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# Garden Leave Provisions in Employment Agreements

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A Practice Note that discusses the implementation of garden leave provisions in employment agreements as an alternative or complement to traditional non-compete agreements. Amid increasing judicial scrutiny and state-level restrictions on non-competes, this Note explains how employers can use garden leave to protect legitimate business interests. It addresses the key distinctions between garden leave and non-compete provisions, reviews case law on the judicial treatment of garden leave, and details the advantages and disadvantages of this approach. This Note also explores important statutory developments, including the Massachusetts Noncompetition Agreement Act (MNAA) and Florida's Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act, and provides practical considerations for drafting effective garden leave clauses. It also flags related compliance issues under Section 409A of the Internal Revenue Code and the Consolidated Omnibus Budget Reconciliation Act (COBRA), offering guidance to employers navigating the evolving legal landscape of post-employment restrictive covenants. This Note is jurisdiction-neutral but will be helpful to all employers seeking to protect business interests while navigating the evolving legal landscape surrounding employee non-compete restrictions.

In recent years, traditional non-compete agreements have faced increasing judicial scrutiny, with courts focusing on issues such as the adequacy of consideration, the propriety of non-competes for lower level employees, and whether the restrictions of a non-compete are justified by a legitimate business interest or are merely a tool used to suppress competition.

Although federal rulemaking efforts to ban non-competes in 2024 were unsuccessful and have been abandoned by the second Trump administration, the Federal Trade Commission (FTC) continues to scrutinize non-competes as potential antitrust violations on an individual basis. Momentum also continues at the state legislative level to pass laws regulating and often restricting non-competes in various ways. Several states have passed legislation essentially banning non-competes for low-wage workers (see Practice Note, Non-Compete Agreements with Employees: Limitations on Non-Competes with Low-Wage Workers).

Other states have limited non-competes for other categories of workers, such as technology sector workers and health care professionals (see Health Care Non-Compete State Law Chart: Overview). Massachusetts passed comprehensive non-compete legislation in 2018 limiting the enforceability of most non-compete agreements (see Statutorily Required "Garden Leave"). In other states, including California, North Dakota, Oklahoma, and Minnesota, almost all post-employment non-competes are unenforceable (Cal. Bus. & Prof. Code § 16600-16602.5; N.D.C.C. § 9-08-06; Okla. Stat. tit. 15, § 217; Minn. Stat. Ann. § 181.988). Wyoming recently enacted a ban on most post-employment non-competes, though with somewhat broad exceptions, effective July 1, 2025 (Wy. Stat. Ann. § 1-23-108). Illinois, Colorado, and the District of Columbia also have enacted or amended their non-compete statutes to limit the enforceability of non-compete covenants, although the Illinois law expressly excludes garden leave clauses from its

definition of covenants not to compete (820 ILCS 90/5, 90/10 and 90/15, as amended; Colo. Rev. Stat. Ann. § 8-2-113; D.C. Code §§ 32-581.01 to 32-581.05). Bucking this trend, Florida has taken a contrary approach and enacted a law providing enhanced protections for employers seeking to enforce certain restrictive covenants with employees covered by the law (see Florida CHOICE Act).

For more on state laws regulating the enforceability of non-compete agreements, see Practice Note, Non-Compete Agreements with Employees and Non-Compete Laws: State Q&A Tool. For a 50-state comparison of non-compete laws and requirements generally, see Quick Compare Chart: State Non-Compete Laws.

For the latest on the federal rulemaking efforts and FTC enforcement actions, see FTC Non-Compete Rulemaking and Enforcement Tracker.

Against this backdrop, employers have been seeking alternatives to traditional non-competes to protect their proprietary information and customer relationships. One alternative is the use of garden leave provisions in employment agreements. Garden leave provisions extend the employment relationship for a period of time during which the employee continues to receive a salary (and sometimes benefits) but cannot go to work elsewhere. While garden leave provisions are not a panacea, they may serve as a helpful tool that employers can use to protect their legitimate business interests and prevent certain employees from immediately working for a competitor.

This Practice Note addresses:

- The history and general characteristics of garden leave in the US.
- Comparisons between traditional non-competes and garden leave provisions.
- Case law addressing garden leave provisions.
- Advantages and disadvantages of garden leave.
- Drafting considerations for employers that want to use garden leave provisions, including potential issues under:
  - Section 409A of the Internal Revenue Code (Code); and
  - the Consolidated Omnibus Budget Reconciliation Act (COBRA).

## Garden Leave Overview

Garden leave is a variation of a notice provision. Instead of requiring that employees actively work during their notice period, employers place employees on so-called garden leave (to "tend to their gardens"). The employees typically are relieved of their duties and responsibilities during that time, yet remain employed by the employer and therefore cannot go to work for a competitor.

### Garden Leave in the US

Garden leave was first widely adopted in the US by the financial services industry in New York, presumably after these firms became familiar with the concept in London financial circles (see Practice Note, Key Employment Law Issues for Financial Services Employers: Non-Compete and Garden Leave Provisions). In recent years, it has gained some traction as another way for employers to restrict competition by departing employees, either as an independent tool or combined with non-compete or non-solicitation provisions. In 2021, the Illinois legislature recognized garden leave by expressly providing that the statutory definition of a covenant does not include, among other things, "clauses or an agreement between an employer and an employee requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation" (820 ILCS 90/5). Nevertheless, garden leave provisions remain relatively uncommon in the US outside of the financial services industry.

