FOR MORE INFORMATION

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New York (Gig Economy)

1. Does the state have a transportation network company ("TNC") statute? If so, what are the key components of the TNC statute? If not, have courts determined whether gig workers are employees or independent contractors?

In New York State, the operations of Transportation Network Company (TNC) services are largely governed by NY Vehicle and Traffic Law (VTL) Article 44-B (§§1691-1700). NY VTL §1691(3) further defines a TNC as "a person, corporation, partnership, sole proprietorship, or other entity that is licensed pursuant to this article and is operating in New York state exclusively using a digital network to connect transportation network company passengers to transportation network company drivers who provide TNC prearranged trips." Pursuant to the NY Department of Motor Vehicles, currently the only two approved TNC entities are Uber and Lyft.

Article 44-B does not explicitly classify TNC drivers as employees rather than as independent contractors. However, a TNC driver, or the TNC on the driver's behalf through a group insurance policy, must maintain insurance that recognizes that the driver is a TNC driver and provides financial responsibility liability coverage in accordance with VTL Article 44-B.

New York VTL Article 44-B does not apply to prearranged trips originating in New York City. New York City TNCs are subject to the pre-existing New York City Taxi and Limousine Commission regulations, which also have mandatory insurance requirements.

Article 44-B also gives certain local governments the ability to opt out of its requirements. A county may opt out of TNC operation, as can a city with a population over 100,000. The NY Department of Motor Vehicles posts any jurisdictions that have opted out on its web page. None have opted out as of this time.

Notably, legislative efforts have recently been undertaken to classify TNC drivers as TNC employees. Specifically, New York State Assembly Bill 2021-A7521 aims to amend the labor law to classify TNC drivers as employees. This Bill is still in the committee stage and there is no indication when it will be submitted for a final vote in the Assembly.

As discussed in (2) below, New York Courts have evaluated on a case by case basis whether or not a TNC's relationship with its driver amounts to an employer employee relationship.

2. What legal theories are available to impute liability to gig companies for personal injury? What defenses are available to gig companies named as co-defendants in personal injury cases? Have any courts found gig companies liable for distracting gig workers while driving?

New York recognizes a theory of employer vicarious liability pursuant to the doctrine *of respondeat superior* which renders a master liable for a tort committed by his servant while acting within the scope of his employment. Generally, the *respondeat superior* standard turns on whether the offending act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions. In contrast, an employer cannot be held vicariously liable for its employee's alleged tortious conduct if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business

The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results; (with control over the means being the more important consideration). Because the determination of whether a particular act is within the scope of employment is so heavily dependent on factual considerations, the issue is ordinarily a jury question.

New York judicial precedent as to TNC vicarious liability is determined on a case-by-case basis with varied outcomes to date. Both New York federal and state courts have recently held that an affidavit showing that a TNC driver's ride application was inactive at the time of an accident is insufficient on its own to entitle a defendant TNC to summary judgment on the grounds that the driver was not acting in the scope of their TNC related duties.

In another recent holding, a TNC was dismissed via summary judgment, where it successfully argued that it did not hire, control, or employ its driver, but the rather driver is an independent contractor who controlled and maintained his own vehicle. The case was also dismissed on alternate grounds because the TNC vehicle was rear ended by the opposing car.

In another recent decision, a TNC was granted summary judgment where the TNC driver's alleged sexual misconduct was found not to be within scope of his employment. Similarly, a defendant TNC successfully moved to dismiss plaintiff's vicarious liability claim where the TNC driver's physical assault could not be reasonably be considered in furtherance of the TNC's business or as part of the driver's duties.

With respect to distracted driving, New York Vehicle & Traffic Law §§ 1225-C &D prohibit a motor vehicle operator from using handheld mobile telephones and other electronic devices while a vehicle is in motion. Currently, there is no specific statute ascribing vicarious liability to a TNC for a driver's unlawful use of an electronic device. However, should a TNC driver be found to have negligently used an electronic device in the course of their employment, it follows that a TNC could face vicarious exposure,

similar to any other entity that employs a driver.

For additional information concerning personal injury liability, please see the ALFA Transportation Compendium for your state.

3. What is the statutory authority for trade secret protection in your state? What are the elements of a trade secret claim, and are any unique? Are there any noteworthy trade secret cases involving the gig economy space?

