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COMPENSATION

An Alternative to Noncompetes

Traditional noncompete arrangements, while useful, face increasing legal scrutiny and employee resistance. As a result, garden leave, which is prominent in the U.K., has become an emerging practice in the U.S., especially in the financial services sector.

Garden leave is a contractual arrangement in which an employer places a resigning or terminated employee on paid leave for a certain period. Typically, the employee is relieved of their duties but is contractually obligated to act in the company's best interest. This provides a window to secure client relationships and protect confidential data.

Key Benefits

- **Protection of confidential information.** Key employees have access to sensitive information, such as business plans, digital strategies and customer data. Garden leave protects the company during the notice period by removing the immediate risk of the employee walking out the door and using that knowledge at a competitor.
- **Client protection.** Garden leave is particularly beneficial when a revenue producer leaves, since it provides time to work with clients and transfer accounts to other relationship managers.

- **Smoother transition.** By managing the departure proactively, companies can orchestrate a more orderly transfer of responsibilities. This minimizes disruption to operations.
- **Enforceability.** Courts are more willing to enforce garden leave provisions because the employee is still receiving compensation in exchange for the restriction. This is a primary concern for courts when evaluating noncompete fairness.

How It Works

Consider a senior private wealth manager, who manages a substantial portfolio. The wealth manager resigns to join a rival firm. Upon resignation, the bank immediately places the individual on a three-month garden leave per an employment contract. The process unfolds as follows:

- **Immediate restrictions.** Access to all internal systems, client data and the bank premises is revoked. The wealth manager is instructed not to contact clients or other employees during garden leave.
- **Continued compensation.** The wealth manager continues to receive base salary and benefits.
- **Employer action.** The bank's management team begins structured client outreach. They introduce a qualified professional to the wealth manager's clients, emphasizing a seamless transition.
- **The result.** By the end of the three months, client relationships are established with the new manager, and the departing wealth manager's knowledge of the company's proprietary investment strategies has become somewhat dated. The bank has successfully protected its interests.

Effective Implementation

In implementing garden leave, companies should consider the following elements:

- **Choose the form of agreement.** Garden leave provisions may be found in various agreements, including offer letters, employment contracts and award agree-

ments. Terms can still include non-solicitation clauses in addition to garden leave. The agreement must clearly define the duration of the garden leave, the compensation to be provided, and various obligations and restrictions.

The employer removes the employee from active duties. The employer can restrict access to company property, data and communication systems, as well as prevent contact with other employees and clients. This allows the employer to control the transition.

The employee is removed from day-to-day responsibilities but may be required to assist in certain aspects of the transition. The employee is restricted from working for any competitor, is typically required to maintain confidentiality and must adhere to other contractual duties.

- **Formalize compensation.** The employee must continue to be paid their regular salary (and often benefits). For employees with a sizable portion of variable pay, the employer must decide on the treatment of bonuses and other incentive pay. Removing eligibility or eliminating payment of bonuses or commissions may be considered inadequate and make the provision unenforceable. Equity award treatment typically depends on the specific terms outlined in the equity plan documents and the individual award agreements.
- **Comply with laws.** Some states have specific laws regarding garden leave and noncompete agreements. Consult with legal counsel to ensure the garden leave provisions comply with applicable state and local laws.

In conclusion, garden leave is potentially a legally sound and effective alternative to traditional noncompete provisions. By providing paid leave, employers gain a period to ensure a smooth transition of duties.



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