



Employee Mobility:

Noncompetes, Trade Secrets and Protecting Your Interests

Andrew Moriarty & James Sanders

AGENDA

- Refresher on the basics
- Recent W.D. Wash. decision
- No Hire Agreements
- Social Media and BYOD

A Quick Refresher

How Employees See Noncompetes



How Employers See Noncompetes



Noncompetes are not like other contracts

- Balance of interests:
 - Employer's legitimate interests
 - Employee's interest in making a living
 - Public interest







Trade Secrets

CONFIDENTIAL

- Research strategies and next steps
- Negative information
- User feedback
- Key suppliers

- Public information
- Patented inventions
- Non-public information
 - If not "novel"
 - If easily recreated
 - Reverse engineering is allowed

- Websites and marketing materials
- Trade shows and presentations
- LinkedIn and Facebook
- Visitors without NDAs
- Unsecured computer drives

FACTS

- B2B
- Took no documents
- No “specific plans to work elsewhere”

APPLICATION

- Two very fine companies
- Employee leaves one, joins the other

Case 2:12-cv-01911-RAJ Document 31 Filed 12/27/12 Page 1 of 21

HONORABLE RICHARD A. JONES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

AMAZON.COM, INC.,
Plaintiff,
v.
DANIEL A. POWERS,
Defendant.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C12-1911RAJ
ORDER

I. INTRODUCTION

This matter comes before the court on the motion of Plaintiff Amazon.com, Inc. ("Amazon") for a preliminary injunction against Defendant Daniel Powers. Dkt. # 11.

RESTRICTIVE COVENANTS

- NDA (perpetual)
- Customer NDB & NSA (18 months)
- Noncompete (18 months)
- Employee NSA (12 months)

INTERESTING ISSUES

- Competition?
- Prophylaxis?
- MemoryProbe.com™

“Wait . . . I’ll tell you everything!”



“Are my eyes really brown?”



NO HIRE AGREEMENTS



Can't We All Just Get Along?

- Company X agrees with Company Y: "Let's just not hire each other's employees!"
- Everybody wins!



...Maybe Not

- "No Hire" Agreements might violate anti-trust laws
- Businesses can't work together to create an unreasonable restraint of trade
 - The Sherman Act, 15 U.S.C. § 1
 - The Clayton Act, 15 U.S.C. § 15(a)

One Potential Scenario

- Department of Justice investigation
- No hire agreements between key industry players
- Emails setting out "gentlemen's agreements" not to directly solicit employees

One Potential Scenario Resolved?

- The employers settle with the DOJ
- Agree to an injunction



One Potential Scenario Not Resolved

- The allegedly aggrieved workers file class action lawsuits
- Claim: I would have been hired except for these agreements
- Or: Our wages were artificially depressed

Guidance from the Department of Justice

- "No Hire" agreements may be legitimate:
 - Employment or severance agreements;
 - Mergers or acquisitions;
 - Consultant, outsourcing, recruiting agency agreements;

Guidance from the Department of Justice

- "No Hire" agreements may be legitimate:
 - Settlement or compromise of legal disputes; or
 - Legitimate collaboration agreement, such as joint development, technology integration, joint ventures, and joint projects (including teaming agreements)

The Bottom Line

- No hire agreements can be legitimate where connected to some other agreement
- But employers can't just agree not to hire workers to reduce costs or prevent friction

Social Media Issues

- **Preventing** employees from dishing about your company online
- **Investigating** whether confidential information has been revealed



Draft Enforceable Non-Disclosure Agreements



If I'm reading this non-disclosure agreement correctly, you reserve the right to surgically remove parts of my brain that contain proprietary information.

Develop a BYOD Policy



BYOD IS HERE TO STAY



CHALLENGES

- Loss of control over company information
- Eroding trade secrets
- Problems of proof

SOLUTIONS?