In contrast, reliance on garden leave is well-established in the UK and elsewhere in Europe, where most employment relationships are governed by contract and can only be terminated by notice to the other party (and often only for cause by the employer). Because most US workers are at-will employees, the notice concept is relatively rare except for more senior executives and certain other unique personnel who are employed under an employment contract restricting the parties' termination rights.

### Garden Leave Versus Traditional Non-Competes

Garden leave and non-compete provisions are both tools employers can use when seeking to prevent a departing employee from working for a competitor for

a period of time. Traditional non-compete agreements directly prohibit employees from working in certain capacities for the employer's competitors (or certain defined competitors) for a limited time after their employment relationship ends. Employees generally are not paid during the non-compete period, though some state laws now require compensation or other valuable consideration during the restricted period (see Massachusetts Noncompetition Agreement Act (MNAA)). This leads to close judicial scrutiny and concerns about fairness to the employee and the adequacy of consideration for the agreement.

In contrast, under typical garden leave provisions, employees must give advance notice of their resignation, typically between 30 and 90 days' notice. During this garden leave period, the employees remain employed by the company and continue to receive their salary (and often benefits) but generally are relieved of some or all of their duties and responsibilities. In some cases, employers also pay a pro rata share of the employee's bonus, especially where the bonus constitutes a significant portion of the employee's total compensation. With garden leave provisions, the employer has a mirror image obligation not to terminate an employee without giving the same advance notice or pay in lieu of the notice.

During the garden leave period, the employer generally can:

- Remove employees from their active duties.
- Exclude employees from the workplace.
- Prevent employees from contacting and communicating with staff and customers or clients.
- Limit or cut off employees' access to the employer's computer systems, email, and other documents and information.

However, because employees on garden leave remain employed and receive compensation, they continue to owe a duty of loyalty (and for some employees, a fiduciary duty) to their employer and therefore cannot join or assist a competitor or any other employer during the garden leave period. The garden leave period therefore functions as a traditional non-compete period by keeping the employee out of the competitive market but may be perceived as less Draconian and more enforceable because:

- Garden leave periods are often shorter in duration than traditional non-compete periods (typically 30-90 days, and rarely longer than six months).
- The employee continues to be paid during the garden leave period.

Although paid post-employment non-competes are sometimes also referred to as garden leave, that usage is inaccurate. While paid non-compete periods have some of the same characteristics as garden leave, and share some of the same advantages (see Advantages and Disadvantages of Garden Leave Provisions), there is an important distinction between the two. With a non-compete, the employment relationship has terminated, and employees have no continuing duty of loyalty during the non-compete period (see, for example, 820 ILCS 90/5, recognizing garden leave provisions as distinct from non-competes and "requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation"). Paid non-competes are therefore subject to the same judicial scrutiny as traditional non-competes and should not be confused with true garden leave provisions.

## Judicial Treatment of Garden Leave Provisions

In most states (though there are growing exceptions), non-competes are generally enforceable to some degree, but remain subject to rigorous judicial review. Some states regulate non-competes by statute and increasingly restrict non-competes with lower wage workers. Other states evaluate them under common law contract principles. Although the specific iterations vary, most common law jurisdictions disfavor non-competes but enforce them to the extent reasonably necessary to protect legitimate business interests (see Practice Note, Non-Compete Agreements with Employees: Limitations on Enforceability).

Case law regarding garden leave provisions is less well developed than the law regarding non-competes. This is likely because:

- Garden leave provisions are challenged less often than non-competes, because garden leave periods generally are:
  - shorter than most non-competes;
  - paid; and
  - increasingly common and accepted in the financial services industry where they are most

often used (see, for example, *Citizens Bank, N.A. v. Baker*, 2018 WL 4853318, at *2 (W.D. Pa. Oct. 5, 2018) (in a dispute about breach of confidentiality provisions, the departing employees conceded they were placed on a 30-day garden leave after resigning and that they remained on the bank's payroll without having any official duties during that time)).

- In the financial services industry, where garden leave provisions are most common, many employment disputes are subject to mandatory Financial Industry Regulatory Authority (FINRA) arbitration (see Practice Note, Procedural Steps in FINRA Industry Arbitration and Key Employment Law Issues for Financial Services Employers: FINRA Industry Arbitration of Employment Disputes).

Courts have reached conflicting conclusions about their enforceability. Some courts have been particularly reluctant to specifically enforce these provisions, because doing so would require the court to order employees to continue an at-will employment relationship against their will (see Limitations on Specific Enforcement of Garden Leave Provisions). Other courts have found garden leave provisions generally enforceable.

In one of the earliest US cases regarding garden leave, Bear Stearns sought enforcement of a garden leave provision requiring 90 days' advance notice of resignation that was "buried" in various deferred compensation plans that the departing employees never signed. Bear Stearns agreed to pay the employees' salaries during the garden leave period but reserved the right to terminate their employment or not assign any work during that time. The court refused to enforce these "stealth" garden leave provisions. (*Bear Stearns & Co., Inc. v. McCarron*, 2008 WL 2016897 (Mass. Super. Ct. Suffolk Co. Mar. 5, 2008).)

