

# California's Noncompete Ban Getting Sidestepped in Court Rulings

May 15, 2025 | Katherine V.A. Smith, Harris M. Mufson, and Justin M. DiGennaro

*Gibson Dunn attorneys explain how employers are winning federal court disputes involving California's ban on noncompete agreements by enforcing contractual choice-of-law provisions.*

A series of federal court rulings in the last year demonstrate that invoking [SB 699](#)—California's law against non-competition agreements—is not absolute. Choice-of-law provisions remain critically important for employers when enforcing post-termination restrictive covenants.

The new California law, in effect since Jan. 1, 2024, states that non-competition agreements are unenforceable “regardless of where and when the contract was signed.” It also prohibits employers from attempting to enforce non-competition agreements “regardless of whether the contract was signed and the employment was maintained outside of California.” This language purports to invalidate non-competition agreements involving employees who never even set foot in the state to work.

Out-of-state employers have yet to challenge whether California's voiding of private contracts formed outside of, and with little to no connection to, the state can survive constitutional scrutiny. But in what appears to be an emerging trend, employers have avoided the application of SB 699 by skirting the issue altogether and instead enforcing contractual choice-of-law provisions.

For example, in April 2024, a former senior executive sought to invalidate his non-competition agreement with DraftKings, a company based in Massachusetts. In [DraftKings Inc. v. Hermalyn](#), Michael Hermalyn spent his entire DraftKings career based out of the company's New York office and frequently traveled

to Massachusetts for work. In exchange for millions of dollars in equity grants, Hermalyn signed a series of non-competition agreements. Those agreements stated that they were governed by Massachusetts law.

In the days before he resigned from DraftKings to join a California-based competitor, Hermalyn claimed to become a California resident. Unbeknownst to DraftKings, in those few days, he allegedly leased an apartment, obtained a driver's license, purchased a car, registered to vote, and scheduled appointments with health care providers, all in California. On the day he resigned, Hermalyn sued DraftKings in California state court seeking a declaratory judgment invalidating his non-competition agreements under SB 699.

A few days later, DraftKings sued Hermalyn in Massachusetts federal court seeking an injunction enforcing his non-competition agreement under Massachusetts law. The US District Court for the District of Massachusetts held that the Massachusetts choice-of-law provision was enforceable and that California had “only a minimal connection” to the dispute because, among other reasons, Hermalyn never worked in California for DraftKings and only became a California resident a few days before his resignation.

The court also ruled that Massachusetts's public policy endorsing non-competition agreements under certain circumstances is equally as “fundamental” as California's public policy against non-competition agreements. The court ultimately held

that Hermalyn's non-competition agreement was enforceable and issued a preliminary injunction. The US Court of Appeals for the First Circuit affirmed the district court's preliminary injunction, ruling that California's public policy reflected in SB 699 doesn't eclipse the parties' clear and unambiguous agreement to apply Massachusetts law.

A federal court in Georgia similarly enforced a choice-of-law provision in September 2024, rejecting a former employee's invocation of SB 699. In [NetRoadshow, Inc. v. Carrandi](#), the ex-employee argued that her non-competition agreement with a Georgia choice-of-law provision was invalid under SB 699 because, after signing her agreement, she had moved to California and continued to provide services to her former employer while living in the state.

The US District Court for the Northern District of Georgia rejected the former employee's argument and applied Georgia law to the non-competition agreement, emphasizing that Georgia's analysis for enforcing choice-of-law provisions focuses only on the public policy and interests of Georgia, not those of another potentially implicated jurisdiction. Because enforcing the Georgia choice-of-law provision would not be contrary to Georgia public policy or interests, the court applied Georgia law to the non-competition agreement.

Two months later, a California federal court reached a similar conclusion. In [Poer v. FTI Consulting, Inc.](#), a former FTI employee sought a preliminary injunction preventing FTI from enforcing his non-competition agreement under SB 699, even though his agreement stated it was governed by Maryland law.

The ex-employee argued that California law should apply because FTI listed him as a California-based employee on its website (even though he

was a remote Nevada-based employee), he had access to one of FTI's eight California offices, and he performed work for California clients.

The US District Court for the Northern District of California disagreed and enforced the Maryland choice-of-law provision, ruling that the dispute lacked any real connection to California. In so ruling, the California federal court explained that SB 699 doesn't protect "a non-California citizen working for a non-California-based employer at an office outside California."

Given the purported breadth of SB 699's invalidation of non-competition agreements, out-of-state employers can expect that former employees will continue to push the boundaries of the new law's application by emphasizing or even manufacturing California-based connections.

But the above decisions suggest that employers can navigate these challenges to their post-termination restrictive covenants by ensuring their contracts include robust choice-of-law provisions favoring jurisdictions that support the enforcement of non-competition agreements.

*This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.*

#### AUTHOR INFORMATION

**Katherine V.A. Smith** is partner at Gibson Dunn in Los Angeles.

**Harris M. Mufson** is partner at Gibson Dunn in New York.

**Justin M. DiGennaro** is of counsel at Gibson Dunn in New York.