U.S. employment landscape and its enforceability has not been widely tested, garden leave shows great promise. It has many of the advantages of post-employment restrictive covenants, with the added benefit of providing certain security afforded employers during the employment relationship. For the employer looking for added protection in a tight labor market, garden leave is a powerful tool.

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