- Restrict users
- Restrict local save
- Mandate tough passwords
- Backup







Set Up The Proper Electronic Safeguards

- Create Automatic Notifications

- Utilize Encryption

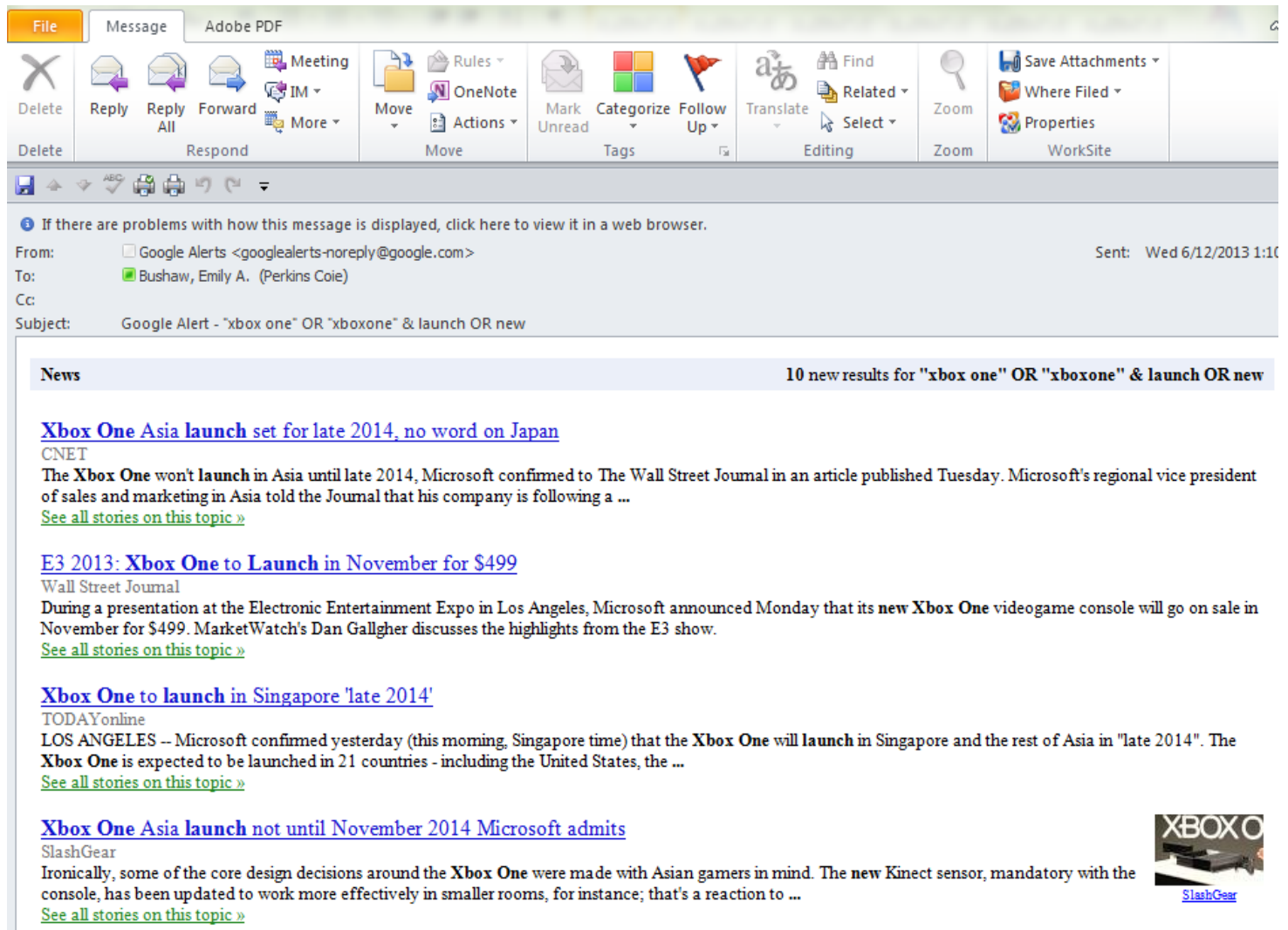
- Connect with Customers Via Company Owned Social Media Accounts



- Restrict Use of Thumb Drives

- Install Monitoring Software

Google Alerts




The screenshot shows an email client window with a toolbar at the top containing various actions like Delete, Reply, Forward, Meeting, IM, Move, Actions, Mark Unread, Categorize, Follow Up, Translate, Find, Related, Select, Zoom, Save Attachments, Where Filed, Properties, and WorkSite. Below the toolbar is a message header with the following details:

From: Google Alerts <googlealerts-noreply@google.com> Sent: Wed 6/12/2013 1:10
To: Bushaw, Emily A. (Perkins Coie)
Subject: Google Alert - "xbox one" OR "xboxone" & launch OR new

Below the header is a section titled "News" with the heading "10 new results for 'xbox one' OR 'xboxone' & launch OR new". The results are as follows:

