

Non-competes fail to protect CXOs from poaching. India Inc. builds a stronger shield

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CXOs and the next-in-line are hesitant to switch jobs, making replacement hiring arduous.
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SUMMARY

To protect sensitive information and prevent CXOs from quickly joining rivals, investment banks, consultants, startups and law firms are relying on one provision. Here's what is this new preferred shield of India Inc.

As the non-compete clause fails to protect senior executives from poaching and worthy replacements remain elusive, Indian companies have found a deterrent to keep senior executives tethered: extended garden leaves.

Clients are inserting a garden leave clause in new contracts and also extending the duration of such a period that requires an executive who has quit to be on the rolls but without any responsibility, according to law firms and human resource consultants. Investment banks, consultants, startups and law firms alike now include such conditions.

“When we talk about negotiating terms, everyone is constantly talking about non-competes. But let’s be very honest—non-competes are largely not enforceable worldwide,” Apeksha Mattoo, partner-labour and employment law practice, Trilegal, told *Mint*. “So, what approach are companies looking at instead? Longer garden leave periods.”

The period, according to Mattoo, can extend from six months to up to a year.

During the garden leave, a CXO who has resigned gets full salary but does not have access to the company's emails and data, and doesn't attend meetings and client interactions. The executive wields no influence over teams so that the company and employees can transition to the new appointee. Above all, it's to deter rivals from poaching top executives tied to lengthy garden leaves.

A senior executive at one of the largest consulting companies told *Mint* that one of his key personnel who resigned had a six-month garden leave, and the company is insisting that he must serve the entire period, rejecting his request to leave a month earlier.

"We used to consider such requests earlier and, in most cases, accepted them because one wanted to part on good terms," the executive told *Mint* on the condition of anonymity. "But getting a replacement is so tough that we are stretching the candidate, hoping he reconsiders."

CXOs and the next-in-line are hesitant to switch jobs, making replacement hiring arduous. Subdued appraisals amid global uncertainties and poor demand outlook have made candidates anxious that the last man in will also be the first one out.

"Given the sensitivities attached to senior management exits and the potential risks, companies are becoming more cautious and making the contracts more watertight when it comes to aspects around poaching clients or employees or having access to sensitive information," said Roopank Chaudhary, partner and head of data consulting at Aon.

Unlike notice period that is part of a company's rules, garden leaves are subjective, and terms may vary with each CXO. Garden leave is mostly applicable to the top brass, aiming to create a buffer between the employee and the company and its clients. For CXOs, the notice period may be included in the garden leave. However, at the junior to middle level, the employee is expected to work, hand over duties, and train the replacement during the notice period that may last up to three months.

Buyouts with mutual consent

Legally buying out the garden leave period is possible, provided it's negotiated between the existing employer, the employee, and the new employer. Mutual consent is a must and may include financial compensation to the current employer for waiving full or part of this requirement.

In India, employers can seek an injunction against the breach of garden leave obligations under the terms of the employment agreement and relevant provisions of the Indian Contract Act.

Garden leaves are often discussed between the firm and the employee, and while the importance of intellectual properties does not diminish in a lean firm, negotiations remain an option, said Rohit Jain, managing partner at law firm Singhania & Co.

"The high cost of paying a non-productive executive's salary during leaner economic times is definitely a significant factor," said Jain. "We are seeing that negotiations are getting more common and at times, companies are even trying to negotiate a lump-sum settlement that is less than the full salary cost, allowing for a quicker and cleaner exit."

Jain said the flexibility depends on the perceived risk to the business, citing an example. Singhanian & Co. was the legal adviser to the acquisition of an auto ancillary company. The deal terms provided that the incumbent CXO would remain in the position during the initial post-acquisition integration phase.

"Upon the conclusion of this agreed-upon service period, the employment contract granted our client the sole discretion to place the CXO on a three-month garden leave," said Jain. "The intent behind providing this optional clause was to provision for a strategic buffer, allowing our client to protect sensitive business interests, client relationships..."

Executive search firms say the preference for garden leave means the waiting period to get the right CXO is getting longer. "Companies have 3–6 months of garden leave, and for the right candidate, the client is willing to wait," said Navnit Singh, chairman and regional managing director at Korn Ferry, India. "But the Big Four in some cases are mandating a one-year garden leave," he said, referring to the four largest audit and consulting firms KPMG, EY, PwC, and Deloitte.