

Garden Leave Provisions: Negotiation, Drafting, and Legal Issues

A Lexis Practice Advisor® Practice Note by
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This practice note provides guidance on drafting garden leave provisions in restrictive covenants or other employment agreements. Employers sometimes require employees to provide a specific amount of notice before resigning. During the notice period, employers sometimes instruct the employee to not come to work, but the employer keeps the employee on its payroll during this time. This practice is often referred to as garden leave. It helps keep employees from taking confidential information from the employer if the employee decides to join a competing company.

Specifically, this practice note addresses the following issues regarding garden leave:

- Differences between Garden Leave Provisions and Traditional Non-compete Agreements
- Advantages and Disadvantages of Garden Leave Provisions
- Garden Leave Provisions Enforced as Reasonable Restriction
- Garden Leave Provisions Not Enforced Due to Overbreadth or Unconstitutionality
- Statutorily Required Garden Leave
- Drafting Enforceable Garden Leave Provisions

For non-jurisdictional and state-specific practical guidance on drafting, negotiating, and litigating restrictive covenants, see [Restrictive Covenants Resource Kit](#).

Differences between Garden Leave Provisions and Traditional Non-compete Agreements

Employees are often tempted to ignore their non-competition agreements, especially when they are faced with an attractive offer from a competitor and believe that there is a low probability that their former employer may discover their post-employment activities. A garden leave clause, where the employee promises to provide the employer with a relatively long (three to twelve months) notice before terminating his or her employment and employer agrees to allow the employee to keep him or her on the payroll while the employee does not work and, metaphorically speaking, tends his or her garden, is an attractive alternative to regular non-competition agreements in certain circumstances.

The essential difference between a garden leave provision and a traditional non-compete agreement is that the employee who is subject to a garden leave remains on the company's payroll and is considered an employee of the company during the garden leave period when he or she may not compete with the employer. In contrast, with a traditional non-compete agreement, the non-compete period typically begins on the date that the company has terminated the employee's employment.

Employers should consider a garden leave clause for an employee who deals directly with customers and where the long-term revenue associated with the customers with whom the employee interacts exceeds the salary paid to the employee during the separation period. Garden leave can also be particularly helpful where a higher-level employee has access to the employer's strategic plans for the immediate future. Placing such an employee on a garden leave while the employer rolls out its plans without interference from competitors can outweigh the cost of the employee's salary.

Advantages and Disadvantages of Garden Leave Provisions

Garden leave provisions offer employers several unique advantages and a few potential disadvantages as well.

Advantages

First, because the employment relationship continues during the garden leave period, the individual may not work for others, including competitors, if the work constitutes a breach of the employee's duty of loyalty to his or her employer.

Second, as the individual no longer reports to work, he or she no longer has access to confidential information, which reduces the risk for misappropriation.

Third, if the garden leave provision includes "forfeiture for competition," the employer simply stops paying the individual in the event of a breach and may seek injunctive relief to stop competition. The primary disadvantage stems from the employer's contractual obligation to continue paying the individual's salary and benefits for weeks or months after services have effectively ended.

Fourth, if the time comes to enforce the garden leave provision via an injunction, the employer's chances of success are heightened because the employee is less likely to establish that the balance of the harms tips in his or her favor if he or she is receiving compensation during the restricted period. An employee would rarely be able to show that she or he is suffering harm if he or she continues to receive full benefits and compensation from his or her prior employer.

Fifth, another major benefit of a garden leave provision is to prevent a key employee from contacting clients during a "buffer" period, which gives the employer an opportunity to transition the clients and prospective clients with whom the employee worked to new points of contact within the company.

Disadvantages

The primary disadvantage of a garden leave provision stems from the employer's contractual obligation to continue paying the individual's salary and benefits for weeks or months after the employee has effectively stopped providing his or her services to the employer. Furthermore, if an employer terminates garden leave payments because it believes that the employee violated his or her non-compete or non-solicitation restraints, and it turns out that the employee did not commit a violation or the employee disputes the employer's action, the employee may have a counterclaim against the employer for breach of contract. Finally, as discussed below, some courts have held that garden leave clauses are unenforceable because they force an at-will employee into specific performance of their employment contract. See the section entitled Garden Leave Provisions Not Enforced Due to Overbreadth or Unconstitutionality, below.

