

Tending the Garden: Restricting Competition via “Garden Leave”

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American employers have rarely paid for the noncompetition agreements they require of many employees, at least if “payment” is defined as anything above normal compensation. That is clearly changing at least in some sectors of the economy and for at least some employees. A version of the common English practice of offering “garden leave” has been adopted by many firms in the financial services industry for higher-value workers, and it is spreading to other sectors.

Garden leave is essentially a paid sit-out restriction, and while well-established in England, there is relatively little law on such provisions in the United States. To complicate matters, American firms have typically departed from the defining characteristics of traditional English garden leave. Most importantly, English firms retain workers as employees during garden leave, thus looking to the employee’s duty of loyalty to justify the restraint on competition. In contrast, American employers generally use garden leave as a postemployment device, requiring former employees to refrain from competition during a restricted period.

One inquiry, therefore, is simply how well American garden leave fits within the normal doctrinal analysis for noncompetition agreements. This embraces the question of whether such provisions may be used to end-run judicial limitations on postemployment restraints. It also raises issues about the respective rights and duties of the employer and former employee during the period of garden leave.

Finally, of course, garden leave provisions raise in stark relief the long-submerged tension between the two interests that have traditionally been in opposition to the employer’s interest in restraining competition. The first is

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undue hardship on the employee; such provisions reduce the costs to employees and may tend towards narrower and shorter restraints, precisely because the employer now has “skin in the game,” thus mitigating such concerns. However, the second interest—the benefits to society of free competition—continues unabated; indeed garden leave would seem to exacerbate the effects of postemployment restraints in that regard.

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INTRODUCTION

Transplanting legal innovations from one country can be a risky business, and perhaps riskier when the new arrival is altered to a form significantly different from its parent stock. A recent example of this phenomenon is “garden leave,” an import from the United Kingdom that is finding increasing acceptance in the United States. To date, it has been used mostly in higher level positions in the financial services industry (perhaps because firms in that industry typically have strong presences in both London and New York),¹ but there is evidence of growing interest in other sectors.²

1. See Howard J. Rubin & Gregg A. Gilman, *Will Garden Leaves Blossom in the States?*, 33 EMP. REL. L.J. 1, 1-2 (2007) (reporting adoption of garden leave for higher level directors at Morgan Stanley and Citigroup); Hugh Son, *BofA Forces ‘Garden Leave’ on Brokers After Defection*, BLOOMBERG BUSINESSWEEK (Feb. 17, 2011, 9:00 PM PST), <http://www.bloomberg.com/news/articles/2011-02-18/bofa-forces-garden-leave-on-advisers-after-top-broker-defects> (last updated Feb. 18, 2011, 10:26AM PST).

2. See, e.g., Thomas B. Lewis & Mark F. Kowal, *Garden Leave Provisions: A Growing Trend in Employment Agreements*, N.J. L.J., Apr. 18, 2011, at 2; Christopher P. Stief, *What In-House Counsel Should Know About “Garden Leave” Clauses*, CORPORATE COUNSEL, Oct. 22, 2008 (archived from <http://www.corpcounsel.com> to LexisNexis); Jeffrey S. Klein & Nichols J. Pappas, *“Garden Leave” Clauses in Lieu of Non-Competes*, N.Y. L.J., Feb. 5, 2009, at 1.

A number of recent cases describing employees as being placed on “garden leave” involve firms outside the financial industry. *E.g.*, *Menzies Aviation (USA), Inc. v. Wilcox*, 978 F. Supp. 2d 983 (D.

However, the most common American version differs in major respects from its English progenitor, making it difficult to assess how such provisions affect employees on leave and, ultimately, the viability of the transplant.

As is often true, the narrow inquiry about the viability of garden leave leads to the broader questions of whether garden leave is a welcome addition to American law governing competition and how its use might affect a range of current practices. As we will see, the answers are not clear, which may partially explain the limited use—so far—of this particular mechanism in the United States. Indeed, perhaps because of its relatively recent emergence, there has been little sustained discourse about the phenomenon in this country, the scholarship being limited to one student note a decade ago³ and occasional short references in a variety of sources.⁴ This article, then, undertakes the tasks of describing the phenomenon, assessing its viability and implications in the United States, and evaluating its desirability here. This exploration is more than a little handicapped by the absence of empirical data, forcing reliance on a handful of cases and articles in legal newspapers as well as the casual empiricism of anecdotal evidence.

As developed under English law, garden leave is an alternative to postemployment noncompetition clauses: the employee remains employed for the period of the leave but is expected to do no work. He could, then, stay home and tend the garden. The legal advantages in England follow from the structure of the arrangement. Since current employees are bound by a duty of loyalty not to compete with their employer⁵ and those on garden leave remain employed, they are barred from competition without the complications of the

Minn. 2013); Kirby v. Frontier Medex, Inc., No. ELH-13-00012, 2013 U.S. Dist. LEXIS 155357 (D. Md. Oct. 30, 2013); Smiths Group, PLC v. Frisbie, No. 13-52(DSD/TNL), 2013 U.S. Dist. LEXIS 9445 (D. Minn. Jan. 24, 2013); Borich v. BP, PLC, 904 F. Supp. 2d 855 (N.D. Ill. 2012). Nevertheless, Professor Norman Bishara, who has empirically studied forms of noncompetition arrangements, believes, on the basis of both anecdotal evidence and a survey of CEO contracts, that garden leave is rare, at least outside the finance industry. Email to author from Norman Bishara (Jan. 6, 2015) (on file with author).

3. See generally Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2002).

4. See, e.g., Daniel J. Raker, *A Lower Level of Scrutiny? New Alternatives for an Effective Restraint on Competitive Activity*, 39 LOY. U. CHI. L.J. 751, 766 (2008) (“[T]here are good reasons for employers to use a system similar to garden leave to deal with key employees. Garden leave arrangements are expensive in that they require ongoing payments during the restricted period, but these payments dwarf the potential amount the company would spend in ongoing litigation related to the breach of a restricted covenant.”).

5. The duty of loyalty of current employees in the United States is similar. See, e.g., Scanwell Freight Express STL, Inc. v. Chan, 162 S.W.3d 477, 479 (Mo. 2005); Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486 (Colo. 1989); RESTATEMENT OF EMPLOYMENT LAW § 8.01(b)(ii) (AM. LAW INST. 2015) (“Employees breach their duty of loyalty to the employer by . . . competing with the employer while employed by the employer . . .”); *id.* § 8.04 (defining such competition). See generally Bob Hepple, *The Duty of Loyalty: Employee Loyalty in English Law*, 20 COMP. LAB. L. & POL’Y J. 205 (1999).

more traditional form of covenants not to compete—a *postemployment* restraint of trade.⁶ Or at least that seems to be the theory.

Legal implications aside, departing employees are less likely to challenge the restraint because they are being paid, and those who would prefer to forgo the garden for competitive activity are not likely to be viewed as sympathetically by courts as compared to workers whose noncompetition agreements leave them with no income for the restricted term. Further, because an employer pays for the leave and therefore has some skin in the game, a court might find this arrangement more legitimate and less prone to employer overreach than a typical noncompete agreement.⁷

The costs of such leave, of course, are also a reason why employers may decide not to offer it, relying instead on the law governing contracts with postemployment restraints. In the United States, with notable exceptions,⁸ such covenants are generally enforceable if reasonably tailored to protect defined legitimate employer interests.⁹ Thus, employers would seem to have the ability to prevent competition without paying the cost of the former employee's salary during the sit-out period.

One threshold question, then, is why any rational American employer would incur the increased compensation cost of garden leave to achieve essentially the same goal.¹⁰ Answering this question may be critical to whether garden leave is likely to spread widely beyond the financial sector in the United States, and this Article explores several possible explanations.

To do so, this Article will begin by defining the garden leave term more rigorously in Part I. Part II will then trace the origins of garden leave in English law while Part III will explain how variations on that theme have been adopted in the United States. Part IV then sketches the state of noncompetition law in the United States, setting the stage for a consideration in Part V of how the American version of garden leave fits into that structure; Part V concludes that it remains unclear whether the growth of garden leave

6. Terminology is somewhat confusing here. I will refer to the more traditional postemployment restraints simply as “noncompetition” or “noncompete” clauses, to distinguish them from garden leave, with the major difference being whether the employee is paid during the relevant period. In England, however, those on garden leave remain employed, at least formally, while those American employers who pay for a sit-out period seem to prefer terminating employment before the leave period commences. See *infra* note 51.

7. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 425 (2006) (“[T]he garden leave device has the virtue of forcing employers to internalize the primary cost of restrictions on employees’ postemployment activities, and thus to think twice about whether and how long they are willing to do so.”).

8. See *infra* note 101.

9. See *infra* note 52.

10. A variation—requiring the employee to remain employed and available to work for a period, even though the employer has no obligation to provide work—may have other advantages, such as ensuring an orderly transition to a replacement worker. To the extent the few reported cases reflect current practice, however, this seems not to be the form of leave usually used by American employers.

here is driven mainly by “legal” concerns or economic forces, while predicting some growth of the phenomenon in either case. Part VI then explores three aspects of garden leave: first, the rights of the employee subject to such leave, which, we will see, may be considerably different than might first appear; second, the use of garden leave as a mechanism to avoid the prohibition on postemployment restraints of trade in states such as California; and third, the deployment of garden leave as a mechanism to avoid the prohibition of postemployment restraints where attorneys are concerned. Finally, Part VII attempts an overall assessment of the value of garden leave in American competition law.

I. VARIATIONS OF GARDEN LEAVE

As the Introduction suggests, garden leave in England capitalized on the legal benefits of retaining and fully compensating employees while not expecting them to perform any actual duties.¹¹ By foreclosing the employee’s access to customers or confidential information during this period, the arrangement leaves her less able to compete with her former employer after the leave ends.

Although the concept’s moniker suggests forced leisure, a pure garden leave arrangement need not require the employee to remain idle so long as her other employer is not a competitor: absent that, there would be no breach of the duty of loyalty.¹² To avoid this kind of double dipping, some contracts in the United States have explicit language requiring idleness.¹³ Such provisions, however, seem functionally unenforceable and may be legally problematic.¹⁴

As the concept has since morphed in the United States, however, garden leave (sometimes referred to as “sitting out” clauses) is typically an arrangement under which a former employee is terminated but subject to a postemployment restraint of trade for the period. Compensation continuation

11. See *infra* text accompanying note 18.

12. The duty of loyalty arises from the employment relationship. Once the relationship ends, any duty of loyalty limiting competition also ends, although an ex-employee may still be restrained in her ability to use or disclose confidential information learned during employment. See RESTATEMENT OF EMPLOYMENT LAW § 8.01 (AM. LAW. INST. 2015).

13. See, e.g., Lewis and Kowal *supra* note 2, at 3 (recommending contract terms “enjoining the employee from engaging in employment with any other employer for the duration of the garden leave”). But at least some clauses explicitly allow an employee to work in a noncompeting position during the period. See *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 179 (S.D.N.Y. 2006) (“[B]y its very terms, the covenant would be unenforceable if enforcement was sought against Batra for leaving Estee Lauder for employment with a company that did not directly compete with R+F and Darphin—the Estee Lauder brands in which Batra possesses knowledge of trade secrets.”).

