

# New York Law Journal

Select '**Print**' in your browser menu to print this document.

**Copyright 2009. Incisive Media US Properties, LLC. All rights reserved. New York Law Journal Online**

Page printed from: <http://www.nylj.com>

[Back to Article](#)

---

## **Far-Flung Employment Rulings: Noncompetes in Calif., LinkedIn in London**

Kelly D. Talcott  
08-20-2008

It's August, which means it's time to pack our bags and head out of town. Today we'll review two employment-related cases some 5,500 miles apart that may be of particular interest to technology-focused companies. From California, a Supreme Court decision essentially does away with employee noncompete agreements in that state, and from England, a High Court ruling permits an employer to gain access to information from a former employee's LinkedIn account.

The California case[[FOOTNOTE 1](#)] arises out of the demise of the accounting firm Arthur Andersen. Raymond Edwards was a senior manager with the firm's private client services practice group when, following the firm's indictment in connection with the Enron investigation, Andersen shut down its accounting practices in the United States. Edwards' group was among the tax practice groups Andersen agreed to sell to HSBC USA Inc.

Edwards had signed a noncompete agreement when he joined Andersen, in which he agreed not to do work for Andersen clients for which he had worked while at the firm for a period of 18 months after leaving. He also agreed not to solicit clients of the firm's Los Angeles office for a period of 12 months after his departure. As a condition of his employment with HSBC, he was asked by HSBC to execute a "Termination of Non-Compete Agreement" that, among other things, released Andersen from "any and all" claims, including employment-related claims. In return, Andersen was to release Edwards from his noncompete agreement.

Edwards, citing concerns over giving up his right to seek indemnification from Andersen if he were to be named as a defendant in any potential client suits against Andersen, refused to sign the termination agreement. As a result, Andersen terminated Edwards and withheld his severance benefits, and HSBC withdrew its employment offer. Edwards sued Andersen, HSBC and an HSBC subsidiary for intentional interference with prospective economic advantage and under California's Cartwright Act (CA Bus. & Prof. Code, §16720 et seq.), which regulates against certain anti-competitive business practices.

Edwards argued that the Andersen noncompete agreement violated California Business & Professional Code section 16600, which states that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in lawful profession, trade, or business of any kind is to that extent void." Edwards eventually settled with the HSBC entities, and the trial court severed for a separate trial the issue of the enforceability of the noncompete agreement (as well as the termination agreement).

The trial court ruled in Andersen's favor, finding the noncompete agreement did not violate §16600 because it was narrowly tailored, and because it did not prohibit Edwards from pursuing his profession.[\[FOOTNOTE 2\]](#) The appeals court disagreed, and held that the noncompete agreement was invalid under §16600.

The California Supreme Court upheld the ruling, finding that Andersen's noncompete agreement was invalid because it restrained his ability to practice his profession. The court noted the noncompete's prohibition on Edwards doing any work for Andersen clients on whose accounts he had worked for 18 months after his departure, as well as its prohibition on Edwards' ability to solicit any client of Andersen's Los Angeles office for 12 months after leaving. These, the court said, "restricted Edwards from performing work for Andersen's Los Angeles clients and therefore restricted his ability to practice his accounting profession."

The court refused to apply a "narrow-restraint" exception to 16600 that the 9th U.S. Circuit Court of Appeals had implemented over the years, based on its reading that 16600 only applied to restraints that "preclude one from engaging in a lawful profession, trade, or business."

By the 9th Circuit's reasoning, a restraint that acted in a more limited fashion to bar an employee from "pursuing only a small or limited part of the business, trade or profession" did not violate 16600.

According to the California Supreme Court, however, "no reported California state court decision has endorsed the 9th Circuit's reasoning," and the court refused to do so in this instance. It noted that §16600 was "unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect."

Technology companies often use noncompete agreements to discourage employees from leaving to work for competitors, and those of us who have dealt with New York-based noncompete agreements are familiar with the sometimes delicate exercise of determining whether a noncompete's restrictions are too broad (or, depending on the client, too narrow). Companies with operations in California need to be aware that, absent legislative change, noncompete agreements are no longer legal in that state.

Nothing in the *Edwards* case, however, changes the ability of a company to restrict an employee from using proprietary or confidential company information for a new employer. Edwards, in fact, had conceded this point fairly early in the litigation. It is generally much more difficult to enforce confidentiality agreements, given that the employee is no longer under the watchful eye of the former employer, so this may

provide little solace to California employers.