Garden Leave Provisions Enforced as Reasonable Restriction

In the United States, companies primarily in the financial services industry have adopted garden leave provisions as an alternative to restrictive covenants. As such, the few domestic cases where courts have considered the enforceability of garden leave provisions involve financial services companies. One example in which a court looked favorably upon a garden leave provision is *Credit Suisse First Boston L.L.C. v. Vender*, 2004 U.S. Dist. LEXIS 24525 (N.D. Ill. Dec. 3, 2004). There, the court upheld the garden leave provision as a reasonable restriction that permitted the employer to ensure client relationships while the terminating individuals were still employed. *Vender*, 2004 U.S. Dist. LEXIS 24525, at *4-8. The court also found reasonable the employer's additional thirty-day post-termination non-compete provision to facilitate the retention of those client relationships. *Id.*

Similarly, in *Citizens Bank, N.A. v. Baker*, 2018 U.S. Dist. LEXIS 172378, at *8, *14-16 (W.D. Pa. Oct. 5, 2018), the Court granted a preliminary injunction against two financial advisors who began competing against their soon-to-be-former employer while on garden leave. The court noted that a preliminary injunction would not cause more harm to the employees than to their employer because they expressly agreed not to solicit the employer's customers and "were paid handsomely" by their employer. *Baker*, 2018 U.S. Dist. LEXIS 172378, at *14.

In another case involving a financial services firm and in an unusual twist, the court enforced the garden leave clause upon the employee's request after the employer changed its mind one week into the garden leave period and decided to "waive"

the \$1 million payment it promised to make to the employee if he sat out for a six-month period. See *Reed v. Getgo, LLC*, 65 N.E.3d 904, 907 (Ill. App. Ct. 5th Div. 2016). A week after the employee left the company's employment, the employer notified him that it was waiving the non-compete agreement, he would not receive any non-compete payments, and was free to work for any employer. *Id.* Despite having various job offers, the employee waited until the end of the garden leave period before beginning new employment and immediately thereafter sued his former employer for breach of contract. *Id.* The company argued that the agreement allowed it to unilaterally waive the garden leave, but the court held for the employee finding that under the specific language of the agreement, the company could stop payments to the employee only if he breached the non-competition restraints or if such restraints were found unenforceable. *Getgo*, 65 N.E.3d at 909.

Based on *Getgo*, you should advise employers of the perils of drafting a garden leave provision that does not allow an employer the flexibility to withdraw such leave or declare an early termination.

Garden Leave Provisions Not Enforced Due to Overbreadth or Unconstitutionality

Despite the fact that several courts have enforced garden leave provisions, there are a few that tend to view garden leave provisions as being against public policy or even unconstitutional because they require employees to stay in an employment relationship with a particular employer.

For example, in *Bear Stearns & Co. v. Sharon*, 550 F. Supp. 2d 174, 179 (D. Mass. 2008), the court denied an employer's request for a preliminary injunction to enforce a garden leave provision. *Bear Stearns* and its executive, Douglas A. Sharon, had entered an agreement providing he would give at least 90 days advance notice of his resignation in exchange for the company continuing his salary during this notice period. *Sharon*, 550 F. Supp. 2d at 176. The garden leave provision further required Sharon to perform "all, some, or none of his work duties in *Bear Stearns*' sole discretion." *Id.* Sharon nevertheless resigned and began working for his new employer the next day. *Id.* The court found the garden leave provision unenforceable because, among other reasons, it was against public policy. The court explained that requiring Sharon to continue an at-will employment relationship against his will not only violated public policy but also the general prohibition against specific performance of employment contracts. *Sharon*, 550 F. Supp. 2d at 178-79.

In *Waldron v. Mendelson*, 2017 Pa. Dist. & Cnty. Dec. LEXIS

5846, at *101 (C.P. May 5, 2017), the court considered a garden leave provision that a wealth management and advisory firm imposed upon a former employee and held that it was unconstitutional because it violated the Thirteenth Amendment to the U.S. Constitution, which forbids the legal compulsion of agreements to perform personal services. The court denied the application for a preliminary injunction that would have required the employee to complete the term of employment under a garden leave. *Id.*

Garden leave provisions are usually viable in the United States. Their effectiveness, however, may depend on an employer's ability to establish a reasonable business justification for the garden leave protection.