In *Bear, Stearns & Co., Inc. v. Sharon*, the resigning broker had signed a memorandum to all senior managing directors accepting a raise in base salary in exchange for agreeing to a 90-day garden leave provision. Bear Stearns agreed to pay the broker's salary during the garden leave period and reserved the right to decide what, if any, duties the broker would perform during that time. Although the court originally granted a temporary restraining order preventing the broker from going to work for a competing firm, the court refused to grant a preliminary injunction as against public policy (see Limitations on Specific Enforcement of Garden Leave Provisions). However, the court found that there was a likelihood that Bear Stearns would prevail on a breach of contract claim and could be compensated by monetary damages for that breach. (550 F. Supp. 2d 174, 178 (D. Mass. 2008).)

In *Bear Stearns & Co. v. Arnone*, a New York state court found that a garden leave clause protected a legitimate business interest and enforced the provision against a departing broker who contacted her clients during the garden leave period, informing them that she could be reached at her new employer following the garden leave period. The court prohibited the broker from any further communications with those clients. (Case No. 103187 (Sup. Ct. N.Y. Co. 2008).)

Similarly, in *Natsource LLC v. Paribello*, a federal district court enforced a 30-day notice provision followed by a three-month paid non-compete and enjoined a commodities broker from working for a competitor for the combined four months. The court found it reasonable because the employer continued to pay the employee's full salary during this period. (151 F. Supp. 2d 465, 472 (S.D.N.Y. 2001).)

More recently, a federal district court in Oregon granted a TRO prohibiting an insurance broker from working for his new employer, a competing brokerage firm, for the duration of a 60-day garden leave period under a contract with his former employer. The court found the burden on the broker to be "minimal" given the relatively short duration and that the broker was being paid during the garden leave period. (*Aitkin v. USI Ins. Servs., LLC*, 2021 WL 755475, at *4-5 (D. Or. Feb. 26, 2021).)

In *Citizens Bank, N.A. v. Baker*, a federal district court granted a preliminary injunction against two former bank employees based on violations of their non-solicit and confidentiality agreements. The former employees resigned their employment and teamed up to start a competing wealth management business while on a 30-day paid garden leave period. In this case, however, the court did not enjoin their working for the competing business, but rather only enjoined the solicitation of Citizens' customers and use of its confidential information. (2018 WL 4853318 (W.D. Pa. Oct. 5, 2018).)

Another federal district court held that a garden leave policy limiting financial advisors' ability to work for a competitor and prohibiting customers from following

their chosen financial services professional potentially constitutes a violation of the Florida Antitrust Act or unfair competition (*Bank of Am., N.A. v. Crawford*, 2014 WL 12616933, at *3-4 (M.D. Fla. Aug. 6, 2014) (ruling on a motion to amend to add counterclaims that the advisors' new employer had standing to allege and sufficiently pled these claims)). However, this case settled and was dismissed without further legal developments on the issue.

Many cases conflate the concepts of paid notice or garden leave provisions and paid non-competes and use these terms interchangeably. Courts generally find that reasonable notice or garden leave provisions and other restrictions are enforceable when supported by a legitimate business interest, such as protecting and cementing customer relationships, maintaining the confidentiality of proprietary information, or both. For example, courts have:

- Found reasonable a 60-day notice and two-year non-solicitation and non-service of clients provision (*Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 651 N.Y.S.2d 504, 505-06 (1st Dep't 1996)).
- Enforced a 60-day notice provision (*AllianceBernstein, L.P. v. Clements*, 932 N.Y.S.2d 759 (Sup. Ct. N.Y. Co. 2011)).

When analyzing the reasonableness of a garden leave or a non-compete, courts generally find that an employer's willingness to pay an employee during the restricted period weighs in favor of enforcing the restriction (see, for example, *Maltby v. Harlow Meyer Savage Inc.*, 633 N.Y.S. 2d 926, 930 (Sup. Ct. N.Y. Co. 1995) (finding the restrictive covenant reasonable "on condition that plaintiffs continue to receive their salaries for six months while not employed by a competitor"); *Lumex Inc. v. Highsmith*, 919 F. Supp. 624, 629-36 (E.D.N.Y. 1996) (enforcing a six-month non-compete where the employer agreed to pay the employee's salary and benefits if he could not find work because of the non-compete); *Aitkin*, 2021 WL 755475, at *4-5 (finding that the equities balanced in favor of enforcing a 60-day garden leave period where employee received pay for the period)). Courts have also enforced these provisions where employees only receive their base salary and no bonus, even if this results in a substantial reduction in pay for the restricted period (see, for example, *Hekimian Labs., Inc. v. Domain Sys., Inc.*, 664 F. Supp. 493, 498 (S.D. Fla. 1987) (enforcing a non-compete where the employee received 50% of his salary during the restricted period); see also Statutes Addressing Garden Leave).