14. If restrictions on *competitive* employment are invalid unless they are reasonably tailored to the employer’s legitimate business interests, see discussion *infra* notes 61-69, it would seem to follow that restrictions on *all* employment would be even more problematic. See *infra* text accompanying note 88.

during this period reduces any hardship on the employee,¹⁵ thus presumably making the noncompetition clause more palatable to the former employee and thus less likely to be challenged. Whether it also makes the restraint more reasonable in the eyes of the law is another question.

Other arrangements not typically thought of as garden leave can operate similarly. For example, contracts may provide for severance payments to the employee, and such contracts may also contain noncompetition agreements. A study of CEO employment agreements, for example, revealed that about two-thirds of such contracts had noncompetes (most of which were for two years).¹⁶ Further, of the agreements with both a noncompete and a severance provision, eighty-four percent “have a severance payment that is equal or greater than the length of the non-competition period.”¹⁷ This arrangement could easily be viewed as a kind of garden leave but is not so called.

II.

GARDEN LEAVE IN THE UNITED KINGDOM

In England, it seems generally accepted that properly drafted clauses may allow an employer to restrain an employee from working for a competitor during the period where she remains formally employed, even though assigned no duties.¹⁸

English law is not uniformly employment at will as in the United States. This is reflected in both notice rights and unfair dismissal rights. After employment for one month, an employer is by statute required to provide notice before dismissal, the length of which rises from one week to a maximum of twelve weeks as the length of employment increases.¹⁹ Misconduct may, however, justify termination without such notice.²⁰ Employees, in turn, are to provide one week’s notice before quitting.²¹ The notice provisions for higher level workers are often contractually longer than

15. In some cases, leave is structured to require the employee to seek noncompetitive work while making the former employer liable should such new employment not be found or not be as remunerative. See *Bannister v. Bemis Co.*, 556 F.3d 882, 883 (8th Cir. 2009) (upholding an agreement in which the non-compete provisions remained binding only as long as the former employer continued to pay the employee his salary, if the employee could not secure comparable work because of the noncompete provisions).

16. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 254 (2006); see also Randall S. Thomas, Norman D. Bishara, & Kenneth J. Martin, *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants*, 68 VAND. L. REV. 1, 18 (2015) (recounting a very generous “combined retirement and severance package” that included an agreement not to work for a competitor “anywhere in the world for three years”).

17. Schwab, *supra* note 16, at 256.

18. See I.G.C. Stratton, *Restraint of Trade During and On the Termination of a Contract of Employment*, 12 DENNING L.J. 107 (1997).

19. Employment Rights Act, 1996, c. 18, §§ 86(1).

20. *Id.* § 86(6).

21. *Id.* § 86(2).

the statutory minima and are often reciprocal, that is, the employee is required to give the employer advance notice of quitting comparable to what the employer agrees to provide for dismissal.²² Further, after two years of work, employees have rights against unfair dismissal.²³

This right to employment may partially explain the development of garden leave. An employer that gives notice of dismissal may well wish to bar the employee from continued access to its confidential information or customers during the notice period. Continuing the employment, in the sense of paying all compensation otherwise due while eliminating any actual duties, achieves both goals. And, since the employment continues, the employee is presumably barred from competing by the duty of loyalty.²⁴ Even if it is the employee who gives notice, the same incentives exist, perhaps even more so since a departing worker is likely to be leaving for a competitor. In either case, a garden leave arrangement may justify an injunction against competitive employment during the restrictive period, which might be unavailable to a plain vanilla postemployment covenant not to compete. Indeed, the standard story of the development of garden leave in the United Kingdom is a response to judicial hostility to noncompetition agreements pitched largely on concern for fairness to employees.²⁵

As we will see, United States courts also frequently list hardship to the employee as a factor in assessing the reasonableness of a post-employment restraint but rarely give it real weight.²⁶ In contrast, English courts seem to

22. One source provides the following example of this part of an employment contract:

Your employment may be terminated by either party on the giving of one month's written notice and the company reserves the right to pay salary in lieu of notice during the notice period. When you have completed five years' employment with the company you are entitled to one week's notice for every year of employment, up to a maximum of 12 weeks after 12 years.

BARRY CUSHWAY, *EMPLOYER'S HANDBOOK 2012-13: AN ESSENTIAL GUIDE TO EMPLOYMENT LAW, PERSONNEL POLICIES AND PROCEDURES* 49 (9th ed. 2012).

This source also recommends that the employer reserve the right to exclude the employee from work without contract breach:

To prevent attendance during the notice period you should insert a provision into the employment contract giving you the right to require the employee not to report for work. You can attach conditions to this "garden leave," such as not permitting the employee to work for another company, but these should be clearly spelt out in the contract.

Id.

An example of a garden leave clause is as follows: "The company shall have the right during the period of notice, or any part of that period, to place you on leave, paying the basic salary and benefits to which you are entitled. During this period you are not to visit company premises, other than at our request." *Id.* at 50.

23. Employment Rights Act, c. 18, §§ 94-110; Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 434-36 (2014).

24. See Hepple, *supra* note 5.

25. Lembrich, *supra* note 3 at 2306-2314; Credit Suisse Asset Mgmt., v. Armstrong, [1996] EWCA (Civ) J0515-4, [1996] I.C.R. 882, 892 ("The court's reaction to these clauses has been more flexible than in the case of restrictive covenants.").

26. See *infra* text accompanying note 70.

take employee hardship seriously, although in a somewhat roundabout way. They reject specific performance of personal service contracts and see as a corollary of the principle that enforcing postemployment restraints would wrongly coerce the employee into remaining with her former employer.²⁷ Older cases tended to ask whether an injunction would “reduce the employee to ‘idleness and starvation’ if they did not return to work,”²⁸ but the phrase is “more colourful than helpful.”²⁹ Rather,

[A] degree of financial hardship short of actual destitution may suffice to engage the principle. What is required is a realistic evaluation of whether the pressures operating on the employee in the particular case are in truth liable to compel them to return to work for the employer. . . . [The test] is not simply whether the employee will suffer some degree of hardship by being held to the negative obligations in their contract—and certainly not . . . whether they will be prevented from earning their living during the period of the restraint.³⁰

Although this context is said to explain the origins of garden leave, the rationale is more than a little problematic. After all, in the name of not forcing employees to remain with the prior employers, the garden leave concept does precisely that—at least formally.

In any event, the origin of the garden leave concept is said to be a 1987 decision of the Court of Appeals in *Evening Standard Co. v. Henderson*³¹ where an employee sought to resign in breach of a one-year’s notice provision. The employer, stating its intention to continue to pay for the year whether the employee worked for it or not, sought and obtained an injunction for the remainder of the notice period. The court, expressing dissatisfaction at the current state of the law of noncompetes absent such a promise,³² stressed this willingness to pay in granting a preliminary injunction.³³ The

27. *Sunrise Brokers LLP v. Rodgers*, [2014] EWCA (Civ) 1373, [28]. (“[T]he court will not order specific performance of a contract for personal services. It is a well-established corollary of that rule that the Court will also not grant an injunction to enforce a prohibition on an employee from working for anyone other than the employer if that will produce the same result indirectly—that is, because if the employee cannot work for anyone else he will be compelled to continue to work for the employer. . . . It is as a response to that potential obstacle that employers seeking injunctive relief have in recent years been prepared to volunteer, and submit to undertakings, to pay the employee during the remainder of the term, whether he works or not.” (citing *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch 416)).

28. *Sunrise Brokers LLP*, [2014] EWCA (Civ) 1373 [28].

29. *Id.* at [32].

30. *Id.* at [32]-[33].

31. [1986] EWCA (Civ) 9, [1987] I.C.R. 588.

32. *Id.* (“Nowadays, the need for skilled personnel is very great indeed, particularly in industries using sophisticated technology. There is a great temptation on employees . . . to break their contracts and go to other employers, usually for far higher salaries, and . . . as the law stands at present, they can snap their fingers at their old employers because they can say: ‘You cannot obtain an injunction against me which will have the effect of forcing me either to come back and work out my notice or starve, and . . . in the real world damages are impossible to quantify.’”)

33. *Id.* (“The injunction must not force the defendant to work for the plaintiffs and it must not reduce him, certainly, to a condition of starvation or to a condition of idleness, whatever that may mean on the authorities on this topic. But all that, in my judgment, is overcome by the fact that the plaintiffs

case was viewed as making a previously unenforceable restraint enforceable, and thus, without using the term, originated garden leave.³⁴

Shortly thereafter, in *Provident Financial Group v. Hayward*,³⁵ the Court of Appeals was faced with an agreement that provided the requisite notice period but expressly allowed the employer to suspend the employee's duties and exclude him from its premises during that period. It described this arrangement, "apparently known colloquially as 'garden leave,'" explaining that "provisions to this effect are, we are told, commonly included in the current contracts of employment of senior executives."³⁶ Perhaps surprisingly, however, for a case that is cited as supporting the concept, the court expressed concerns about such provisions, as "obviously capable of abuse."³⁷ Nevertheless, while it ultimately denied the injunction, the court did so because it saw no competitive harm. The bottom line in English courts seems to be that an employee will not be enjoined if she poses no danger to the employer; if, however, such danger exists, the employee on garden leave may be restrained without the usual concern for her hardship.³⁸

While *Hayward* was not a ringing endorsement of garden leave, English tribunals continued to approve injunctions in breach of notice period cases where employees received payments.³⁹ They did, however, insist both on

have made the offer they have. The defendant can go back and work for them. If he elects not to go back (and it will be a matter entirely for his election: there will be nothing in the judgment which forces an election upon him) he can receive his salary and full contractual benefits under his contract until such time as his notice would have expired had it been for the proper period.")

34. A recent development may have shifted the ground somewhat in England, making it riskier for employees to abandon their work in the expectation that the worst case scenario would be garden leave. See *Sunrise Brokers LLP v. Rodgers*, [2014] EWCA (Civ) 1373, [26]-[30] (holding that, even when an employee attempts to breach his contract, the employer can keep the contract of employment alive, so as to be able to enforce the employee's obligation not to work for anyone else, while simultaneously refusing to pay the employee any wages on the basis that the employee is no longer "ready and willing to work" for the employer).

35. [1989] 3 All E.R. 298, [1989] I.C.R. 160 (C.A.).

36. *Id.* at [164]; see also *Delaney v. Staples (t/a De Montfort Recruitment)*, [1992] 1 A.C. 687 [692] (describing garden leave as when "[a]n employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case . . . there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.").

37. *Provident Financial Group Plc. v. Hayward*, [1989] 3 I.C.R. at 165 ("It is a weapon in the hands of the employers to ensure that an ambitious and able executive will not give notice if he is going to be unable to work at all for anyone for a long period of notice. Any executive who gives notice and leaves his employment is very likely to take fresh employment with someone in the same line of business not through any desire to act unfairly or to cheat the former employer but to get the best advantage of his own personal expertise.").

38. See *Sendo Holdings Plc (In Administration) v. Brogan* [2005] EWHC (QB) 2040 (issuing an injunction after finding that a company had a legitimate interest to protect by virtue of a garden leave clause even though it had sold its assets to another company).

