Are there alternatives to noncompete agreements?

Q. I have certain employees that I don't want leaving my business to work for a competitor. I am leery about using a noncompetition agreement because I know that courts can be hostile toward them. I understand they can cost a lot of money in legal fees to enforce. Are there any alternatives for me to consider?

A. You are correct that courts have been historically skeptical about the enforcement of noncompetition agreements.

In today’s economy, it’s even more difficult. Judges simply do not want to enjoin a family’s breadwinner from working. Instead of using a noncompetition agreement, think about using a “garden leave” contract.

The concept of garden leave originated in the United Kingdom. It describes the practice of an employer paying an employee to stay on the sidelines during a set period of time following the end of his or her employment. Presumably, many British workers would spend their enforced free time puttering in their gardens.

A typical garden-leave contract requires a lengthy advance notice of resignation, prohibits certain competitive activities during the notice period and requires the employee to be sent home but still get paid his or her full salary and benefits during the notice period.

Provided an employee has enough value, garden-leave clauses provide many of the same benefits as a traditional noncompetition agreement. The employer is provided time to replace the departing employee, delay competition by the departing employee, cultivate relationships with clients and customers and maintain good will.

Also, because the employee remains an employee during the paid notice period, concepts like the duty of loyalty (which prohibits solicitations of customers and other employees, as well as the misuse of confidential information) remain in place and protect the employer.