However, even paid non-competes lasting for time periods that are too long or covering a geographic area that is too broad may be deemed unreasonable in scope or not necessary to protect an employer's legitimate business interests (see, for example, *Estee Lauder Co., Inc. v. Batra*, 430 F. Supp. 2d 158, 180-82 (S.D.N.Y. 2006) (reducing a 12-month paid non-compete period to five months, but enforcing worldwide geographic scope because of executive's global responsibilities and international scope of business, and continued pay during the restriction); *Baxter Int'l, Inc. v. Morris*, 976 F.2d 1189, 1197 (8th Cir. 1992) (Illinois law) (refusing to enjoin a research scientist from working for a competitor during a one-year paid non-compete period, where the company's legitimate interests in protecting its trade secrets were already covered by an injunction against disclosing confidential information)).

### Limitations on Specific Enforcement of Garden Leave Provisions

Courts have been reluctant to specifically enforce notice or garden leave provisions because doing so requires the court to order employees to continue an at-will employment relationship against their will (see, for example, *Smiths Grp., plc v. Frisbie*, 2013 WL 268988, at *3 (D. Minn. Jan. 24, 2013); *Sharon*, 550 F. Supp. 2d at 178). Courts instead are more likely to issue an injunction prohibiting competition during the garden leave period (see, for example, *Ayco Co., L.P. v. Feldman*, 2010 WL 4286154, at *10 (N.D.N.Y. Oct. 22, 2010) (issuing preliminary injunction enforcing a combined 90-day notice and non-compete period but acknowledging that the court would not issue an injunction forcing the employee to continue working for the employer); *Smiths Grp., plc*, 2013 WL 268988, at *5 (refusing to enforce a six-month notice provision but enforcing one-year non-compete)).

Another court refused to specifically enforce a 90-day notice of termination (garden leave) provision because it would be "fundamentally unfair" to the employee's private banking clients to deprive them of their choice of financial advisor, especially during the turbulent market times of 2008 (*McCarron*, 2008 WL 2016897). In contrast, the *Aitkin* court granted a TRO specifically enforcing a garden leave provision that did not deprive financial services clients from moving their business to the brokerage of their choice, especially given the departing broker's claim that he was not servicing his former employer's clients who moved their business to his new employer

(*Aitkin*, 2021 WL 755475, at *4-5). However, in later proceedings in that case, the court refused to extend the plaintiff's duty of loyalty through the garden leave period, noting that:

Plaintiff clearly breached the garden leave provision of his Employment Agreement by not providing 60-days' notice. But while an employee has no legal right to breach a garden leave provision, that employee has the power to terminate their employment at any time. . . Defendants could not compel Plaintiff to remain their employee after he resigned, and his resignation was effective on the date he provided. And Plaintiff only owed Defendants a duty of loyalty until the date and time he effectively resigned.

(*Aitkin v. USI Ins. Servs., LLC*, 607 F. Supp. 3d 1126, 1151 (D. Or. 2022).)

In contrast, a recent Florida law creates a presumption of enforceability for garden leave provisions under certain circumstances, and mandates that a court grant an injunction to prevent an employee from providing services to another business or individual during the notice (garden leave) period. The law only allows the court to modify or dissolve the injunction if the employee can prove entitlement to an exception (§ 542.44, Fla. Stat.; for more information, see Florida CHOICE Act).

## Statutes Addressing Garden Leave

### Massachusetts Noncompetition Agreement Act (MNAA)

In August 2018, Massachusetts enacted the Massachusetts Noncompetition Agreement Act (MNAA), which requires employers to provide for "garden leave," or other mutually agreed on consideration, to support an enforceable non-compete provision. The MNAA applies to most non-compete agreements with employees and independent contractors entered into on or after October 1, 2018 (but does not apply to non-solicit or confidentiality agreements). The MNAA defines garden leave as a provision by which the employer agrees to pay the employee during the restricted non-compete period, "provided that such provision shall become effective upon termination of employment unless the restriction upon post-employment activities [is] waived by the employer or ineffective" because the employee was terminated without cause or laid off.

Garden leave under the MNAA must:

- Provide for pay on a pro rata basis during the entire restricted period of at least 50% of the employee's highest annualized base salary paid by the employer within two years of the employment termination.
- Not allow the employer to unilaterally discontinue or fail to make the payments, unless the restricted period is extended because of the employee's breach or misappropriation of employer property.

(M.G.L. ch. 149, §§ 24L(a), (b)(vii).)

Courts will not enforce agreements covered by the MNAA if they lack a garden leave provision or other mutually agreed consideration (see, for example, *KPM Analytics N.A. Corp. v. Blue Sun Scientific, LLC*, 2021 WL 2982866, at *32 (D. Mass. July 15, 2021)). However, agreements entered into before October 1, 2018 are not held to this requirement (*NuVasive, Inc. v. Day*, 2021 WL 1087982, at *9 (D. Mass. Feb. 18, 2021)). Moreover, a valid choice-of-law provision naming a jurisdiction other than Massachusetts is permissible, and not contrary to Massachusetts public policy, notwithstanding the MNAA (*NuVasive, Inc. v. Day*, 954 F.3d 439, 445 (1st Cir. 2020)).

The statute does not define "other mutually agreed consideration" or state whether the 50% rate is a minimum threshold. However, a recent case filed in a Massachusetts federal district court challenges the adequacy of consideration provided for a non-compete, where the amount paid was less than the employee would have received under the 50% calculation, and may provide clarity about the law's boundaries. (See *Boyd v. The Boston Beer Co., Inc.*, 25-CV-13618-GAO (D. Mass. Dec. 1, 2025) (complaint) (available on Westlaw Dockets).)

