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Companies block poaching with 'garden leave'

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MUMBAI: Retaining high potential talent through monetary incentives is a regular practice across industries. Disincentivising competition from acquiring your key talent by way of 'garden leave clauses' — seen mainly in the banking, financial services and insurance (BFSI) sector — is a trend now picking up pace in other segments as well.

Unlike a notice period, which an employee serves within the company after resignation, garden leave is a period that a person serves after he/she has left the organisation but cannot join another company. Garden leave clauses can be a disincentive for prospective employers because of the time lag and possibility of a no-show even after the candidate has served the period.

HOLDING ON TO KEY TALENT

- > After resigning from a company, most employees usually serve a notice period within the organisation
- > But a **'garden leave clause'** specifies a period for which the employee cannot join another company after having already quit the current organisation
- > This clause was mostly used to retain top management in the financial services segment
- > Now consumer, tech & semi-conductor cos are using it to discourage prospective



employers from poaching key talent by **ensuring the inherent time lag between jobs**

- > Recruiters and HR experts also say cos inserting the garden leave clause in contracts **enforce it strictly and do not negotiate**

Executive search firms and HR experts told TOI that a number of companies in the consumer, technology and semi-conductor space is incorporating such clauses in employment contracts of senior-level personnel as a retention tool. This is to create additional barriers for rival organisations, who may hesitate to wait for three-six months for hiring a candidate.

Garden leaves, which were earlier seen in very senior positions in the financial sector, are now becoming more common. Executive Access India MD Ronesh Puri said, "Earlier, there were isolated cases where a person occupying an important position in a bank or a financial services firm had a garden leave clause in the contract, which ranged from three to six months. This is now moving to other industries like services and consumer sectors. Companies are raising queries with us. They are

asking us how to go about it and many are certainly considering it.”

Companies that include garden leave clauses in individual contracts are said to be now standing by it quite sternly with little room for negotiation. Hunt Partners managing partner Suresh Raina said, “The economy has picked up and the ensuing demand is encouraging companies to adopt a hardline approach. We are staying close to candidates to help manage their exit. Companies have become quite strict — trying everything to stop or delay the departure, including ultimatums to those who join competition to make them serve the garden leave time.”

Many employers feel that the benefit gained by delaying a key employee from joining a competitor would outweigh the potential costs in keeping an employee on their rolls even though he/she may not be doing any active work.

Khaitan & Co associate partner Vinay Joy said such clauses are seeing more prevalence in competitive work environments, given that the very intent of such clauses is to prevent an employee from having access to the employer’s confidential information and data. “Because of the way shifts in technology are disrupting traditional business models, it has become key for companies to keep their best innovators and thinkers on board or at the very least, keep them out of the hands of their competitors,” said Joy.

The case law around the validity of such clauses, however, has been limited. The principles for determining the validity of such clauses, said Joy, were established by a 2007 judgment of the Bombay high court where it struck down the garden leave clause in question on the grounds that it was meant to prevent an employee who had left a job to take up gainful employment elsewhere.

Joy said, “Given the non-enforceability of restrictive covenants beyond the term of employment under Indian law, many companies are these days resorting to garden leave clauses to try and restrict the employees from joining a competitor, at least for the duration of their notice period. This flows from the premise that restrictive covenants during the term of employment are still enforceable and, therefore, so long as the employment subsists, employers would be able to restrict an employee from joining a competitor by enforcing a garden leave clause.”