- [Xbox One Asia launch set for late 2014, no word on Japan](#)**
CNET
The Xbox One won't launch in Asia until late 2014, Microsoft confirmed to The Wall Street Journal in an article published Tuesday. Microsoft's regional vice president of sales and marketing in Asia told the Journal that his company is following a ...
[See all stories on this topic »](#)
- [E3 2013: Xbox One to Launch in November for \\$499](#)**
Wall Street Journal
During a presentation at the Electronic Entertainment Expo in Los Angeles, Microsoft announced Monday that its new Xbox One videogame console will go on sale in November for \$499. MarketWatch's Dan Gallagher discusses the highlights from the E3 show.
[See all stories on this topic »](#)
- [Xbox One to launch in Singapore 'late 2014'](#)**
TODAYonline
LOS ANGELES -- Microsoft confirmed yesterday (this morning, Singapore time) that the Xbox One will launch in Singapore and the rest of Asia in "late 2014". The Xbox One is expected to be launched in 21 countries - including the United States, the ...
[See all stories on this topic »](#)
- [Xbox One Asia launch not until November 2014 Microsoft admits](#)**
SlashGear
Ironically, some of the core design decisions around the Xbox One were made with Asian gamers in mind. The new Kinect sensor, mandatory with the console, has been updated to work more effectively in smaller rooms, for instance; that's a reaction to ...
[See all stories on this topic »](#)



Monitoring Software

- **Monitor:**
 - **Downloads to external devices and drop boxes**
 - **Size of file transfers**
 - **Emails with attachments sent to certain domain names**

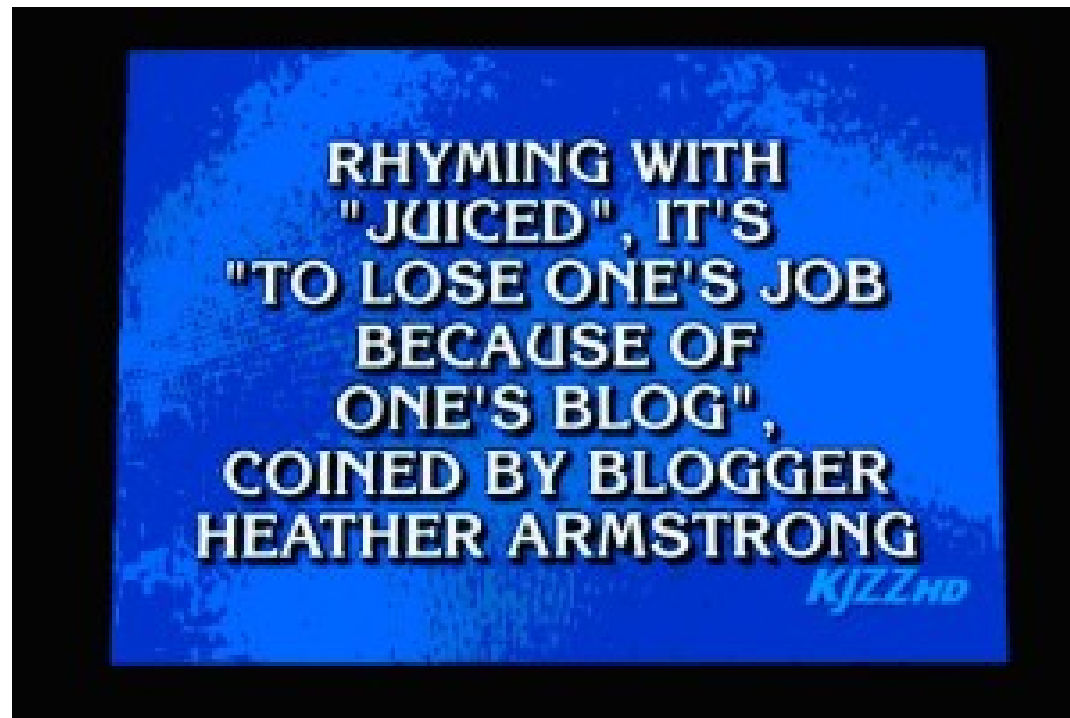
Encryption

- Prevents the use and disclosure of confidential information by unauthorized users



- Varying levels of protection based on the sensitivity of the information transmitted

Draft a Social Media Policy... That Can Withstand the NLRB's Scrutiny



Answer?

What is. . . being “dooxed.”

- Being terminated for the content of one’s Internet posts = being “dooxed.”
- Be cautious before “dooxing” or taking other disciplinary actions based on employees’ blogs, Facebook posts, and tweets.



Employee Rights

Under the National Labor Relations Act

- An employer violates Section 8(a)(1) of the National Labor Relations Act through the maintenance of a work rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights.”

Pitfalls of Overly Restrictive Social Media Policies



- Failing to clearly define terms like “non-public,” “confidential,” or “proprietary” in a manner that does not restrict employees’ discussion about the terms and conditions of employment
- Requiring employees’ online posts to be “completely accurate and not misleading”
- Requiring employees to secure permission from an employer prior to posting online

Wal-Mart's Policy Passes Muster

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a “tip” on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as “The postings on this site are my own and do not necessarily reflect the views of [Employer].”

Investigating Whether Confidential Information Has Been Revealed Online



Obtaining Discovery of Social Media Content