The MNAA contemplates that the payments continue after the termination of employment, but does not require that the employer extend the employment relationship throughout the so-called garden leave period. The statutory garden leave therefore functions more like a paid non-compete than traditional garden leave, which extends the employment period but relieves the employee of the obligation to perform active duties during that time. (See, for example, *Carroll v. Mitsubishi Chem. Am.*, 2022 WL 16573974, at *4 (D. Mass. May 19, 2022) (holding that required garden leave payments are not wages under the Massachusetts Wage Act).)

For more information on the MNAA, see Legal Update, Massachusetts Legislature Finally Passes Non-Compete Law.

### Florida CHOICE Act

Bucking the trend of state laws restricting the enforceability of non-competes, in July 2025, Florida enacted the Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act (H.B. 1219, codified at §§ 542.41 to 542.45, Fla. Stat.). The CHOICE Act is a first-of-its kind law creating a presumption of enforceability for covered garden leave agreements (and non-competes) with employees and contractors earning over a minimum salary threshold if the agreement meets certain conditions. The CHOICE Act became law without the governor's signature on July 3, 2025, but by its terms contains an effective date of July 1, 2025 (H.B. 1219, Sec. 22).

The Florida CHOICE Act defines:

- A covered employee as an employee or individual contractor who earns or is reasonably expected to earn a salary (as defined, and excluding commissions, bonuses, and tips) greater than twice the annual mean wage of the Florida county where either:
  - the employer has its principal place of business; or
  - the employee resides, if the employee works for an employer with an out-of-state principal place of business.
- A covered garden leave agreement as a written agreement between a covered employee and a covered employer in which the parties agree that:
  - there is an express notice period of no more than four years for terminating the relationship;
  - the employee will not resign before notice period ends; and
  - the employer will retain the employee during the notice period at the same salary and benefits provided during the month before the notice period began, but is not required to pay discretionary incentive compensation or benefits or have the employee perform any services.

(§ 542.43(3), Fla. Stat.)

The CHOICE Act only applies to those covered employees who either:

- Maintain a primary place of work in Florida, regardless of any applicable choice of law provisions in the agreement.
- Work for an employer with a primary place of business in Florida and a contract designating Florida as the governing state law.

(§§ 542.44(1) and 542.45(1), Fla. Stat.)

Covered garden leave agreements are presumptively enforceable if:

- The employer advises the employee in writing of the right to seek counsel before signing the agreement.
- The employee acknowledges that they will receive confidential information or customer information during their employment.
- The agreement provides that:
  - after the first 90 days of the notice period the employee does not have to provide any services to the employer;
  - the employee may engage in non-work activities at any time during the remainder of the notice period;
  - the employee may work for another employer during the remainder of the notice period with the covered employer's permission; and
  - the notice period may be reduced by the employer on 30 days' advance notice to the employee.
- The employer provides notice of the garden leave agreement at least seven days before the employment offer or offer to enter into the garden leave agreement expires.

(§§ 542.44(2) and (3), Fla. Stat.)

When an employer seeks enforcement of a covered non-compete or garden leave agreement, a court must enter a preliminary injunction unless the employee or the new employer establishes by clear and convincing evidence, without using confidential information, any one of the following:

- The employee will not perform any work similar to that performed during the last three years of the employment relationship or use any confidential information or customer relationship.

- The employer failed to pay or provide the consideration for the covered agreement or the salary and benefits required during the garden leave period and has had a reasonable opportunity to cure.
- The new employer is not engaged in and is not planning or preparing to engage in during the notice period any business activity similar to that engaged in by the former employer in the specified geographic area.

The injunctive relief provided under Florida's CHOICE Act is not an exclusive remedy, and a prevailing employer is entitled to recover all available monetary damages for all available claims. In any action to enforce a covered garden leave agreement, the prevailing party is also entitled to reasonable attorneys fees and costs. (§ 542.44(5), Fla. Stat.)

Florida's CHOICE Act applies to garden leave agreements with covered employees who either:

- Maintain a primary place of work in Florida, regardless of the agreement's choice of law provisions.
- Work for a covered employer with a principal place of business in Florida and where agreement is expressly governed by Florida law.

(§§ 542.44(1) and 542.45(1), Fla. Stat.)

The Act provides similar protections for covered non-compete agreements (for more information, see Practice Note, Non-Compete Agreements with Employees: Statutory Protections Favoring Enforceability of Non-Competes).

Given the uniqueness of this new law, it may be subject to legal challenges. The pro-Florida choice of law provision may also set up court battles with other states, especially those states that prohibit or limit the enforcement of restrictive covenants, given that the law purports to apply to employees who do not live or work in Florida. Practical Law will continue to monitor these developments.

The CHOICE Act specifically exempts certain licensed health care practitioners, as defined in § 456.001, Fla. Stat., from coverage under the law (§ 542.43(3), Fla. Stat.). Garden leave agreements that are not covered by the CHOICE Act remain governed by Florida's generally applicable law regarding restraints of trade and may be enforceable if they meet that law's criteria (§ 542.335, Fla. Stat.; for more information, see State Q&A, Non-Compete Laws: Florida).

