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Using garden leave can help take the edge off attrition

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The grass is greener on the other side, human resources managers may soon start hearing, what with attrition rates starting to go up again. Indian companies, having successfully survived the recession, are reviving their war for talent. As per local news reports, the IT/ITES industry alone is looking to recruit over 100,000 candidates.

From a retention standpoint, HR managers may be a worried lot. Several talented employees may just be updating their CVs and some of them may be in possession of critical confidential information (CI) and trade secrets, especially in relation to ongoing projects. This brings on the concept of garden leave, first adopted in England with the intention of protecting an organisation from disclosure of CI by the departing employee.

Encyclopaedia Encarta defines garden leave as "obligatory leave with full pay given to employees between notification of termination of employment and the actual termination date." During garden leave, an employee is not required or allowed to work (or come to office for that matter), but is eligible to salary and benefits. The employee, however, continues to be on the rolls of the company.

Garden leave allows the employer or HR department to ensure that the employee does not perform any function or activity during a specified period, as a result of which,

i) He is not exposed to additional CI of the employer;

ii) The CI that he is already in possession of becomes stale

and cannot be misused for that period; and

iii) He is unable to keep or source any business contracts since he is disallowed from dealing with customers or other employees.

Garden leave may prove crucial, especially to companies engaged in sectors such as banking, financial services, IT, pharma, biotech, media, telecom and retail. These sectors have witnessed more sensitive information flowing across various employee levels and therefore remain more susceptible in the short term.

From a legal perspective, garden leave clauses need to be drafted carefully. The Indian Constitution provides, under Articles 21 and 41, that every individual has the right to livelihood and work.

In the case of VFS Global Pvt Ltd vs Suprit Roy (2008(2) BomCR446), the Bombay High Court held that garden leave can only be enforceable when the employment arrangement subsists. The court also held that payment of compensation for the period of garden leave is an essential component of ensuring subsistence of a garden leave clause.

Accordingly, it is imperative that the garden leave clause is drafted to reflect that the employment would continue during the gardening leave and that the employee would be bound by all contractual terms and conditions. Further, it is necessary to ensure that the employer has a right but is not obligated to provide garden leave in all situations.

Another importance of this concept is the fact that unlike the UK and select US states, Indian contract law treats post-termination non-compete clauses in employment contracts as void. It is not possible to prevent the departing employee from joining a competitor unless the restriction is enforced during the term of employment. Garden leave could end up being an effective solution.

The High Court of England and Wales in the matter of SG&R Valuation Service Co vs Boudrais & Others ([2008] EWHC 1340) contemplated whether an employer could imply a gardening leave clause in employment agreements without it being expressly provided. The court held that for employees whose continuity of work is essential for maintenance of his skills, there

can be no implied gardening leave clause, unless gross misconduct is proved by the employer.

Given the need to have strong evidence, the onerous process involved and the delays in receiving judgments through the courts/ arbitrators, garden leave may prove to be a useful tool to potentially mitigate the exposure. At the same time, it must be noted that stipulating a garden leave is not a straight jacket formula to ensure the ability to protect CI and trade secrets. In the context of a developing economy such as India, employers also need to ensure that they have their other systems in place, including having clear HR policies and procedures, monitoring of computer and internet usage, preventing access to company's server, returning of laptops and BlackBerry, documenting exit interviews, etc.

In effect, garden leave is a great tactical tool to take the edge off an exiting employee's knowledge and skill set, particularly that derived from his employment in the organisation. It allows the employer to curtail, to some extent, the value loss due to the exit.

An employee may jump the fence for a greener lawn, but the next time you hear your employee say so, please ensure that he leaves your garden unruffled.

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