

Betting Against DraftKings: A Lesson in Noncompete State Laws

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November 5, 2024

2024 has been the year of noncompete litigation. Since the Federal Trade Commission (FTC) announced its Final Rule in April 2024, seeking to ban noncompetes with limited exceptions, employers have been (rightfully) focused on the associated legal challenges to that Final Rule and thought about (maybe anxiously) the possible widespread implications to their workforce if the rule had taken effect on September 2, 2024. But fortunately for employers, the Final Rule was blocked and did not take effect, as we anticipated. Following the [decision in *Ryan LLC v. FTC*](#), which granted summary judgment and set aside the Final Rule, the FTC has continued its efforts to enforce the Final Rule. The FTC filed a notice appealing the *Ryan* decision to the Fifth Circuit, and similarly, it has appealed the district court's preliminary injunction in *Properties of the Villages, Inc. v. FTC* to the Eleventh Circuit, which also blocked the Final Rule. As it stands, absent a reversal by either the Fifth or Eleventh Circuits (neither of which seems likely), the noncompete rule remains on pause.

While the FTC's fight to invalidate noncompetes continues, employers still need to be thinking about the enforceability of noncompete provisions, especially because the enforceability of noncompete provisions has been and continues to be determined by state law.

A perfect reminder of that is the case of *DraftKings Inc. v. Hermalyn*.

DraftKings v. Hermalyn

Then-New Jersey resident Michael Hermalyn, a former executive with Massachusetts-headquartered DraftKings—an online sports betting and gambling company—quit his job with DraftKings and moved to California to join a California-based competitor, Fanatics (also a company that is engaged in the business of online sports betting). Hermalyn signed a one-year noncompete agreement with DraftKings, which had a Massachusetts choice of law provision. Massachusetts law allows the use of noncompetes, with some restrictions, while California law bans most noncompete agreements, regardless of where they are signed. And so the stage was set; if Massachusetts law applied, Hermalyn breached his noncompete; but if California law applied, Hermalyn's noncompete would not be enforceable (hence the importance of which state's law applies).

Seeking to preemptively invalidate his noncompete, Hermalyn sued DraftKings in California for declaratory relief. Days later, DraftKings sued Hermalyn in Massachusetts District Court and obtained a preliminary injunction to enforce the one-year noncompete agreement contained in his contract and prevent him from working for Fanatics until the expiration of the noncompete. In rendering its decision, the Massachusetts District Court sided with DraftKings and applied Massachusetts law.

Hermalyn then appealed the Massachusetts District Court's decision to the First Circuit Court of Appeals.

Hermalyn argued that California's interest in not enforcing the noncompete was "materially greater" than Massachusetts' interest in enforcing it. The First Circuit disagreed and affirmed the preliminary injunction, holding that Hermalyn's noncompete agreement should be enforced regardless of his current California residence.

The court held that California's interest in this dispute was not "materially greater" than Massachusetts, and therefore it would not disturb the choice of law provision in the noncompete agreement. The Court rejected Hermalyn's argument that because he currently resides in California, which is where he allegedly breached the noncompete agreement, the reasoning in *Oxford Global Resources, LLC v. Hernandez* (2018), a Massachusetts state court case, should apply. In *Oxford*, the court held that California had a materially greater interest than Massachusetts in the dispute because the employee executed and performed the contract in California and committed a breach in California after he quit and joined a California-based competitor. The First Circuit, however, distinguished *Oxford* because Hermalyn primarily worked for DraftKings from the East Coast (traveling regularly to Massachusetts) and did not perform any of his work responsibilities for DraftKings from California. The Court therefore determined that the effect of any breach would have been felt by DraftKings in Massachusetts, not California. The court also found that Massachusetts had carefully considered the issue of enforcing noncompetes, as it had passed the Massachusetts Non-Competition Act, which limits the use of noncompetes (but not to the same degree as California). And further, Hermalyn did not show that California's interest in pursuing its policy in regulating noncompetes was materially greater than Massachusetts' interest in doing the same.

What Can Employers Takeaway From The DraftKings Case?

The *DraftKings* case is a great reminder of the importance of the impact of state law on the enforceability of noncompetes. Even if an employee moves to a state with employee-friendly noncompete laws, employees cannot necessarily avoid the enforceability of an otherwise lawful noncompete by relying upon the laws of another state. That concept is especially important given the nature of remote work and employee mobility in today's workforce. Until the FTC is successful in enforcing a federal ban of noncompetes (a day that may not come any time soon, especially if the FTC appeals are unsuccessful), employers should be reviewing the noncompetes in their employees' agreements and evaluating the enforceability of those noncompetes (and even before then, the necessity of having a noncompete in the first place) on a case-by-case basis.

If you have any questions on best practices to draft restrictive covenant agreements or defend the enforceability of your restrictive covenant agreements, please contact a member of the [Kelley Drye Labor and Employment team](#).