## Advantages and Disadvantages of Garden Leave Provisions

Garden leave clauses have many advantages over traditional non-competes, including:

- An increased likelihood of enforcement. Courts may be more receptive to garden leave clauses because:
  - the employee is paid during the garden leave period;
  - garden leave is typically much shorter in duration than a non-compete; and
  - employers use garden leave more selectively.
- Added protection for the employer. The employee's common law duty of loyalty (and in some cases, fiduciary duty) continues throughout the garden leave period because the employee remains employed while on garden leave.
- A more orderly transition of client relationships and work responsibilities. When an employee leaves, the most crucial period for an employer is the immediate 30- to 90-day period after the resignation notice. That period is typically covered by garden leave and is longer than the typical two-week notice employees often give before resigning.
- A decreased likelihood of overuse when not necessary to protect legitimate business interests. Because of the cost of paying an employee while on garden leave, employers use garden leave provisions more selectively.
- The flexibility to release employees from their garden leave obligations if their departure poses no competitive threat (but only if the garden leave provision specifically allows for this).

Despite the benefits, garden leave is not without its drawbacks. The disadvantages of garden leave clauses include:

- The significant cost of paying an employee who does not perform any work during the garden leave period.
- The relatively short duration of a garden leave period (typically 30 to 90 days) compared with a typical non-compete period (commonly 6 to 18 months, and sometimes up to two or three years). A garden leave provision therefore may provide less protection to an employer than a reasonable non-compete.

- Logistical issues regarding electronic access during the garden leave period if the employee is needed for transitional duties during that time, especially if the employee is otherwise prohibited from working or contacting clients or coworkers.
- The difficulty in specifically enforcing garden leave provisions because doing so requires that employees remain employed against their will (especially if the employer can require the employee to perform services during that time).

## Drafting Garden Leave Provisions

Garden leave provisions may be included in various agreements between employers and employees, such as:

- Offer letters (see, for example, Standard Documents, Offer Letter/Short-Form Employment Agreement for Executive and Offer Letter/Short-Form Employment Agreement for a Non-Executive).
- Employment agreements (see, for example, Standard Documents, Executive Employment Agreement (Long-Form) and Executive Employment Agreement (Medium-Form)).
- Stock option plans (see Practice Notes, Overview of Equity Compensation Awards and Stock Options Overview).
- Bonus plans or agreements (see, for example, Standard Document, Annual Cash Bonus Plan).
- Equity award agreements (see, for example, Standard Document, Restricted Stock Award Agreement (Employees)).
- Long-term incentive plan (LTIP) agreements (see, for example, Standard Document, Long-Term Cash Incentive Plan).
- Supplemental Executive Retirement Plan (SERP) agreements (see Practice Note, Supplemental Executive Retirement Plans (SERPs)).
- Stand-alone non-compete, non-solicit, or confidentiality agreements (see Practice Note, Non-Compete Agreements with Employees, Standard Document, Employee Non-Compete Agreement, and Standard Clause, Non-Solicitation Clause).
- Severance agreements (see Practice Note, Severance Benefits, Plans, and Agreements: Overview).

Garden leave provisions can also be found in separation agreements (see Practice Note, Employer-Side Strategies for Negotiating a Severance or Settlement Agreement: Single Plaintiff Employment Dispute and Standard Document, Separation and Release of Claims Agreement (Long-Form)). It is not uncommon for employers terminating employees, especially high level employees, to provide for a transitional period during which employees are not expected or permitted to work but continue to be paid their salaries and receive certain benefits. In these circumstances, the garden leave period is often negotiated at the time of separation, which provides an even stronger basis for its enforcement.

For a sample garden leave provision, see Standard Clause, Garden Leave Provision.

To maximize the employer's protections and increase the likelihood of enforcement, employers should consider several issues when drafting garden leave provisions.

### Require Signed Agreements

Employers should ensure that employees subject to garden leave provisions sign the agreement or plan that contains the restriction. Employees should clearly acknowledge the garden leave provision. Failure to do so creates difficulty in enforcement (see, for example, *McCarron*, 2008 WL 2016897 (refusing to enforce restrictive covenants "buried" in the terms and conditions of a deferred compensation plan, where the former employees did not sign the terms and conditions and may never have seen them)). In some cases, the signature may be electronic (see Standard Clause, General Contract Clauses: Electronic Signatures).

### Identify Covered Employees

Employers must determine which employees will be subject to garden leave provisions. Since the garden leave period is paid, often with benefits and sometimes with bonuses, and requires a continuing relationship with the employer, employers generally restrict garden leave to those employees at its highest level, such as key executives and information technology (IT) employees.

Garden leave provisions may be useful for sales or other employees responsible for developing

relationships with clients to provide a period in which the employer can work to transition their client relationships without direct competition. A garden leave period may also be useful for employees with substantial access to trade secrets and other confidential information. Garden leave provisions are generally not used for lower-level, rank-and-file employees.

## Define Garden Leave Period

Employers must determine the appropriate length of the garden leave period. Periods of 90 days or less are the most common, though some garden leave periods can be up to six months. Garden leave periods for much longer than this run the risk of being challenged, especially in non-negotiated agreements, as a form of involuntary servitude because the employee must remain employed.

The single most important factor in determining the garden leave period is the protectable interests at stake. Employers should consider the nature of the employee's position as well as particular concerns associated with that position. For example, employers may have incrementally longer garden leave periods for persons with greater responsibility, such as:

- 30 days for a vice president.
- 60 days for a director.
- 90 days for a managing director.