39. The test case may well be when the contract contains both a garden leave clause and a noncompetition agreement after the expiration of such leave. See *Associated Foreign Exchange Ltd. v. International Foreign Exchange (UK) Ltd.*, [2010] EWHC (Ch) 1187, [43], [2010] I.R.L.R. 964 ("The

explicit clauses for payment and for retaining the employee during the period of the leave.⁴⁰ Thus, one decision found continued employment was a key factor for an injunction and refused to consider severance pay the equivalent.⁴¹ It reasoned that the absence of a continuing duty of loyalty in such situations was fatal to an injunction.⁴² Further, later decisions required an explicit limitation on competition.⁴³ This suggests that garden leave by itself may not justify an injunction, perhaps because not all substitute employment would breach an employee's duty of loyalty. And this, in turn, indicates that, to the extent it is law-driven, garden leave's utility is *not* due to a doctrinal sleight of hand capitalizing on the duty of loyalty of present employees but rather to its alleviating the undue burden on employees that might otherwise bar enforcement.⁴⁴

Garden leave seems to have met an uncertain reception in other Commonwealth countries,⁴⁵ and other nations approach the issue in considerably different ways.⁴⁶

opportunity for an individual to maintain and exercise his skills is a matter of general concern. I would therefore leave open the possibility that in an exceptional case where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant.”)

40. See *William Hill Organisation Ltd. v. Tucker*, [1999] I.C.R. 291, 301 (C.A.); Jane Middleton, *Heave-hoe to Garden Leave*, 148 NLJ 579 (1998) (“Even with an express garden leave clause, therefore, [Tucker suggests that] employers will find themselves in the position of having to justify the period of garden leave in the contract by reference to the individual employee's access to confidential information, their customer connection and the effect on the stability of the workforce that their departure will have.”).

41. *JA Mont (UK) Ltd. v. Mills*, [1993] F.S.R. 577, [586]-[588].

42. *Id.* at [587]. While the notice period could still be enforced by damages, proof of harm is notoriously difficult.

43. *E.g.*, *Symbian Ltd. v. Christensen*, [2001] I.R.L.R. 77, [80] (C.A.).

44. See, e.g., *J.M. Finn & Co. v. Thomas Brook Holliday*, [2013] EWHC (QB) 3450, [73] (“I have also taken into account as an important factor in my consideration of this question, whether the grant of an injunction for 12 months would cause disproportionate harm to Mr. Holliday. There is no evidence that Mr. Holliday will suffer financial loss—he will be paid his full salary and benefits during his notice period. Nor has it been suggested that his contract of employment with Hargreave Hale will be withdrawn if he cannot join quickly. The fact that he will be unable to advise clients or carry out transactions for clients for the balance of his notice period if that is the period ordered, seen in the context of a working life building up and using such skills, does not mean that his skills will atrophy, or that he will lose his ability once the relevant period expires. He will have ample time and opportunity during garden leave to keep up with the market and to maintain his market knowledge through publicly available sources and the resources available through the CISI website.”).

45. See, e.g., Amanda Coulthard, ‘Garden Leave, The Right to Work and Restraints on Trade’ (2009) 22 *Australian Journal of Labor Law* 19 (analyzing two Australian cases casting doubt on the effectiveness of garden leave in justifying an injunction).

46. One example is France, where employers are required to compensate their employees for post-employment non-competition agreements. See 2-12 *DOING BUSINESS IN FRANCE* § 12.04 (“[A] non-competition clause is only valid if it requires the employer to pay a remuneration, which shall not be derisory and which amount may be set forth in the applicable collective bargaining agreement, to the employee as consideration for the employee's respect thereof.”). The practice differs from English garden leave in that the employee does not work for her former employer during the notice period although she is paid a compensatory indemnity; it is also unlike garden leave in that the compensation is less, typically at least 33% of her salary. See *id.* The compensation may be higher according to an applicable collective

III.

GARDEN LEAVE IN THE UNITED STATES

As has been suggested, garden leave is a relative newcomer to this country, and seems to be found mostly in the financial services industry. Even that observation, however, is based on relatively scanty evidence. Other than anecdotal reports, the spread of garden leave here is documented mostly by the efforts of a few commentators that champion it⁴⁷ and the relatively few cases in which it has been mentioned or litigated.⁴⁸ Nevertheless, these indications and the anecdotal evidence—from the financial sector at least—suggest that the American version is sufficiently widespread to repay attention.

However, the previous discussion of garden leave in England suggests why it has not been a simple transplant to the United States. Most American employment is at will and not subject to any notice period.⁴⁹ Thus, offering garden leave in America requires an employer to incur real additional costs. Employers here are unwilling to contract for a period of employment even for relatively highly paid workers, and this is true even in the financial services sector, which seems most open to adopting some form of garden leave. Where garden leave is offered, employers must see some real advantages justifying the additional cost, advantages we will explore shortly.

The absence of a notice period may also account for an American variation on the English theme: American employers who provide garden

bargaining agreement, since “virtually every company doing business in France is subject to ‘national’ collective bargaining agreements based on its business scope.” See Susan F. Eandi & Dr. Ute Krudewagen, *Noncompete Strategies – A New Year’s Resolution*, LAW360 (March 7, 2011), <https://advance.lexis.com/api/permalink/003880a0-47ba-4bdd-ae5b-8a191290bfb6/?context=1000516>.

In order to prevent employers from claiming that any payment is part of the employee’s compensation, payment must occur after the termination of the employment contract; otherwise the non-competition clause is invalid. *E.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] soc., Jan. 15, 2014, Bull. civ. V, No. 12-19.472 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 7, 2007, Bull. civ. V, No. 05-45511 (Fr.). Additionally, compensation is required regardless of the reason for the termination of the employment contract, whether it be for serious misconduct (Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 28, 2006, Bull. civ. V, No. 05-40990 (Fr.)), the employee’s resignation (Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 31, 2006, Bull. civ. V, No. 04-44598 (Fr.)), or the employee’s retirement (Cour de cassation [Cass.] [supreme court for judicial matters] soc., Sep. 24, 2008, Bull. civ. V, No. 07-40098 (Fr.)).

47. See *supra* notes 1 and 2.

48. The term “garden leave” appears, albeit often merely in passing, in sixteen decisions representing fourteen separate cases in the Lexis Advance “Cases” database, the earliest in 1998. Eight of the cases involved financial services firms. Search conducted on March 24, 2016.

49. Although riddled with statutory and common law exceptions, the at-will rule is typically viewed as the baseline in this country. See RESTATEMENT OF EMPLOYMENT LAW § 2.01 (AM. LAW INST. 2015) (“Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement . . .”).

leave tend to do so at their option, not as a matter of duty.⁵⁰ Presumably, this allows them to weigh the costs of such leave for a given employee against his competitive threat at the time of prospective departure.⁵¹

But perhaps the most striking formal difference between American garden leave and its English ancestor is that employers in this country tend to prefer to terminate rather than continue employment for those “on leave.” The result is more than a little jarring in that some employees will have compensation security only *after* their employment has effectively terminated. Obviously, this structure, although often referred to as garden leave, lacks the formal defining justification of the English version—reliance on an employee’s duty of loyalty to justify the noncompetition provisions. It thereby forfeits one argument in support of such arrangements. The reason for this departure may or may not be some cost savings, as when garden leave compensation is limited to salary rather than including fringe benefits. Further, financial services firms tend to pay a substantial portion of compensation (sometimes equal to or exceeding base salary) in the form of year-end bonuses, which typically require a recipient to be employed to be eligible. Termination of employment ends eligibility for many benefits and therefore reduces the cost of the leave. However, the same goal could be achieved by modifying bonus eligibility rules. Thus, costs savings seems an unlikely explanation for why American-style garden leave formally ends employment.

In any event, the question remains whether this mutated form of garden leave will be effective in this country. To address that question, we must consider the current state of the law governing noncompetition agreements.

50. An example of such a clause between a hedge fund and a high-value employee provided for no competition during the “Restricted Period,” and defined that term to “mean[] the 0, 3, 6, or 9 month period following the end of my employment with [hedge fund], as elected by [hedge fund] within 10 days following the end of my employment.” Agreement on file with the author. Similarly, an agreement between a bank and its employee provided: “I acknowledge and agree that the Company may instruct me not to report to work during the Notice Period and may, in its sole discretion, restrict my access to the Company’s systems. The Company may, in its sole discretion, elect to shorten the duration of the Notice Period. In such circumstance, the Company will not be required to pay or provide benefits to me beyond the end of the Notice Period.” Agreement on file with the author.

51. Less easy to understand are some arrangements in the United States that reverse the option, giving the employee a choice between not competing and receiving some form of compensation or competing and sacrificing that benefit. *See, e.g.*, *Lucente v. IBM*, 310 F.3d 243, 248 (2d Cir. 2002). Under such agreements, the employer essentially pays the worker to temporarily sit out. *See Fraser v. Nationwide Mut. Ins. Co.*, 334 F. Supp. 2d 755, 760-61 (E.D. Pa. 2004) (describing clause under which insurance agent gave up deferred compensation if he chose to compete after employment as “more akin to incentive program than a non-compete clause” in finding clause enforceable).

IV.

NONCOMPETITION LAW IN THE UNITED STATES

Postemployment restraints of trade are endemic to the American economy, as reflected in the numerous court cases decided every year, cases that are presumably only the litigated tip of a much bigger transactional iceberg.⁵² The only empirical study attempting a general assessment of their incidence in the labor force concluded that at least a quarter of American workers have signed one during their lifetime.⁵³

Despite their prevalence, employee noncompetition agreements occupy an odd doctrinal position, being one of the few areas of contract law where the court does not merely purport to enforce the agreement of the parties but rather looks to public policy concerns. Contract law has traditionally refused to enforce “illegal” contracts, but most illegality doctrine is tied to some statutory regime.⁵⁴ In contrast, the courts’ skepticism about noncompetition agreements is free-floating, being one of the few areas where the judiciary routinely imposes its own notions of public policy.⁵⁵ To a greater or lesser extent, the courts view noncompetition clauses as suspect, largely because the goal of such agreements is to deprive the public of the benefits of a

52. This article generally refers to noncompetition clauses, or “noncompetes,” unless there is some reason to be more specific. However, provisions barring competition by former employees are only one variety of employer-protection clauses. Other varieties include nonsolicitation and nondisclosure provisions, which are in theory less restrictive because they are more focused. *E.g.*, *Star Direct Inc. v. Dal Pra*, 767 N.W.2d 898 (Wis. 2009). In general, courts tend to apply the same analysis to all of these clauses, although the more focused ones tend to be upheld more readily simply because they are more closely tailored to recognized legitimate employer interests. In addition, even noncompetition clauses come in various flavors. For example, some contracts provide that employees will be free to compete in return for a specified payment. *E.g.*, *Goodman v. N.Y. Oncology Hematology, P.C.*, 957 N.Y.S.2d 449, 453 (2012).

53. Evan Starr, Norman D. Bishara, & J.J. Prescott, *Noncompetes in the U.S. Labor Force 1* (June 25, 2015) (working paper), <https://sites.google.com/site/starrevan/research> (“The data show that noncompetes are a perhaps surprisingly common feature of the labor market.”). The emerging data from this large survey shows that around 25% of all U.S. workers sign noncompetes at some point in their lives, and that number is even higher in the for-profit sector. *Id.* at 2, 18. In addition, certain industries such as engineering and mathematical occupations likely have noncompete usage rates closer to 30% and many service industries have rates of 10% or greater. *Id.* at 3; Emails from Evan Starr, Norman Bishara, and J.J. Prescott to author (Feb. 5, 2016) (on file with author).

