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Garden Leave - The Hotel California of Restrictive Covenants

“You can checkout anytime you like, but you can never leave.” This time-honored lyric from *Hotel California* aptly describes Garden Leave (or Notice) provisions in employment agreements. A Garden Leave provision is simply a notice requirement in an employment agreement requiring the employee to provide notice prior to voluntary termination of employment. The Garden Leave works to give the employer time to solidify its relationship with clients while the employee stays at home and is prohibited from contacting clients during the Garden Leave period, which can be anywhere from two weeks to as long as a year. During the Garden Leave period the employer pays the employee’s regular compensation without requiring the employee to actually work, and in most instances, explicitly prohibiting the employee from working.

In this country,* Garden Leave provisions are becoming increasingly common in employment agreements. Very few courts have squarely addressed the Garden Leave and whether it is valid and enforceable, but decisions by those courts which have contemplated Garden Leave have gone in different directions. Garden Leave provisions can be quite valuable to a broker-dealer as it markedly increases client retention when a financial advisor seeks to leave. This appeal has caused a number of firms to start including them into their employment agreements.

Employees asked to sign a Garden Leave should be aware of the pitfalls. Should you be subject to Garden Leave, you should expect to lose a significant percentage of your business and should structure any

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potential recruitment deal accordingly so that you do not find yourself unable to meet asset or revenue hurdles. Also be aware that although you may be home not working during a Garden Leave period, you are still the FA of record on client accounts and are thus responsible and potentially liable for what occurs with your clients' accounts.

Fortunately, there are a number of factual and legal theories that can be utilized to attack the viability of a Garden Leave provision. The Shumaker law firm has extensive experience counseling recruits on Garden Leave provisions as well as defending against them in court and in FINRA arbitration.

** Garden Leave is originally a British term which originated in the 1980s when executives were asked to go home to tend to their gardens for a period of time before starting new employment. It was originally called "gardening leave."*