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Garden leave grows in popularity among U.S. employers

By James L. Komie

James L. Komie is a partner with Howard & Howard. He concentrates his practice in civil litigation and counseling matters, with an emphasis on employment, and trade secret and noncompete issues. He can be reached at jkomie@howardandhoward.com and (312) 456-3666.

Long used in the U.K., garden leave is becoming increasingly popular with employers in the United States as an alternative to traditional noncompete agreements.

Garden leave provisions take several forms, but the key feature is that the employee is paid to sit out before starting the new job. The payment of compensation lessens the impact on the employee, especially as compared to a noncompete where no payment is required and the employee may suffer a significant loss of earnings.

Garden leaves are also generally shorter than noncompetes — 30 to 90 days, rather than one or two years as with many noncompete agreements.

As a result, employees are often willing to comply with garden leaves voluntarily. Many employers find that paying employees to sit out is more cost-effective than funding a suit against an employee fighting his or her noncompete agreement, especially since noncompete litigation can be so unpredictable.

The term “garden leave” reflects the concept’s British origins, where “garden” means what we would call the backyard. Employees in the U.K. post photos on Twitter and Instagram under #gardenleave trying to one-up each other on their garden leave leisure activities.

A true garden leave provision is actually a notice requirement. Most employee handbooks or employment agreements don’t use the term “garden leave.” Instead, the provision requires the employee to give a certain number of days’ notice of his or her resignation.

The provision then specifies the employer can place the employee on paid leave during the notice period. The individual remains an employee during the garden leave with a duty of loyalty to the employer.

In theory, the employer could ask the employee to keep working during the garden leave period. That rarely happens in practice, especially where the employee is joining a competitor. At most, the employee is asked to transition projects to colleagues or introduce customers to his or her replacement — and then is sent home.

Another agreement often referred to as garden leave is a noncompete agreement that requires the employer to pay the employee during the noncompete period. Strictly speaking, such provisions aren't garden leaves because the individual no longer is an employee and thus is not on "leave." As a practical matter, however, they work much the same as true notice requirements.

The payments made to the employee during garden leave are generally only base compensation. Most garden leave provisions specify that the employee will not earn incentive compensation or bonuses during the garden leave period.

The garden leave concept is starting to find its way into state noncompete laws.

Massachusetts recently enacted a comprehensive reworking of its noncompete statute. Among other changes, the new Massachusetts statute requires employers to pay employees 50 percent of their salary during the noncompete period or some other agreed upon consideration.

It would not be surprising to see more states adopt a similar requirement.

There is little case law regarding the enforceability of garden leaves — presumably because fewer employees fight the requirement. In practice, courts appear to regard garden leaves as more reasonable than noncompete agreements.

The fact that the employee is paid during the garden leave makes a huge difference, as does the typically shorter duration of the sit-out period. A two-month paid vacation may sound pretty good to an overworked and underpaid judge.

Garden leave dos and don'ts? The key thing for an employee on garden leave to keep in mind is that he or she remains an employee of the old firm during the garden leave with a duty of loyalty.

That means the employee cannot begin performing work for the new firm while on garden leave. It also means the employee cannot be provided with confidential information by the new firm to study so he or she can hit the ground running when the leave is over.

Although the employee cannot begin work, the new firm can announce during the garden leave that the employee will be joining the firm at its conclusion. Some employees change their LinkedIn profiles to reflect that they are on garden leave from their current employer.

Employers considering adopting a garden leave requirement instead of a traditional noncompete may find the concept of paying an employee not to work to be a put-off. But many employers that have moved to garden leaves have found that the expense is well worth it, both in terms of reduced legal costs and greater employee acceptance of the requirement.

As one employee put it in a recent Instagram post: "Garden leave is the best part of working on Wall Street." Garden leave is thus one British import that looks to be here to stay.

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