54. See *RESTATEMENT (SECOND) OF CONTRACTS* § 178(1) (AM. LAW INST. 1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”). In balancing the interests, an important factor is “the strength of that policy as manifested by legislation or judicial decisions.” *Id.* § 178(3)(a).

55. While the antitrust laws reflect related concerns, the core provisions barring contracts combinations, and conspiracies in restraint of trade, 15 U.S.C. § 1 (2015), build on the common law prohibition, not the other way around. *E.g.*, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899); see also Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 *IOWA L. REV.* 1019 (1989); Charles A. Sullivan, *Revisiting the “Neglected Stepchild”: Antitrust Treatment of Postemployment Restraints of Trade*, 1977 *U. ILL. L.F.* 621; Harvey J. Goldschmid, *Antitrust’s Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 *COLUM. L. REV.* 1193 (1973).

competitive market. For that reason, for example, the *Restatement (Second) of Contracts* places such agreements in the Chapter on Unenforceability on Grounds of Public Policy.⁵⁶ The public policy notion surfaces often in the decisions that announce that a mere desire to avoid competition is never a valid basis for enforcing a covenant.⁵⁷

Underlying the doctrine of noncompetition agreements is a heated controversy about the social value of postemployment restraints of trade. As we will see, the law seeks to strike a balance between encouraging competition by allowing noncompetition agreements only where their availability is thought not merely to provide value to the employers but also to enhance efficiency by encouraging employers to entrust employees with information and customer contacts. The theory is, essentially, that, lacking such protections, employers would either not hire employees or engage in wasteful strategies to keep them away from critical information and customers.⁵⁸

There are considerable permutations of the following principles among the states,⁵⁹ including some that reject employee noncompetition clauses entirely or are very restrictive of them.⁶⁰ Nevertheless, the center of gravity

56. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, § 188 (AM. LAW INST. 1981).

57. See, e.g., *Pirtek USA, LLC v. Wilcox*, No. 6:06-cv-566-Orl-31KRS, 2006 WL 1722346, at *2 (M.D. Fla. June 21, 2006) (“A mere desire to avoid competition does not constitute a legitimate business interest.”); *E. Distrib. Co. v. Flynn*, 567 P.2d 1371, 1376 (Kan. 1977) (“It is well-settled law that the mere desire to prevent ordinary competition does not qualify as a legitimate interest of an employer and a restrictive covenant is unreasonable if the real object is merely to avoid such ordinary competition.”).

58. See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 627 (1960) (“From the point of view of the employer, postemployment restraints are regarded as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relations for their own benefit. Without the protection of such covenants, it is argued, businessmen could not afford to stimulate research and improvement of business methods to a desirably high level, nor could they achieve the degree of freedom of communication within a company that is necessary for efficient operation.”); Rachel Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Non-Compete Agreements*, 80 OR. L. REV. 1163, (2001) (arguing that employers’ interests in retaining human capital should also be accommodated); Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 685 (1980) (arguing that postemployment restraints are a useful mechanism to enable employers to finance employee training while paying the worker above his marginal cost and ensuring that workers have incentive to stay).

59. See generally Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751 (2011) (studying patterns of enforcement across the United States).

60. California’s rejection of such clauses is discussed *infra* notes 101-113. Others taking a very restrictive approach are Colorado, COL. REV. STAT. § 8-2-113 (2014); Montana, MONT. CODE ANN. § 28-2-703 (2015); North Dakota, N.D. CENT. CODE § 9-08-06 (2015); Oklahoma, OKLA. STAT. ANN. tit. 15 § 217 (2015). All go beyond the common law’s limitations to prohibit restrictive covenants in employment agreements, with very narrow exceptions. See also Alan Frank Pryor, Note, *Balancing the Scales: Reforming Georgia’s Common Law in Evaluating Restrictive Covenants Ancillary to Employment Contracts*, 46 GA. L. REV. 1117 (2012) (analyzing Georgia’s Restrictive Covenant Act, GA. CODE ANN. § 13-8-53 (2010)). And, even some states that enforce such agreements under the common law sometimes impose onerous conditions. E.g., *Outsource Int’l, Inc. v. Barton*, 192 F.3d 662, 666 (7th Cir. 1999)

for most jurisdictions is broadly captured in the new *Restatement of Employment Law*. Section 8.06 provides that “a covenant in an agreement between an employer and former employee restricting a former employee’s working activities is enforceable only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer.”⁶¹ Section 8.07 states that “[a] restrictive covenant is enforceable only if the employer can demonstrate that the covenant furthers a legitimate interest,” and includes among those interests “the employer’s (1) trade secrets . . . and other protectable confidential information that does not meet the statutory definition of trade secret, (2) customer relationships, [and] (3) investment in the employee’s reputation in the market”⁶² This list reinforces the notion that a bare desire to foreclose competition is not sufficient to enforce an agreement.

When a restraint is unreasonable in the sense that it reaches further than the employer’s legitimate interests would justify, the common law has developed at least three distinct approaches.⁶³ Some courts refuse to enforce

(viewing Illinois law as limiting the employer’s interest in customer relationships to those that “are near-permanent and but for the employee’s association with the employer the employee would not have had contact with the customers”).

In addition, some jurisdictions, while applying similar general principles, are restrictive when it comes to contractual formalities, such as the existence of consideration. As the RESTATEMENT OF EMPLOYMENT LAW § 8.06, cmt. e (AM. LAW INST. 2015) states, “A significant minority of jurisdictions require ‘new’ or ‘additional’ consideration” beyond continued employment to support a noncompete agreement. *See, e.g.,* *Prairie Rheumatology Assocs. v. Francis*, 24 N.E.3d 58, 62-63 (Ill. App. 2014) (declining to enforce restrictive covenant because Illinois rule of thumb is that two years of continuous employment constituted sufficient consideration for a postemployment restraint, employee had worked for only nineteen months, and employer provided no meaningful additional consideration).

61. RESTATEMENT EMPLOYMENT LAW § 8.06 (AM. LAW INST. 2015). The requirement that restraints be reasonably tailored casts considerable doubt on the current practice of some employers to use off-the-shelf agreements required to be signed by all employees or at least all employees at a given level. An extreme example is Jimmy Johns requiring all employees, including sandwich makers, to sign noncompetes. Neil Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, N.Y. TIMES, Oct. 14, 2014, <http://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html>; *see also* Lawrence F. Carnevale & Lorraine R. Doran, *Restrictive Employment Clauses: Enforceability Enhanced by Tailoring to Your Business and Employees*, 225 N.Y. L.J. 24 (2001) (suggesting the boilerplate noncompetition clauses are less likely to be enforced than ones tailored to the employee and her job).

62. RESTATEMENT EMPLOYMENT LAW § 8.07(a), (b)(1)-(3) (AM. LAW INST. 2015). The section also includes “purchase of a business owned by the employee.” *Id.* § 8.07(b)(4); *see also* Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 878-879 (2010) (arguing that the “IP justification” for enforcing noncompetes allows protection beyond the “intentionally limited” protections of trade secret and other intellectual property regimes which try to channel innovation into the patent system).

63. *See generally* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009); Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 682-88 (2008); Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 245 (2007); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963.

such restraints at all;⁶⁴ others take a “strict blue pencil” approach and would enforce a covenant after it was modified by eliminating any grammatically-severable unreasonable parts of the restraint;⁶⁵ and still others, probably the majority, take a “liberal blue pencil” approach allowing the court to modify the restraint to make it reasonable regardless of grammatical consistency.⁶⁶ The *Restatement of Employment Law*, while generally supporting modification, requires invalidation of overbroad covenants if “the employer lacked a reasonable and good-faith basis for believing the covenant was enforceable,” and “gross overbreadth alone” permits such finding.⁶⁷ Whether this will be interpreted to create a more rigorous review than the majority liberal blue pencil approach remains to be seen.⁶⁸

64. *E.g.*, *Bendinger v. Marshelltown Trowell Co.*, 994 S.W.2d 468, 473 (Ark. 1999) (“[T]he contract must be valid as written, and the court will not apportion or enforce a contract to the extent that it might be considered reasonable.”); *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 916 (W. Va. 1982) (“[W]here savage covenants are included in employment contracts so that their overbreadth operates, by *in terrorem* effect, to subjugate employees unaware of the tentative nature of such a covenant, we will find the covenant void.”); *see also* WIS. STAT. ANN. § 103.465 (West 2015) (“Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.”). *But see* *Star Direct Inc. v. Dal Pra*, 767 N.W.2d 898, 916 (Wis. 2009) (“[T]he legislative history and text of the statute do not eliminate or modify the common law rules on divisibility. The statute’s prescriptions support this as they apply to any ‘covenant,’ not to the whole employment contract. It specifies that if a restraint is unreasonable, the rest of that covenant is also unenforceable.”) In *Richard P. Rita Personnel Services International, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972), the Georgia Supreme Court rejected any modification to an invalid clause to make it enforceable, but this holding has been overturned by statute. *See Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1444, 1447-48 (11th Cir. 1991) (upholding Ga. Code Ann. § 13-8-2.1(g)(1), which allowed district courts to “blue pencil” covenants).

65. *See, e.g.*, *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999) (“Arizona courts will ‘blue pencil’ restrictive covenants, eliminating grammatically severable, unreasonable provisions. Here, however, the modifications go further than cutting grammatically severable portions. The court of appeals, in essence, rewrote the agreement in an attempt to make it enforceable. This goes too far.”) (citations omitted); *Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 561 (Ind. 1983) (“[I]f the covenant as written is not reasonable, the courts may not create a reasonable restriction under the guise of interpretation, since this would subject the parties to an agreement they had not made. However, if the covenant is clearly separated into parts and some parts are reasonable and others are not, the contract may be held divisible. The reasonable restrictions may then be enforced.”) (citations omitted); *Deutsche Post Global Mail, Ltd. v. Conrad*, 116 F. App’x 435, 439 (4th Cir. 2004) (applying Maryland law) (“If a restrictive covenant is unnecessarily broad, a court may blue pencil or excise language to reduce the covenant’s reach to reasonable limits. However, under the blue pencil rule, a court may not rearrange or supplement the language of the restrictive covenant. A court can only blue pencil a restrictive covenant if the offending provision is neatly severable.”) (citations omitted).

66. *E.g.*, *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 n.1 (Minn. 1980) (referring to *Bess v. Bothman*, 257 N.W.2d 791 (Minn. 1977) as “adopt[ing] the ‘blue pencil doctrine,’ which allows a court to modify an unreasonable noncompetition agreement and enforce it only to the extent that it is reasonable, in the context of the sale of a business”).

67. RESTATEMENT OF EMPLOYMENT LAW § 8.08 (AM. LAW INST. 2015).

68. *Id.* § 8.06. Taken literally, an employer’s reflexive use of such agreements without concern for the employee or the job might well bar enforcement, if the courts adopted this principle. *See generally* Charles A. Sullivan, *Restating Employment Remedies*, 100 CORNELL L. REV. 1391, 1397-98 (2015) (exploring the Restatement’s approach to modifying overbroad covenants).