Notably, under the Florida CHOICE Act, covered garden leave agreements with covered employees are enforceable with a notice period of up to four years if the agreement meets other statutory requirements (see Florida CHOICE Act).

## Determine Employee Compensation

Employers must decide what compensation to provide to employees during the garden leave period. At a minimum, employees should continue to receive their regular salary, usually with benefits, but may forfeit eligibility for bonuses or other incentive pay. This may be problematic for employees who receive a substantial portion of their compensation as bonuses because they may claim that they are not receiving adequate consideration and therefore the garden leave provision should not be enforced. Although not always stated in these terms, courts are reluctant to enforce non-competes and, by extension, garden leave provisions, that are perceived as fundamentally unfair to the employee. However, this argument may not be persuasive in jurisdictions where continued at-will employment is sufficient consideration for enforcing even an unpaid non-compete period.

More complicated situations arise when employees are paid solely on a commissioned basis. For these employees, employers may want to set a formula to compensate the employees (such as the average of commissions paid over the last several months) that complies with the parties' contract and applicable law but must be mindful that the law is not well-developed on these issues.

## Consider Leave Accrual and Other Benefits

Employers may choose to limit or decrease certain fringe benefits during the garden leave period, such as the accrual of paid time off. This and other similar reductions in benefits during the garden leave period will likely have a negligible effect on the potential enforceability of the garden leave provision. It may also be helpful for employers to include a provision stating that employees must use all unused accrued leave, such as paid time off or vacation, during the garden leave period, especially in those jurisdictions where employers must pay employees for unused vacation at the time of termination (see Vacation Pay State Laws Chart: Overview).

To be covered by the Florida CHOICE Act, the employer must agree to pay the employee during the notice period the same salary and provide the same benefits (defined as access to health, life, and disability insurance) as it provided during the month before beginning the garden leave period (§ 542.43, Fla. Stat.).

## Reserve Employer's Right to Exclude Employee from Work

Employers should expressly reserve the right to exclude employees from performing any work during the garden leave period. Employers may want to specifically restrict access to the employers':

- Workplace.
- Email and other electronic communication systems.
- Clients.
- Confidential or proprietary information.

Employers should also specify that during the garden leave period the employee will not bind, attempt to bind, or otherwise obligate the employer to any third party and shall not incur business expenses unless pre-approved in writing.

For agreements covered by the Florida CHOICE Act, the employee must not be required to perform any services for the employer after the first 90 days of the notice period.

## Reserve Employer's Discretion to Waive or Modify Garden Leave Restrictions

Employers can decide whether to retain discretion to shorten or waive the garden leave restrictions and whether the employee receives pay in lieu of garden leave for any waived period. If employers want to retain these rights, the garden leave provision should explicitly state what discretion the employers have and how they must notify employees when exercising that discretion. For example, employers may include a section reserving their rights to shorten or waive the period and stating they shall notify the employee in writing of any modification or waiver. For sample language, see Standard Clause, Garden Leave Provision: Garden Leave.

An Illinois state court case shows the risk of not including this provision in an agreement. In *Reed v. Getco, LLC*, an employer agreed to pay an employee $1 million in exchange for a six-month non-compete. Shortly after the employee resigned, the employer notified the employee it was waiving the six-month non-compete restriction and therefore not paying the $1 million. The employee nonetheless complied with his end of the bargain and refrained from competing with the employer for six months. Because the agreement provided that there could be no waiver of the agreement unless it was signed by both parties, the court held that the payment was due. (65 N.E.3d 904 (Ill. App. Ct. 2016) and Legal Update, Epstein Becker: Illinois Appellate Court Holds Employer's Waiver of Non-Compete Period to Avoid $1 Million Payment Was Ineffective; see also *Tini v. AllianceBernstein L.P.*, 968 N.Y.S.2d 488, 489 (1st Dep't 2013) (finding that the employer had no right to unilaterally reduce the notice period).) Although these cases arose in the context of a non-compete, they nonetheless highlight the importance of planning for contingencies and reserving discretion to modify the terms of garden leave provisions.

Employers should be aware that there is a potential risk in expressly retaining unilateral discretion to waive or modify the garden leave period without agreeing to pay in lieu of notice. For example, if the threat of enforcing the garden leave provision limits an employee's job mobility, the employer's waiver of the garden leave period with no notice may still limit the employee's ability to immediately obtain new employment (without the employer obligating itself to do or pay the employee anything in return). A court may find that the employer's promise in this situation is illusory and therefore refuse to enforce the garden leave provision for lack of consideration or unconscionability.

In contrast, the Florida CHOICE Act specifically grants the employer the right to reduce the notice (garden leave) period if the employer provides at least 30 days' advance notice to the employee (§ 542.44(2)(c)(4), Fla. Stat.).

## Consider Pairing Garden Leave with Non-Compete and Non-Solicitation Provisions

Some courts may be reluctant to specifically enforce garden leave provisions because they compel an employee to remain employed against their will and therefore specific enforcement would violate public policy. To increase the likelihood of specific enforcement, employers may want to contract for a non-compete or non-solicitation period (or both) that runs concurrently with the employee's garden leave period. The non-compete period can be paid or unpaid, though if paid, a court may be more likely to enforce it. The employer will then have another avenue for enforcement if the employee starts working for a competitor and the employer cannot enforce the garden leave provision, at least in those jurisdictions that allow post-employment non-competes.