## **LINKEDIN CASE**

Speaking of proprietary information, and packing our bags for the long journey from California to England, a former employee of an English recruiting firm was recently ordered to disclose limited details from his LinkedIn account to his former employer after he left and started a rival agency.

LinkedIn is a popular business networking service that allows individual users to create profiles that are structured along the lines of a resume. Each user may build a network of other users, each of whom has to create a LinkedIn profile to join. Users who are linked together may view each other's contacts, and can take advantage of "friends of friends" for business purposes.

Mark Ions was employed by the recruiting company Hays Specialist Recruitment until he left to start his own competing firm. Following his departure, Hays became concerned that Ions had taken business contact information with him in violation of his employment contract, which prohibited him from making use of a range of confidential information, including "client database" information, and from soliciting clients with whom he had had contact during his employment.

The focus of Hays' concern was Ions' LinkedIn account. LinkedIn includes a feature that will upload a user's e-mail contacts and will send selected contacts a LinkedIn invitation. Hays believed Ions uploaded Hays' customer contacts to LinkedIn at a point shortly before he announced to Hays he was leaving the firm. Hays contacted Ions after he left the firm with its allegations that he had improperly uploaded the contacts; Ions denied doing so, and shortly thereafter deleted his entire LinkedIn network.

In a step that highlights the significant differences between U.S. and U.K. practice, Hays then applied to the High Court of Justice for "pre-action disclosure," seeking what courts in the United States would consider to be a remarkably restrained amount of information. In a careful and thorough decision,[\[FOOTNOTE 3\]](#) the court refused to order the disclosure of most of what Hays was seeking.

The court would not grant Hays' request for all LinkedIn "business contacts" because it was "not framed as an order for disclosure of documents at all." It did, however, agree that Ions should disclose documents that evidenced his uploading of business contacts while he was employed by Hays.

The court also refused as overbroad Hays' request for Ions' entire "database of client and candidate contacts ... together with all documents evidencing the source and use of the clients and candidates listed on the said database." It then narrowed Hays' request for "all documents ... evidencing the use made" of the business contacts, to documents that "evidence dealings" by uploaded business contacts with Ions or his new company.

Finally, the court refused to issue an order to LinkedIn requiring it to produce this information, even though LinkedIn was the only source for that information given that

Ions had deleted his LinkedIn network. The "appropriate course," said the court, "is for Mr. Ions to require production to him by LinkedIn Corp. of the documents or copies and for him then to disclose those which fall within a class identified by" the court's order.

The decision has received a surprising amount of press, presumably because of its connection with LinkedIn. At least one commentator has focused on the "tension between businesses encouraging their employees to use social networking websites whilst trying to claim that the contacts should remain confidential at the end of their employment."

In fact, however, the decision is much more limited. Its purpose was to uncover evidence of the extent to which the employee may have misappropriated confidential employer information by improperly loading client contact information into LinkedIn.

It is one thing for an employee to invite active clients with whom he has a business relationship to join his LinkedIn network; it is another for the employee to upload in bulk form to LinkedIn company contacts with whom he enjoys no ongoing relationship. The High Court's decision was carefully crafted to help the parties determine where in this range of behavior the employee's actions lay.

In that sense, LinkedIn is no different from a notebook, CD-ROM, thumb drive, or other storage media on which a departing employee may load company confidential information. This is another case where the existing legal framework is fully capable of handling situations created by new technologies.

*Kelly D. Talcott, a partner at K&L Gates, practices intellectual property and technology law.*

#### **:::::FOOTNOTES:::::**

FN1 *Edwards v. Arthur Andersen, LLP*, available as of Aug. 12, 2008, at <http://www.courtinfo.ca.gov/opinions/documents/S147190.PDF>.

FN2 The trial court also found that the termination agreement did not waive Edwards' right to indemnification, so that it was not unlawful to require Edwards to sign the document in order to be released by Andersen and employed by HSBC. The focus of this article is on the noncompete agreement, however.

FN3 *Hays Specialist Recruitment (Holdings) Ltd. v. Ions*, available as of Aug. 12, 2008, at <http://www.bailii.org/ew/ESH/CH/2008/745.html>.

This document was created with Win2PDF available at <http://www.win2pdf.com>.  
The unregistered version of Win2PDF is for evaluation or non-commercial use only.  
This page will not be added after purchasing Win2PDF.