Further, section 8.06 specifies several exceptions under which even an otherwise reasonable covenant will not be enforced; they include no-cause discharge of the employee, employer “bad faith,” employer material breach of the underlying employment agreement, and “great public need for the special skills and services of the former employee outweigh[ing] any legitimate interest of the employer.”⁶⁹

What is plainly missing from this list is any concern for undue hardship on the employee. In this respect, the *Restatement of Employment Law* departs from the *Restatement (Second) of Contracts*, which would take into account whether “the promisee’s need [for protection] is outweighed by the hardship to the promisor”⁷⁰ *Employment Law* recognizes that undue burden or hardship is often listed as a factor in courts’ analyses, but states correctly that it is very rare to find a case where that concern dictates the result.⁷¹

This structure for American noncompete law raises the obvious question of whether garden leave offers employers any advantages. Clearly, such provisions reduce the hardship on the employee, but *Employment Law* rejects such hardship as a part of the governing rule. Nor does it otherwise enlighten the reader. The Restatement’s only references to garden leave are somewhat mysterious. Thus, § 8.06, comment c, entitled “Reasonably tailored,” provides:

The inquiry into the reasonableness of geographic, temporal, and scope-of-business limitations in restrictive covenants is context-sensitive and depends heavily on the nature of the legitimate interests at stake. Identical limitations

69. In full text, the exceptions are:

- a) the employer discharges the employee on a basis that makes enforcement of the covenant inequitable;
- b) the employer acted in bad faith in requiring or invoking the covenant;
- c) the employer materially breached the underlying employment agreement; or
- d) in the geographic region covered by the restriction, a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant.

RESTATEMENT OF EMPLOYMENT LAW § 8.06 (AM. LAW INST. 2015). The first and second exceptions are less supported by extant case precedent than the other two. *See infra* note 81.

70. RESTATEMENT (SECOND) OF CONTRACTS, § 188(1)(b) (AM. LAW INST. 1981). This formulation was not without its critics at the time. *See* Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 720 (1982) (“[T]o the extent section 188 . . . precludes enforcement of an otherwise reasonable restrictive covenant when the personal hardship suffered by the promisor outweighs the need of the promisee, it, like its predecessor [the first Restatement], is without support in the authorities.”).

71. RESTATEMENT OF EMPLOYMENT LAW § 8.06, cmt. b (AM. LAW INST. 2015) (“Courts often claim to evaluate whether a restrictive covenant creates an undue burden on the employee who agreed to it. However, courts seldom, if ever, invalidate covenants solely on this ground. Generally, courts find that a restrictive covenant is an undue burden only when it fails to meet the requirements articulated in this Section. At most, it seems that the undue-burden requirement is a tack-on rationale courts use only when a restrictive covenant is otherwise invalid.” (citations omitted)). Some commentators would disagree, at least in particular jurisdictions. *See, e.g.,* Ralph Anzivino, *Drafting Restrictive Covenants in Employment Contracts*, 94 MARQ. L. REV. 499, 534-36 (2010) (viewing undue hardship as a separate test in Wisconsin).

will be reasonable to protect some interests but not others. A provision compensating the former employee during the term of the restrictive covenant (sometimes called “garden leave”) may be a factor in favor of finding the restriction reasonable.⁷²

Given its laser-like focus on the *employer’s* interests and the Restatement’s rejection of undue burden as a factor, its approval of garden leave as a favorable factor in a court’s determination of enforceability is inexplicable. Nor do the Reporters’ Notes clarify why garden leave would make a clause more reasonable in light of the Restatement’s rejection of any undue burden considerations.⁷³

72. RESTATEMENT OF EMPLOYMENT LAW § 8.06, cmt. c (AM. LAW INST. 2015)

73. The Reporters’ Notes to comment c repeat that “‘garden leave’ is not required, but helpful in obtaining enforcement of an otherwise reasonable restrictive covenant.” *Id.* They cite two New York cases, *Pontone v. York Grp., Inc.*, No. 08 Civ. 9 6314(WHP), 2008 WL 4539488, at *4 (S.D.N.Y. Oct. 8, 2008), and *Bradford v. N.Y. Times Co.*, 501 F.2d 51, 58 (2d Cir. 1974), both stating that payments during the restricted period support the reasonableness of the agreement. These cases, however, simply note that there is no risk of hardship, and in that, they are not alone; several other decisions cite garden leave, whether or not so-called, as a factor favoring reasonableness. *See, e.g., Nike, Inc. v. McCarthy*, 379 F.3d 576, 587 (9th Cir. 2004) (finding Nike’s obligation to pay employee full salary during period of restriction a factor mitigating potential harm to the employee and supporting issuance of preliminary injunction); *Estee Lauder Cos., Inc. v. Batra*, 430 F. Supp. 2d 158, 181 (S.D.N.Y. 2006) (“[A]lthough, under the contract, Batra essentially is prohibited from working for a competitor . . . anywhere in the world, the concern that the breadth of such a prohibition would make it impossible for him to earn a living is assuaged by the fact that he will continue to earn his salary from Estee Lauder, as he contracted to do so.”); *Natsource LLC v. Paribello*, 151 F. Supp. 2d 465, 470 (S.D.N.Y. 2001) (suggesting that payments during the restriction eliminate any economic burden); *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624, 634 (E.D.N.Y. 1996). At most, these cases suggest that hardship to the employee is a relevant factor, a position that the Restatement rejects, but it is by no means clear that the absence of hardship was critical to any of the results. There are also cases where burden to the employee is noted as a reason not to enforce an unreasonable covenant, but the clause seems to be overbroad in any event, which means that the burden factor seems to be doing no independent work. *See, e.g., Baxter Int’l, Inc. v. Morris*, 976 F.2d 1189, 1197 (8th Cir. 1992) (“The one-year noncompete covenant contained in Morris’s employment agreement with Baxter is overbroad, unreasonably burdensome, and unnecessary for Baxter’s protection.”).

More telling than these kinds of decisions would be any that find a restraint otherwise reasonable but nevertheless refuse to enforce it because of the hardship it would impose on an employee. These are few and far between—in New York or elsewhere. Even where there is no continuing compensation, courts routinely enforce noncompetition clauses. *See, e.g., Tigor Title Ins. v. Cohen*, 173 F.3d 63, 71 (2d Cir. 1999) (holding that even though defendant would be paid nothing during the six-month restricted period, “part of Cohen’s \$600,000 per year salary was in exchange for his promise not to compete for six months after termination, and since the employer had given Cohen sufficient funds to sustain him for six months, the public policy concern regarding impairment of earning a livelihood was assuaged”). As the Restatement recognizes, there are many jurisdictions that include the absence of undue hardship as part of the test of legality of postemployment restraints, *e.g., Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wis. 2009) (noting that a restrictive covenant must “not be harsh or oppressive as to the employee”), but it is a rare, and usually older, case where this is an independent ground for invalidation. *Cf. Kadis v. Britt*, 29 S.E.2d 543, 549 (N.C. 1944) (stressing individuals’ right to earn a livelihood, the court refused to require defendant to “abandon[] the only occupation for which he is fitted and in which he is experienced, or expatriat[e] himself and family to find employment elsewhere, with persons to whom his character and proficiency are unknown quantities”; however, the court also suggested that the agreement sought “a wider protection than any which the plaintiff might have demanded under any conscionable agreement for the protection of any peculiar right or unique asset which he has shown himself to have, if indeed any exists, in the business conducted by him”).

V.

THE ODDITY OF GARDEN LEAVE IN THE AMERICAN LANDSCAPE

This overview of American law raises a square-peg-in-a-round-hole question: since the justification for garden leave apparently addresses only concerns about hardship to the employee that are largely absent in the United States, why has it nevertheless made inroads on this side of the Atlantic? Answering this question may also provide some insights into whether it will continue to grow in popularity, at least for more valuable employees.

Proposed explanations can be broken down into legal and economic ones. One legal explanation looks to the reality that the financial services industry is concentrated in New York and argues that New York law takes more seriously undue hardship on the employee. As a result, garden leave would be helpful in enforcing a restraint that might otherwise be struck down.⁷⁴ The preceding discussion,⁷⁵ however, suggests that is a “just so” story: even in New York, the cases rarely find employee hardship an independent reason to strike down an agreement, and the notion that sophisticated attorneys somehow think otherwise is implausible.⁷⁶

A second legal explanation may have more explanatory power and relates to the procedural posture of enforcing noncompetition agreements—a motion for a preliminary injunction. A typical formulation of the preliminary injunction standard balances the hardships between the harm to the employer without an injunction and the harm to the employee if one is issued.⁷⁷ The balancing can occur in two scenarios. The first is where the employer seeks to establish a likelihood of success on the merits, irreparable harm, and a balance of hardships in its favor. The second is where the employer, while not establishing a likelihood of success, nevertheless can pose “sufficiently serious questions going to the merits to make them a fair

74. In seeing a strong judicial interest in preserving the right to earn a living, Lembrich, *supra* note 3 at 2298 n.31, relies heavily on New York decisions, but all of these decisions are old, they approve the injunction rather than strike it down, and there is little indication that the burden factor does any real work separate from the other considerations. *See supra* note 73.

75. *See supra* text accompanying note 71.

76. A clause providing that another jurisdiction’s law governs the employment relation might or might not be effective. *See infra* note 102.

77. *Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010) (“[A] court may issue a preliminary injunction in a copyright case only if the plaintiff has demonstrated either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [plaintiff]’s favor. Second, the court may issue the injunction only if the plaintiff has demonstrated that he is likely to suffer irreparable injury in the absence of an injunction. . . . Third, a court must consider the balance of hardships between the plaintiff and defendant and issue the injunction only if the balance of hardships tips in the plaintiff’s favor. Finally, the court must ensure that the public interest would not be disserved by the issuance of a preliminary injunction.”) (citations omitted).

ground for litigation, and a balance of hardships tipping *decidedly* in its favor.”⁷⁸

Assuming a court gets to either balancing of hardships analysis, salary continuation will alleviate what might otherwise be a hardship on the defendant⁷⁹ (although even that is not a sure thing).⁸⁰ In that sense, garden leave is a plus for employers. Admittedly, there are questions about how significant the “plus” might be, but this is a plausible explanation, which might portend the steady growth of garden leave in other sectors for positions for which an injunctive remedy is viewed as essential.

A third legal explanation lies in a number of cases that have refused to enforce a noncompetition clause when it is the employer who terminates the employment without cause.⁸¹ Although the rationale of these decisions is not pellucid, the intuition of these courts seems to be that an employer who voluntarily dispenses with the services of an employee is unlikely to suffer harm from subsequent competition. To the extent employer counsel are concerned with such possibilities, garden leave may be seen as countering this line of cases and, again, would seem applicable across sectors of the economy.

If legal explanations seem unsatisfactory or at least incomplete, perhaps there are more economic answers. From a common sense viewpoint, American garden leave may be preferred mostly for its practical, not legal, advantages. From the employee’s perspective, garden leave is more attractive than a more traditional noncompetition covenant because it guarantees an income stream. As a result, fewer employees might challenge the arrangement (and, harkening back to legal implications, perhaps those who do challenge it will be looked upon less favorably by the courts). Again, if

78. *Id.* at 74 (emphasis added).

79. *Nike, Inc. v. McCarthy*, 379 F.3d 576, 587 (9th Cir. 2004).

80. *See Bear, Stearns & Co. v. Sharon*, 550 F. Supp. 2d 174, 178 (D. Mass. 2008) (“Sharon’s financial wherewithal and ability to earn a living are not in jeopardy but an injunction will likely result in a loss of professional standing and the inability to advise his clients in times of economic turmoil. The loss from such a prohibition may not ever be fully restored. The balance of the hardships, therefore, favors Sharon and further weighs against the entry of a preliminary injunction.”).