As with any restrictive covenant, employers should be aware of the potential impact of "merger" clauses on any pre-existing garden leave provision or other restrictive covenant. For example, in *SVB Secs. Hldgs. LLC v. Drendel*, a federal district court addressed an employer's attempt to enforce a three-month garden leave provision in an employer's initial offer letter followed by a three-month non-compete in a retention agreement entered into regarding a corporate acquisition of the employer. The retention agreement included a merger clause stating that it

superseded prior agreements regarding the same "subject matter" of the agreement. The employee resigned effective immediately, without giving the notice required by the garden leave provision, but complied with the three-month non-compete period. The employer paid the employee for the garden leave (though the employee offered to return that pay) and contended that the garden leave extended the employment period. In ruling on a motion for a TRO and preliminary injunction, the court held that the plaintiff (the acquiring employer) failed to demonstrate a likelihood of success on the merits to show that the non-compete in the retention agreement did not supersede the earlier garden leave provision or that the non-compete period should run from the expiration of the garden leave period (which would have extended the resignation date by three months). (2022 WL 4369991, at *4-6 (W.D.N.C. September 21, 2022) (applying New York law).)

### Other Drafting Issues

Employers should consider including the following provisions when drafting garden leave provisions:

- Choice of law and forum selection provisions (see Standard Document, Employee Non-Compete Agreement: Choice of Law and Forum Selection and Practice Note, Choice of Law and Choice of Forum: Key Issues). As with non-competes, the jurisdiction and applicable law may be outcome dispositive.
- Jury waiver provisions (see Standard Clause, General Contract Clauses: Waiver of Jury Trial).
- Severability and blue pencil provisions (see Practice Note, Non-Compete Agreements with Employees: Reformation of Overbroad Non-Competes (Blue-Penciling), Standard Document, Employee Non-Compete Agreement: Severability, and Standard Clause, General Contract Clauses: Severability). However, as with non-competes, the court's ability to blue pencil (or modify) a garden leave provision may depend on applicable state law (see Non-Compete Laws: State Q&A Tool: Question 6 and Quick Compare Chart: State Non-Compete Laws).

## Benefit and Group Health Plans

If employees subject to garden leave provisions participate in any pension, severance, or other benefit plans, employers should ensure that the plan documents clearly define whether the employees vest in their benefits based on a notice of termination (that is, by placing employees on garden leave) or on the final employment termination (the end of the garden leave period). If this is ambiguous, terminated employees may have a claim for interference with their rights to these benefits under the Employee Retirement Income Security Act (ERISA) (see, for example, *Kirby v. Frontier Medex, Inc.*, 2013 WL 5883811, at *10 (D. Md. Oct. 30, 2013)).

### Section 409A Issues

Although a detailed discussion of this issue is beyond the scope of this Note, when contemplating garden leave, employers also must consider potential issues arising under Section 409A of the Internal Revenue Code. Section 409A creates a complex and comprehensive set of rules regarding nonqualified deferred compensation. Section 409A defines deferred compensation broadly as any form of compensation that is or may be paid in a year following the year in which the legal right to the payment arises, unless an exception applies. Incentive compensation and severance payments and benefits often fall within its reach. While there are often ways to structure payments to comply with an exception from Section 409A, it is important to consider the issue before entering into any garden leave arrangement because the rules are complicated and do not specifically contemplate garden leave. Employers should consult with counsel because even a minor violation of Section 409A can result in significant adverse tax consequences.

For an overview of Section 409A, see Practice Note, Section 409A: Deferred Compensation Tax Rules: Overview. For additional Section 409A resources, see Section 409A Toolkit.

#### COBRA Issues

Although a full discussion of this issue is beyond the scope of this Note, employers that sponsor group health plans also must consider whether placing employees on garden leave triggers any rights or obligations under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA requires most employer-sponsored group health plans to offer covered employees and dependents (known as qualified beneficiaries) the opportunity to continue their health coverage in situations where the coverage would otherwise end because of certain life events (known as qualifying events). Among other

compliance obligations, plans must provide COBRA-qualified beneficiaries an election notice when certain COBRA qualifying events occur (see Standard Document, COBRA Election Notice).

Placing an employee on garden leave with a reduction in, or total elimination of, work hours may:

- Constitute a qualifying event under COBRA.
- Result in a loss of coverage under a plan, depending on the plan terms (including governing eligibility provisions).

Failure to comply with COBRA's specified notice obligations may result in claims by the employee for:

- Damages resulting from the loss of coverage.
- Penalties and fines.

Employers that place employees on garden leave should:

- Consult the governing plan terms and, if applicable, the plan's insurer or stop-loss carrier.
- Address how COBRA will be handled when an employee goes on garden leave provision (including whether the garden leave constitutes a COBRA qualifying event), so that the commencement and duration of any COBRA coverage period is clear.
- Coordinate with any third-party COBRA administrators to ensure that required COBRA notices are timely provided and premium payments are handled properly.

For more information on COBRA generally, see Practice Note, COBRA Overview and COBRA Toolkit.