New York State does not have any statutes that specifically address trade secrets and it is one of only two states not to adopt the Uniform Trade Secrets Act. Rather, all civil trade secret protection in New York comes from the common law. Additionally, criminal theft of trade secrets is prosecuted under New York's larceny laws.

New York Courts have utilized a broad definition of a trade secret that generally is adopted from § 757 of the Restatement of Torts: holding that a trade secret is defined as any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

The New York Court of Appeals has explained that in deciding a trade secret claim the following factors should be considered:

> (1) the extent to which the information is known outside of [the] business;
>
> (2) the extent to which it is known by employees and others involved in [the] business;
>
> (3) the extent of measures taken to guard the secrecy of the information;
>
> (4) the value of the information to [the business] and [its] competitors;
>
> (5) the amount of effort or money expended in developing the information;
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

To prevail in New York on a civil claim for misappropriation of trade secrets, a plaintiff must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means. In *Leo Silfen, Inc. v Cream*, which remains the leading New York case on customer lists, the Court of Appeals held:

> Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers. Conversely, where the customers are not

> known in the trade or are discoverable only by extraordinary efforts courts have not hesitated to protect customer lists and files as trade secrets. This is especially so where the customers' patronage had been secured by years of effort and advertising effected by the expenditure of substantial time and money.

To date, there are no seminal cases addressing trade secrets in the TNC services area of the gig economy.

For additional information concerning trade secrets, please see the ALFA Business Litigation Compendium for your state.

4. What state data privacy laws potentially apply to gig companies? What companies and what kinds of data are covered?

The Stop Hacks and Improve Electronic Data Security Act" (SHIELD ACT), which was signed into law on July 25, 2019 and which became effective March 21, 2020 mandates that all employers, individuals or organizations, regardless of size or location which gather private information take reasonable cybersecurity precautions to protect such data by implementing an information security program with reasonable safeguards to protect the security, confidentiality and integrity of the private information.

Under the SHIELD Act, private information includes personal information, such as name, number or other identifier, in combination with any one or more of the following data elements, (1) Social security number; (2) Driver's license number or non-driver identification card number; (3) Account number, credit or debit card number, in combination with any required security code, access code, [or] password or other information that would permit access to an individual's financial account; (4) Account number, credit or debit card number, if circumstances exist wherein such number could be used to access an individual's financial account without additional identifying information, security code, access code, or password; or (5) Biometric information, meaning data generated by electronic measurements of an individual's unique physical characteristics, such as a fingerprint, voice print, retina or iris image, or other unique physical representation or digital representation of biometric data which are 24 used to authenticate or ascertain the individual's identity; or a username or e-mail address in combination with a password or security question and answer that would permit access to an online account.

In addition to customer contact, account and payment information, TNC driver data will fall within the ambit of the SHIELD Act. The NY Department of Motor Vehicles requires TNC companies to perform a criminal background check on TNC drivers before allowing them to transport passengers. Thereafter, TNC companies are required to track the license status of their drivers as well as enroll their drivers in the DMV's License Event Notification System (LENS), which tracks and reports license events like traffic ticket convictions, suspensions, revocations, and reinstatements.

For additional information concerning trade secrets, please see the ALFA Cyber Security Compendium for your state.

5. What is the status of arbitration with users of gig platforms and gig

workers? How do courts treat motions to compel arbitration? Are there any noteworthy cases involving arbitration in the gig economy space?

In pending New York litigation, contractual arbitration provisions are generally enforced via a motion to the court to compel arbitration and stay the litigation pursuant to NY CPLR 7503. A court decides two gateway issues when ruling on a motion to compel arbitration: (1) whether the parties are bound by a given arbitration clause; and (2) whether that clause applies to a particular type of controversy.

At the motion stage, New York Courts have routinely enforced both Lyft's and Uber's mutual arbitration provisions contained in their respective customer agreements. However, some inconsistency between holdings as to Uber, with one court ruling that the arbitration clause is sufficiently conspicuous to compel arbitration; while another court refused to compel arbitration stating that the agreement failed to explicitly convey that the customer agreed to waive the right to a jury trial. This issue has not yet been resolved at the appellate stage.

Additionally, New York Courts have found that arguments disputing the validity of the arbitration agreement wording and claims as to it being unconscionable must be decided by the arbitrator and are therefore insufficient to stay arbitration.