Statutorily Required Garden Leave

As of April 2, 2019, Massachusetts is the only state that currently requires employers to provide garden leave under certain circumstances. Non-compete agreements signed on or after October 1, 2018—the effective date of Massachusetts' revamped non-competition statute, the Massachusetts Noncompetition Agreement Act (MNAA)—must contain a garden leave provision or some other "mutually agreed upon consideration." Mass. Gen. Laws ch. 149, § 24L(b)(viii). To qualify as garden leave, the employer must:

- Pay at least 50% of the employee's highest annualized base salary over the past two years preceding the termination, on a pro rata basis, during the restrictive period –and–
- Waive the right to unilaterally discontinue such payments, except where the employee has breached the agreement

Id. The MNAA does not require garden leave for customer or employee non-solicitation agreements. Mass. Gen. Laws ch. 149, § 24L(a). The MNAA requires the application of Massachusetts law to an employee's non-competition agreement as long as the employee lived in Massachusetts for the last 30 days before cessation of his or her employment. Mass. Gen. Laws ch. 149, § 24L(e).

For more information on the MNAA, see [Restrictive Covenants \(MA\)](#). Also see [Mass. Noncompete Law Overhaul Not As Strict As It Seems](#).

Drafting Enforceable Garden Leave Provisions

You must exercise great care in drafting garden leave provisions because courts are sometimes reluctant to enforce them. Below are the most important drafting considerations.

Drafting Consideration 1: Who Is the Employee?

Most importantly, advise the employer to carefully consider and identify the types of employees who merit a garden leave provision. Such employees may generally include senior executives, key technical employees, and employees who have access to confidential information.

Drafting Consideration 2: Balancing the Prevention of Unfair Competition vs. the Hardship to the Employee

Also advise the employer to balance the amount of notice it legitimately needs to deter unfair competition against the potential hardship to the employee. For example, if an employer's confidential information generally becomes public knowledge in six months, a provision requiring a year notice may be unreasonable. If the primary purpose of the garden leave provision relates to the orderly transition of client accounts, courts have generally found one to three months to be a reasonable notice period. Also, an employer might consider a variable notice provision depending on the employee's new employment; if the employee's next job is not with a competitor, an employer can save the cost of paid garden leave by having an exception within the provision.

Payment of full salary and benefits during the garden leave term tends to make employees more willing to accept such provisions. An employer may be tempted to draft the garden leave provision so that an employee would receive discounted salary payments and benefits during the time they do not provide services. But drafting the provision in this manner may render it unenforceable as the provision would essentially deprive the employee of the opportunity to earn as much as possible during the garden leave period because he or she cannot work for a competitor.

Drafting Consideration 3: Benefits Issues

Garden leave also raises benefits considerations. As many benefit issues arise upon the termination of the employment relationship (for example, COBRA and pension benefits), the garden leave period creates a disconnect between the end of work and the official end of the employment relationship. Drafters of garden leave provisions should consult benefits counsel to determine what particular issues the agreement must address. For example, if the employee participates in an employer-sponsored deferred compensation plan or supplemental employee retirement plan, Section 409A requires that payment under these plans occur on the date employees cease performing services. As such, an employer would have to pay out the employee's deferred benefits immediately when work ceases, rather than when garden leave ends.

For more information on Section 409A and deferred compensation plans, see [Section 409A Fundamentals](#).

Drafting Consideration 4: Preserving Flexibility for Employer

It may be difficult for an employer to determine all categories of employees who should be subject to a garden leave or whether a particular employee is worth the trouble of invoking a garden leave in his or her employment agreement. For that reason, employers should give themselves an option of deciding not to invoke the garden leave or to terminate the garden leave earlier than specified in the employment agreement. The former option usually allows the employer some time after it receives the employee's notice of termination to decide whether to place the employee on a garden leave or to enforce the non-compete restrictions in his or her agreement. The latter provision is particularly helpful where the employer is able to transition all of the employee's customers to other points of contact within the company earlier than expected and, therefore, has no need to keep the employee on a garden leave anymore.

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Leiza was selected to The Best Lawyers Under 40 in 2018 and 2019, The Best Lawyers in Dallas in 2017 and 2019, and Top 50 Female Attorneys in Dallas in 2018 by Texas Diversity Council. She frequently speaks and writes on employment and trade secrets issues and regularly publishes on her blog, the North Texas Legal News.

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