81. The RESTATEMENT OF EMPLOYMENT LAW § 8.06(a) (AM. LAW INST. 2015) frames one exception to the enforcement of otherwise reasonable restraints as when “the employer discharges the employee on a basis that makes enforcement of the covenant inequitable.” Comment f generally approves of enforceability of noncompetes when an employee is discharged for cause to avoid the perverse incentives of an employee triggering his own discharge to avoid the covenant. *Id.* § 8.06, cmt. f. In contrast, it generally rejects enforcement when the employee is discharged without cause. The Reporters’ Notes to § 8.06 cmt. f cite a number of cases where no-cause termination had no effect on enforceability, e.g., *Twenty Four Collection v. Keller*, 389 So. 2d 1062 (Fla. Dist. Ct. App. 1980), although they cite a larger number that view discharges in such situations as rendering injunctive enforcement inequitable, e.g., *Bishop v. Lakeland Animal Hosp.*, 644 N.E.2d 33, 36 (Ill. App. Ct. 1994) (“[T]he implied promise of good faith inherent in every contract precludes the enforcement of a noncompetition clause when the employee is dismissed without cause.”).

this explanation is correct, we can anticipate the spread of garden leave to more valuable employees in all sectors of the economy.

A somewhat more complicated explanation is market economics. The hypothesis is that valuable employees simply will not agree to work when the risk is unpaid unemployment for as long as six months or a year. Employers assuage such concerns with garden leave. Further, the predominant at-will structure of American employment (even in many high-level positions⁸²) reinforces this explanation. After all, if an employee has, say, a five-year contract, she can be relatively confident that the risks of being on the shelf for six months are recovered through the negotiated compensation. In contrast, absent garden leave, an at-will employee could, theoretically, be out the door in a month and facing six months of no income. From this perspective, garden leave allows an employer to (mostly) preserve its at-will prerogatives while still recruiting a talented workforce.⁸³

For those who do not find market explanations satisfying, this may be another “just so” story. In any event, its implications are obvious: however important the financial sector, savvy workers can be found in every sector. Although the international operations—and competitive environment—of financial firms may have caused them to first deploy garden leave for their American operations, the advantages of such a tool will not be lost on employers in other industries. If garden leave is a way to maximize employer flexibility while providing enough guarantees to attract risk-averse employees, we can expect it to spread more widely through the American economy. Financial sector workers may both be more sophisticated about legal implications and have a greater tendency to measure their success in purely monetary terms than other workers;⁸⁴ nevertheless, high-value workers in any sector are likely to be the kind of employees who understand such considerations or have access to sophisticated counsel who will appreciate whether garden leave makes the enforcement of noncompetition restrictions more likely, either by avoiding doctrinal pitfalls or by eliminating a barrier to the issuance of preliminary injunctions.

However, it remains true that garden leave in the United States has abandoned the English justification of reliance on a current employee’s duty

82. See, e.g., Thomas A. Smith, *The Zynga Clawback: Shoring Up the Central Pillar of Innovation*, 53 SANTA CLARA L. REV. 577, 580 (2013) (“[E]mployees of technology startups in Silicon Valley and in other entrepreneurial hubs, who are neither founders nor C-level executives, are almost always employees at will.”).

83. A variation on that theme is a promise to pay continued compensation but only if the employee cannot find alternative work. See *Bannister v. Bemis Co.*, 556 F.3d 882, 883 (8th Cir. 2009) (noting that the employer promised to pay the former employee for eighteen months if he could not find suitable but noncompetitive employment).

84. See generally Simone M. Sepe & Charles K. Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*, 100 CORNELL L. REV. 655 (2015) (arguing that employee movement in the financial sector is often predicated on short-term perspectives that create substantial risks for the broader economy).

of loyalty, which may make it more vulnerable to legal challenge.⁸⁵ In addition, ending any duty of loyalty by terminating workers placed on garden leave forfeits the quite remarkable remedies often available to an employer faced with a “faithless servant.”⁸⁶ Presumably, this strategy was driven by cost savings, perhaps in fringe benefits, and/or a perception that courts would look past the formal structure of English-style garden leave to see it for what it is: a paid period of noncompetition.

VI.

THE IMPLICATIONS OF GARDEN LEAVE

All of this suggests that garden leave is well worth study, and this part and the next explore its possibilities. While Part VII will assess its overall value in American competition law, this part considers three possible less obvious legal implications of garden leave: (1) the rights of the employee subject to such leave, (2) the possible use of garden leave as a mechanism to avoid the prohibition on postemployment restraints of trade in states such as California, and (3) the possible use of garden leave as a mechanism to avoid the prohibition of postemployment restraints where attorneys are concerned.

A. Employee Rights During Garden Leave

We have seen that garden leave in the United States is usually a paid postemployment restriction on competition. And usually it is at the employer’s option—that is, when employment is about to terminate (at either side’s initiative), the employer decides whether to invoke its rights under the original employment contract to bar the employee from competing. The original contract also typically frames the option as allowing the employer to enforce the noncompete for the fully specified time or for some shorter period.⁸⁷

This means that the framework is not structured as a prohibition on working for another employer; rather, it is simply a restraint on competing. The significance of this is that the now-former employee can collect garden leave while being employed elsewhere—a kind of double dipping. Indeed, since the employer is paying her not to compete, it would seem to follow that

85. See cases cited *supra* note 2.

86. Breaches of a current employee’s duty of loyalty can trigger a very rigorous sanctions regime. See generally Charles A. Sullivan, *Mastering the Faithless Servant? Reconciling Employment Law, Contract Law, and Fiduciary Duty*, WIS. L. REV. 777, 801 (2011). One such sanction is forfeiture of compensation, and the courts would presumably permit forfeiture of the salary paid to an employee who competes while on garden leave. *Id.* at 779-83. Whether they would view the full range of such sanctions, which can include compensation earned at competitive employment, as available against employees in such situations is unclear.

87. See *supra* note 51.

the employee can collect even if the former employer considers her current work to be competitive so long as a court does not share that view.⁸⁸

From the employer's perspective, this suggests a major hole in garden leave provisions. The risk of a court second-guessing the employer's view of what constitutes competition means that an employer may pay the employee during the restricted period without receiving what it viewed as the resulting benefit. This possibility also suggests a solution: the contract could provide that the former employee cannot work in any capacity, as opposed to not merely competing.⁸⁹ If enforceable, that would remove any issue of whether particular subsequent employment was competitive,⁹⁰ but it raises at least two issues. From a purely practical perspective, the law of contracts may provide the employer no meaningful remedies: there is, by hypothesis, neither actual damages to be recovered nor any harm, much less the irreparable harm that would support an injunction.⁹¹ That would leave the employer with a recovery of only nominal damages.⁹²

Alternatively, rather than seeking an injunction or damages, an employer faced with such a situation might characterize the employee's actions as a total breach and seek to rescind the garden leave contract and recover in restitution. Normal contract theory would allow recovery of any compensation paid by the former employer where there is a valid rescission,

88. There may be fraud issues if the employee is not forthcoming about the nature of any subsequent employment at the time an employer exercises its garden leave option. But, assuming full disclosure, the fact that the employer views it as competitive should not be determinative; by hypothesis, the original contract gives the employer a right only to prevent competition and its exercise of the garden leave option cannot give it a greater right than it originally contracted for. Further, from a fairness perspective, the exercise of the option gives the employer a right it did not otherwise have: to prevent the employee from competing (whether for the new employer or another employer). Whether the employee has a duty to disclose the nature of any prospective employment at the time the employer exercises its option is another question. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. LAW INST. 1981) (stating the test for when there is an affirmative duty to disclose). Merely remaining silent may be permissible.

89. *See, e.g.,* Lewis & Kowal, *supra* note 2, at 3 (recommending contract terms "enjoining the employee from engaging in employment with any other employer for the duration of the garden leave").

90. Some clauses explicitly allow an employee to work in a noncompeting position during the restricted period. *See, e.g.,* Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 179 (S.D.N.Y. 2006) ("[B]y its very terms, the covenant would be unenforceable if enforcement was sought against Batra for leaving Estee Lauder for employment with a company that did not directly compete with R+F and Darphin—the Estee Lauder brands in which Batra possesses knowledge of trade secrets.").

91. *See supra* note 77.

92. There is substantial academic literature on the issue of efficient breach, that is, the situation where the breaching party is better off even after the innocent party recovers damages. It is said that economic efficiency encourages breach in such situations. *See, e.g.,* Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 13-23 (1989); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982). Although most of the efficient breach literature deals with sales of goods, the situation hypothesized here seems like a textbook example of such a breach: the employee is better off by virtue of the compensation from her new employer and the former employer, by virtue of not being damaged, is no worse off.

and it may even be that the former employer has a right, in the alternative, to the compensation paid by the new employer.⁹³

The problem with any of these remedies is that they depend on the validity of the underlying contract, which by hypothesis is an agreement not to work for anyone for a period of time. It is possible, however, that such an agreement would violate public policy. If so, it would not be enforceable even in restitution since the law tends to leave the parties to an illegal contract as it finds them.⁹⁴ At most, the employer would be free of any obligation to continue payments; it could not recover for compensation already paid.

Whether such a contract is illegal, of course, is relatively uncharted waters, but the law's approach to postemployment restraints strongly suggest invalidity: if the law views an agreement not to work for a competitor as unenforceable unless rigid conditions are met, it is hard to see why it would view a promise not to work at all as permissible. In the former case, as we have seen, the law requires both a legitimate employer interest and a tailoring of the covenant to that interest.⁹⁵ In the latter case, neither of these justifications for restricting the freedom of the employee to engage in productive work is present.⁹⁶

93. The RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011) would allow for restitution of gains earned by virtue of an “opportunistic” breach, even if the effect were to frustrate an efficient breach. Section 39(1) provides that a breach that is both material and opportunistic gives the injured promisee “a claim to restitution of the profit realized by the [defaulting] promisor as a result of the breach,” with disgorgement of profit as “an alternative to liability for contract damages measured by injury to the promisee.” It goes on to provide that a breach is “opportunistic” if:

- a. the breach is deliberate;
- b. the breach is profitable. . . ; and
- c. the promisee’s right to recover damages for the breach affords inadequate protection to the promisee’s contractual entitlement. In determining the adequacy of damages for this purpose,
 - i. damages are ordinarily an adequate remedy if they can be used to acquire a full equivalent to the promised performance in a substitute transaction; and
 - ii. damages are ordinarily an inadequate remedy if they cannot be used to acquire a full equivalent to the promised performance in a substitute transaction.

Id. § 39(2). The hypothesized breach would be deliberate and would be “profitable” within the meaning of the section by “result[ing] in gains to the defaulting promisor (net of potential liability in damages) greater than the promisor would have realized from performance of the contract.” *Id.* § 39(3).

That would leave the question as to whether the employer’s damage remedy “afforded inadequate protection” to the employer’s contractual entitlement. Given that by hypothesis there is *no* harm, damages would scarcely vindicate the entitlement. But the absence of any damages raises questions about whether it makes sense to apply this provision to the employment setting to begin with. In any event, this Restatement provision was controversial both because it was argued to go beyond current law and because it was a frontal attack on efficient breach theory. See David Campbell, *A Relational Critique of the Third Restatement of Restitution* § 39, 68 WASH. & LEE L. REV. 1063, 1070-71 (2011).

94. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 63 cmt. B (AM. LAW INST. 2011).

95. See discussion *supra* Part IV.

96. In England, agreements are sometimes challenged as denying the employee the opportunity to use his or her skills. Thus, in one case, the employee argued that he had a “legitimate concern to work” and the grant of an injunction during garden leave “would . . . compel idleness for the remainder of the notice period.” *Elsevier Ltd. v. Munro*, [2014] EWHC (QB) 2648, [56]. The court avoided the issue since,

This might suggest that the English had it right in the first place by requiring continued employment during garden leave.⁹⁷ While such employment would be a formality, it might be one that the law would honor. An employer, having chosen to structure its arrangements as paid idleness by a former worker, is less likely to be permitted to enforce such idleness in the absence of any cognizable interest in that idleness. If both parties are satisfied with that arrangement, there is no legal problem, but if one resists enforcement, it seems contrary to the rationale limiting noncompetition agreements to validate such an agreement.

This analysis suggests that the American version of garden leave is problematic from a legal standpoint: once the employment relation is severed, the employer has, at most, a legitimate interest in preventing the former employee from competing. To the extent that the employer seeks to do more than that, it is pursuing no legitimate interest and should find no comfort in the legal system.⁹⁸

Perhaps American employers might be well advised to revert to the English system of garden leave: retaining the employee as such during the period of the restriction, even if assigning no duties and, indeed, cutting her off from customers and co-workers for the duration of the restrictive period. But this, too, seems problematic. In such a scenario, “employment” is merely a formality, and it is not clear why the courts ought to give it much deference.⁹⁹ Indeed, it does not seem that English courts do so.¹⁰⁰ Where the employee in this country seeks to work, the normal rules governing postemployment restraints should apply. The fact of continuing compensation is relevant only in any jurisdictions that take seriously the

in the case before it, the employer was offering the defendant not merely garden leave but real employment: “There is a public policy against the compulsory sterilisation and potential atrophy of skills. Here, the Defendant’s contract includes a garden leave provision But the Claimant has not so far exercised its rights under that provision. On the contrary, it has asked the Defendant to continue working until January 2015. The reason the Defendant is not working at the present time is that he has chosen to stop working for the Claimant. It does not lie in the Defendant’s mouth to complain of ‘idleness’ which he has chosen, in breach of his contract of employment. I am not sure this is because to do so is to rely on his own wrong, as was submitted on behalf of the Claimant. It seems to me, rather, that the point is that the underlying public policy is not engaged in a case where the employer is not depriving the employee of an opportunity to work.” *Id.* at [58].

97. See *supra* text accompanying note 41.

98. Employers may guard against court errors in identifying subsequent employment as competitive by drafting specific provisions. These are easiest to do with respect to prohibiting solicitation or even dealing with customers or co-workers but harder with respect to the use of confidential information.

99. In at least one case, the court did not. After holding that the balance of hardships favored the employee in a preliminary injunction proceeding, the court in *Bear, Stearns & Co. v. Sharon*, 550 F. Supp. 2d 174, 178-79 (D. Mass. 2008), went on to find enforcement in equity also against public policy: “The so-called ‘garden leave’ provision is not a simple restrictive covenant against competition or the solicitation of clients. If it were, a different result might be warranted but to give it full effect would be to force Sharon to submit to Bear Stearns’s whim regarding his employment activity in the near future.”

100. See discussion *supra* note 44.

burden on the employee as part of the reasonableness analysis or in the balance of hardship analysis in a preliminary injunction proceeding. If the employee is not competing, it is hard to see why the employer should have any greater remedies—in damages or restitution—than if she was not a formally designated employee.

The bottom line is that restrictions on noncompetitive employment are likely suspect, no matter what the structure. That means the success of any garden leave provision depends primarily on its relevance to the traditional employer interests in avoiding unfair competition through the employee's exploitations of things like trade secrets or customer contacts.

B. Gardening in California

California is the poster child for viewing post-employment covenants not to compete to be against public policy, and thus refuses to enforce them,¹⁰¹ which has resulted in some amusing efforts to ensure that either California law or some other jurisdiction's law applies.¹⁰² The basis for the California rule is its Business & Professions Code § 16600, which, with exceptions not relevant here,¹⁰³ declares "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The statute has been interpreted not only to bar injunctive relief for such covenants but also any provisions that would impose a financial penalty for competing.¹⁰⁴ While this language is broad enough to reach noncompetition during garden leave, the California courts have no difficulty in finding competition with one's employer *while still employed* to be

101. There are several statutory exceptions but they are limited to sales of interests in businesses. CAL. BUS. & PROF. § 16602-16602.5 (West 2007).

102. *E.g.*, *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 235-38 (Cal. 2002) (considering the appropriateness of California courts issuing antisuit injunctions to foreclose an employer suit in Minnesota courts); *see also Cardoni v. Prosperity Bank*, 805 F.3d 573, 585-89 (5th Cir. 2015) (denying a Texas-headquartered bank a preliminary injunction against Oklahoma employees who left to work for an Oklahoma competitor because a Texas choice of law provision is likely unenforceable as violating fundamental Oklahoma policy disfavoring noncompetition agreements; however, the nonsolicitation covenant likely did not violate Oklahoma policy and therefore could be governed by Texas law); *Brown & Brown, Inc. v. Johnson*, 34 N.E.3d 357, 362-63 (N.Y. 2015) (finding that the application of a choice of law clause to a non-solicitation provision violated New York public policy and was, therefore unenforceable, because Florida law required different elements and degrees of proof than New York); *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 173-74 (S.D.N.Y. 2006) (applying New York law rather than California law to a noncompetition clause); *cf. Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 144-45 (2015) (holding that a forum selection clause violated public policy when the employer could not establish that the chosen forum would not diminish an employee's substantive unwaivable rights under California law because it did not stipulate to the application of California law). Similar issues can arise across national borders. *See, e.g.*, *Andrew Stewart & Janey Greene, Choice of Law and the Enforcement of Post-Employment Restraints in Australia*, 31 COMP. LAB. L. & POL'Y J. 305 (2010).

103. The exceptions deal with sales of interests in businesses. *E.g.*, § 16601.

104. *E.g.*, *Muggill v. Reuben H. Donnelley Corp.*, 398 P.2d 147, 149 (Cal. 1965) (invalidating a retirement plan provision that made benefits contingent upon plaintiff's not competing). *Muggill* was cited favorably in *Edwards v. Arthur Andersen, L.L.P.*, 189 P.3d 285, 291 (Cal. 2008).

actionable.¹⁰⁵ Thus, a formalistic analysis might suggest that in California the English flavor of garden leave is a permissible restraint while the American version is not.

However, the whole point of garden leave is to prevent competition by someone who is not, in reality, working for the employer, which suggests that California courts might see through the formalities. Resolving the issue would require a determination of whether the Code was designed mainly to protect workers (in which case continuing compensation might seem sufficiently protective) or competition (in which case it would not).¹⁰⁶ In most cases, of course, the two justifications proceed in tandem, but garden leave may require California courts to choose between them.

Decisions to date have spoken in terms of both interests as if they always point in the same direction. Thus, *Edwards v. Arthur Andersen LLP*,¹⁰⁷ California's most recent and definitive statement, thoroughly intermixed the various policies in the course of a few paragraphs. The court spoke of § 16600 as reflecting "settled public policy in favor of open competition,"¹⁰⁸ as manifesting "a settled legislative policy in favor of open competition and employee mobility,"¹⁰⁹ and ensuring "that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice."¹¹⁰ Section 16600 "protects 'the important legal right of persons to engage in businesses and occupations of their choosing.'"¹¹¹

A number of scholars have defended the California rule in terms of its contributions to the state's overall economy. The argument is, essentially, that heightened employee mobility ensures knowledge spillovers; that is argued to explain the dominance of Silicon Valley over tech centers in states where employee mobility is constrained by noncompetes.¹¹² If that view is

105. See *IDX Techs., Inc. v. Aspen Elecs., Inc.*, No. G025520, 2001 Cal. App. Unpub. LEXIS 1873, at *1 (4th Dist. Nov. 7, 2001) (finding the defendant employee had "breached a fiduciary duty (duty of loyalty) owed to his employer by secretly developing a product for a competitor"); *Bancroft-Whitney Co. v. Glen*, 411 P.2d 921, 935 n.10 (Cal. 1966) (citing approvingly cmt. e of § 393 of the Restatement (Second) of Agency drawing a distinction between preparation to compete while still employed and actually competing).

106. See Tyler M. Paetkau, *The Case for "Garden Leave" in California*, 2009 EMERGING ISSUES 4513 (LEXISNEXIS), Oct. 28, 2009, at *6 ("Garden leave, by its terms, applies to current employees and is consistent with current employees' duty of undivided loyalty. However, an employee could argue that garden leave provisions impose a financial penalty on employees for competing (i.e., loss of compensation during the garden leave period) and are a form of involuntary servitude. It is presently unclear whether a California court would enforce a garden leave provision.").

107. 189 P.3d 285 (Cal. 2008).

108. *Id.* at 290.

109. *Id.* at 291.

110. *Id.* (quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (Ct. App. 1994)).

111. *Id.* (quoting *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 734 (Ct. App. 1997)).

112. See ORLY LOBEL, *TALENT WANTS TO BE FREE* (2013); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to*

taken of the thrust of the statute, garden leave, even in the form of continued employment during the period of the restriction, would be held invalid as depriving the public of the benefits of competition. While the short duration of the leave might minimize the anticompetitive effects, California does not allow any restrictions and the clear purpose of the leave is anticompetitive.

On the other hand, some of the language in *Edwards* seems aimed at protecting employees' rights to practice their professions. Suppose that is the correct view of the purpose of the California statute, with any economic advantage just a positive side-effect. In such a scenario, the American version of garden leave—noncompetition by a terminated employee—would still seem to fall within the statutory prohibition. Indeed, it seems exactly the kind of penalty for competing (as opposed to explicitly barring competition) that California has rejected.¹¹³

However, the legality of English garden leave—with the individual still remaining employed—is more ambiguous. As has been suggested, California's recognition of an employee's duty of loyalty while employed necessarily suggests a limitation on the scope of the statute, and the question is whether the California courts would view this as a mere formality or find such an arrangement permissible. Given the strength of California's policy, it seems likely that the courts would view this as an attempt to end-run the state's doctrine.

C. Attorneys and Garden Leave

One major exception to the general enforceability of properly tailored postemployment restraints is with respect to attorneys, for whom such noncompete agreements are said to be unethical. Rule 5.6 of the Model Rules of Professional Conduct provides that “[a] lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship”¹¹⁴ although the Rules do permit

Compete, 74 N.Y.U. L. REV. 575, 589-603 (1999); ALAN HYDE, WORKING IN SILICON VALLEY (2003); Norman D. Bishara, *Covenants Not To Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287 (2006); Viva Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939 (2012).

Yet, another perspective suggests that noncompetes may be self-defeating in terms of employer interests by dampening employees' incentives to improve their skills. See On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 837 (2013) (reporting an experimental study supporting the proposition that postemployment restrictions “may discourage employees from investing in their own human capital and work performance, as well as restrict regional positive spillovers and endogenous growth over time”).

113. See *supra* note 105.

114. MODEL RULES OF PROF'L CONDUCT r. 5.6(a) (AM. BAR ASS'N 2015). The rule also bars “an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. *Id.* r. 5.6(b); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13 (AM. LAW INST. 2000).

“an agreement concerning benefits upon retirement.”¹¹⁵ The rule has been applied by a number of courts.¹¹⁶

The language of this rule would not be infringed by the classic version of garden leave—continued employment but no work during the period of the leave—since no restraint would operate “after termination of the lawyer’s relationship with the law firm.”¹¹⁷ Does that mean that law firms may restrict the competition of departing attorneys if they use the English version? Given the constant shuffling and reshuffling of attorneys in firms of almost any size,¹¹⁸ this would be a remarkably attractive solution for many law firms.

There have been some modest efforts in this direction, but they seem to be framed as simple notice provisions justified by the need for continued client service and smooth transitions.¹¹⁹ In these cases, there does not appear to be real garden leave at stake. However, longer restraints, even of those still formally viewed as employees, are highly suspect. Rule 5.6 and its predecessor¹²⁰ are justified as preserving clients’ freedom to choose their attorneys.¹²¹ To that end, the Rule has been interpreted to reach not only

115. R. 5.6(a); *see, e.g.*, *Neuman v. Akman*, 715 A.2d 127, 128 (D.C. 1998). *See generally* Robert W. Hillman, *Ties That Bind and Restraints on Lawyer Competition: Restrictive Covenants as Conditions to Payments of Retirement Benefits*, 39 IND. L. REV. 1 (2005) (discussing retirement penalties).

116. *E.g.*, *Law Offices of Ronald J. Palagi, v. Howard*, 747 N.W.2d 1 (Neb. 2008); *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358 (Ill. 1998); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992). *But see* *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723 (Ariz. 2006) (finding that an agreement requiring return of stock in law firm with no compensation when an attorney competes with his former firm does not violate Rule 5.6 but is to be evaluated under traditional principles governing noncompetition clauses).

117. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13 cmt. b (AM. LAW INST. 2000). The comment does not view the prohibition as reaching “law-firm requirements restricting a lawyer’s right to practice law prior to termination, such as the common restriction that the lawyer must devote his or her entire practice to clients of the firm.” *Id.* § 13 cmt. b. However, this sentence likely had in mind an attorney actually serving some of the firm’s clients, rather than sitting out entirely.

118. *See generally* ROBERT W. HILLMAN, *LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS*, at 2:128 (Aspen Publishing) (1994); Robert W. Hillman, *Law Firm Risk Management in an Era of Breakups and Lawyer Mobility*, 43 TEX. TECH L. REV. 449 (2011).

119. Debra Cassens Weiss, *To Discourage Partner Exits, Law Firms Enforce Contract Terms*, AMERICAN BAR ASSOC. (April 7, 2015), http://www.abajournal.com/news/article/law_firms_increasingly_discourage_partner_exits_with_enforcement_of_contract; Ameet Sachdev, *Departing Wildman Harrold partners may be there for a while: 6 who plan to join Barnes & Thornburg may be required to fulfill 90-day notice period*, CHICAGO TRIBUNE (Oct. 1, 2010), http://articles.chicagotribune.com/2010-10-12/business/ct-biz-1012-chicago-law-90-20101012_1_lawyers-from-other-firms-clients-wildman-harrold.

120. The earlier Model Code had a similar provision. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-108 (A) (AM. BAR ASS’N 1980) (“A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.”).

121. ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1072 (1968) (reasoning that an attorney must “be available to prospective clients who might desire to engage his services.”). This was not always the justification. *See* Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 HOFSTRA L. REV. 65, 70 (2007) (noting that the prohibition was originally

formal postemployment restraints of trade but also arrangements that effectively penalize those who continue to practice law.¹²² Thus, forfeiture of deferred compensation by an attorney who practices after leaving has been struck down as violating disciplinary rules.¹²³

VII.

FINAL ASSESSMENT

If one thing is clear from the foregoing, it is that garden leave is a largely untested phenomenon in the American setting, whether of the original English continuing-to-be-employed version or the dominant American paid-postemployment-sit-out flavor. It is unclear, however, whether it will continue to be offered predominantly in the financial services industry or spread more broadly into other sectors, at least for higher-level positions. Nevertheless, there are reasons to believe that such a diffusion is likely to occur. Garden leave provides a clear legal advantage for employers in shifting the balance of hardships in preliminary injunction proceedings, the normal setting in which noncompetes are enforced.¹²⁴ And labor market economics suggest that higher-value workers will be increasingly reluctant across sectors to agree to uncompensated¹²⁵ noncompetition clauses that effectively prevent them from using their skills and talents once they leave their current employer. As we have seen, garden leave allows employers to

viewed as unnecessary since attorneys would be bound by ethical rules from seeking clients of the former employer).

122. The core business competition among attorneys is, and has always been, for clients. But, especially in an era of Big Law, it is possible that particular individuals may have confidential information about other aspects of law practice, including merger possibilities. Presumably, such information could be protected by a nondisclosure agreement that would not fall afoul of the Model Rules. *See generally* Hillman, *Law Firm Risk Management*, *supra* note 118, at 458-62.

123. *See, e.g.,* Spiegel v. Thomas, Mann & Smith, 811 S.W.2d 528, 530 (Tenn. 1991) (finding that a clause in a law firm's stockholder's agreement under which a lawyer who resigned but continued the practice of law would forfeit deferred compensation was against public policy and unenforceable under state disciplinary rules prohibiting restriction of practice agreements between lawyers); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989) ("The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.").

124. *See supra* text accompanying note 77.

125. Some would argue that the restraint period in such a scenario is never "uncompensated" because the compensation for employment necessarily reflects the risk that the employee will someday (by her choice or by the employer's) be in that position. They would posit that compensation reflects a kind of hazard premium. Given that noncompetition clauses are often extracted at the outset of employment and may not come into operation for years, it is unclear how rational such calculations can be. But even assuming this analysis is correct, in any event, whatever the theory says, few real world employees with bargaining leverage are likely to take that position. *See also supra* note 46 (recounting how the compensation paid for the French version of garden leave must be over and above the employee's other compensation).

retain most of the flexibility of at-will employment while addressing these employee concerns.

This suggests it is time to begin to come to grips with the normative implications of the phenomenon. I attempt to do so here in the context of the current approach to postemployment noncompetition clauses.¹²⁶ In other words, the question is whether garden leave is an improvement on the current law such that it should be allowed and perhaps even celebrated.

At first glance, a celebration seems in order. Whatever one may say about garden leave, it seems no worse than the more traditional unpaid noncompetition agreements and has some significant advantages for workers. These are obvious to the employee bound by such a provision since he or she is paid during the sit-out period.¹²⁷ And there is also reason to suspect that garden leave is typically shorter than traditional noncompete arrangements,¹²⁸ thus minimizing the resulting harm to both the employee and to competition.¹²⁹ In theory, the additional cost of garden leave should push employers to be more grudging in its use, especially the American version which gives the employer the option of deciding whether and how long the restraint period will be at the point where employment terminates.¹³⁰ That choice point may result in fewer and lesser restraints than an off-the-shelf clause added years before.

It is true that garden leave currently tends to be used in high-energy fields where, at least it is believed, the marketability of employees may vary

126. In other words, I do not address the more complicated question of whether the whole structure of noncompetition law should be reconsidered. *See supra* note 59.

127. A different question would arise if a postemployment restraint was imposed for a period after garden leave expired as has occurred in England. *See supra* note 39.

128. One set of commentators summarizes the justifications for garden leave as provid[ing] mechanisms to protect each party's property rights, while limiting overreaching on either side. The employer's interest in protecting property rights in competitive information is ensured, and that protection lasts only for the period of time that the employer is willing to pay compensation (the price mechanism). The employee preserves her interest in making a living and protecting her rights to her productive capacity in the long run. In the short run, although the employee would not actively use her productive capacity in her chosen field, she would be fairly compensated for that period.

Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 41 (2012).

129. A recent article argues that, in the financial sector, garden leave should be required by regulators in order to mitigate what the authors perceive to be the short-termism that led to the Great Recession. *See Sepe & Whitehead, supra* note 84. The core argument is that the ability of some traders to capitalize on short-term success by moving to new employers at higher compensation encourages risk-taking since the new employer is unable to assess the longer-term success of the worker. Accordingly, a "mandatory 'garden leave' period will increase the cost of departure, as well as permit successor employers to better assess a prospective hire's performance, helping to balance against a nonexecutive's incentives for short-term risk taking." *Id.* at 660.

This, of course, is a frontal assault on the value of competition—at least in this industry and at least for some kind of employees. I leave it to others to assess whether the problem the authors identify justifies the solutions, including mandatory garden leave, they propose.

130. *See supra* text accompanying note 51.

dramatically over very short periods. In other words, even sending the employee to her garden for, say, six months might seriously impair her attractiveness to other employers,¹³¹ thus raising essentially the same concerns over limiting employee mobility that drive restraint of trade law.¹³² Nevertheless, so long as garden leave provisions are subject to much the same reasonableness analysis as traditional restraints, it is hard to see them as not an improvement. Further, the American version of garden leave as a postemployment restraint means that the usual reasonableness restrictions apply, with the major benefit for employers being more likely satisfaction of the balance of hardships factor in the preliminary injunction setting.

In short, whatever one's beliefs about noncompetition clauses in general, garden leave is an improvement. My biggest reservation, however, is less doctrinal and more an excursion into judicial psychology. Perhaps hardship to employees, while doing little work in the formal doctrinal analysis, influences courts in their application of other factors of the traditional test.¹³³ While this intuition is hard to validate empirically it seems likely and such concerns about hardship might also influence decisions refusing to apply the liberal blue pencil rule to cure overbroad restraints.¹³⁴ The risk is that, should garden leave become more common, courts might be less demanding when considering noncompetition clauses. Whether that is cause for condolences or cheers depends on your overall view of such provisions in the employment relation.

CONCLUSION

Garden leave seems to be an increasing if not yet important feature of the American landscape. Whether it will continue to grow will depend both on the reactions of courts to the various forms in which it appears and on the perceptions of employers and higher-value employees as to its use as one of the doctrinal tools for reconciling employer interests in preventing "unfair" competition and the employee's and public's interests in freedom to compete.

131. One possible explanation is cynical: the very value of the employee to others is dependent on her knowledge of the present employer's customers and business practices, which reinforces the standard justifications for noncompetition agreements in the first place. But it is at least possible that such value stems less from knowledge about the present employer than from knowledge about current market conditions.

132. Bishara & Westermann-Behaylo, *supra* note 128, at 49 ("The garden leave clause seems less amendable to reasonableness scrutiny by policy makers and may still act as an improper restraint on trade. It may also allow employer overreaching, provided that the employer is willing to pay to overreach. It is still restrictive from a public policy perspective, in that the public is denied the beneficial services, innovation, and knowledge of the worker for a period of time. The worker is not being a productive member of society—even if she is not being denied compensation to refrain from competition. Moreover, though the worker is getting paid to lock up her skills, she is potentially harmed by not having her skills remain sharp and relevant.").

133. See *supra* text accompanying notes 70-80

134. See *supra* text accompanying note 66.

This article sketches at least some of the considerations in a very complicated inquiry.