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Kansas (Gig Economy)

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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?

The Kansas Transportation Network Company Services Act, K.S.A. 8-2701, et seq. became effective on July 1, 2015. K.S.A. 8-2702(e) specifically defines "transportation network company" as "a corporation, partnership, sole proprietorship or other entity operating in Kansas that uses a digital network to connect transportation network company riders to transportation network company drivers who provide prearranged rides." The definition continues by stating that a TNC "shall not be deemed to control, direct or manage the personal vehicles or transportation network company drivers that connect to its digital network, except where agreed to by written contract."

The Kansas Transportation Network Company Services Act includes a variety of requirements TNCs must follow to fall under the prevue of the statute, including requirements related to driver qualification standards, driver disqualification, insurance, record maintenance, etc.

Recently, the Kansas legislature supplemented the Act by adding K.S.A. 8-2722, which provides that all TNC drivers "shall be independent contractors and not employees of the transportation network company" if the following conditions are met: (1) the transportation network company does not prescribe specific hours that a transportation network company driver shall be logged into the transportation network company's digital network; (2) the transportation network company imposes no restrictions on the transportation network company driver's ability to utilize digital networks from other transportation network companies; (3) the transportation network company does not restrict a transportation network company driver from engaging in any other occupation or business; and (4) the transportation network company and the transportation network company driver agree in writing that the driver is an independent contractor with respect to the transportation network company."

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?

Kansas is a modified comparative fault state, meaning that any party can be held liable for a portion of their negligence in a personal injury lawsuit, if plaintiff is less than 50% at fault, which could include a gig company under certain theories of negligence.

The United States District Court for the District of Kansas recently addressed some of these issues on a motion to dismiss filed in *Doe v. Lyft, Inc.*, 2024 WL 4651015 (Nov. 1, 2024). Interestingly, the district court initially ruled against the defendant, finding that the application itself was a product with sufficient similarities to a tangible product to subject it to product liability law. The court continued, noting that plaintiff would be required to "show that her alleged injury resulted from the app itself, whether in the design or in the functionality of the app."

The court then turned its attention to the claims of vicarious liability against the transportation network company. The court granted the motion to dismiss, noting that the Complaint had included "conclusory and inadequate" allegations in support of vicarious liability, and that they failed to meet the standard necessary. The court also dismissed a claim filed against the Kansas Consumer Protection Act relative to engaging in deceptive behavior, a claim for fraud, and a negligence per se claim under the Kansas Transportation Network Company Services Act.

It should be noted that in Kansas, the causes of action for negligent hiring, training, supervision, and retention, require plaintiff to prove the existence of a duty, a breach of that duty, an injury to the plaintiff, and a causal connection between the duty breached and the injury suffered, as they are independent torts. *See Reardon for Estate of Parsons v. King*, 310 Kan. 897, 903, 452 P.3d 849 (2019). *See also Gardin v. Emporia Hotels, Inc.*, 31 Kan.App.2d 168-171, 61 P.3d 732 (2003) and *Kirk v. City of Shawnee*, 27 Kan.App.2d 946, 950, 10 P.3d 27 (2000), *rev. denied* (Dec. 19, 2000). In *Reardon*, the court stated, "While an employer's practices when hiring, training, and supervising its employees may be evidence of a breach of an employer's duty of reasonable care to third parties, they are not separate causes of action." *Reardon*, 310 Kan. at 907. Stated differently, "[e]mployers in Kansas do not have a duty to third parties to train or to supervise their employees. They have a duty to exercise reasonable care under the circumstances." *Reardon*, 310 Kan. at 904-05.

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?

Kansas has adopted the Uniform Trade Secrets Act ("KUTSA"), which can be found at K.S.A. § 60-3320, et seq. The purposes of the KUTSA is to protect certain types of sensitive business information. In this regard, the KUTSA defines a "trade secret" as "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

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

The Kansas Transportation Network Services Act prohibits a TNC from disclosing a rider's personally identifiable information to a third party unless the rider consents or a legal obligation to disclose exists, or disclosure is required to protect or defend the terms of the use of the service or to investigate violations of terms. The TNC is allowed to share a rider's name or telephone number with the driver providing prearranged rides for the purpose of facilitating correct identification of the rider or communication between the rider and the driver.

In addition, it should be noted that K.S.A. § 50-7a01-04, any individual, business, or governmental entity that owns, licenses, or maintains personal information must notify the persons of any unauthorized access and acquisition of unencrypted or unredacted computerized data that compromises the security, confidentiality, or integrity of personal information and could lead to identity theft. This information includes first name or initial and last name, in combination with one or more of the following: (1) social security number; (2) driver's license; or (3) financial records. The notice must be made in the most expedient time possible and without unreasonable delay.

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 2018, Kansas enacted the Uniform Arbitration Act ("KUAA"), replacing the prior version of the Kansas's Uniform Arbitration Act. Kan. Stat. § 5-423 *et seq.*; *see* Kan. Sess. Laws 2018, ch. 90, § 35, eff. July 1, 2018. To date, there are no Kansas appellate court opinion that construe the new KUAA provisions. However, *see Nager v. Tesla Motors, Inc.*, 2019 WL 4168808, *2 n.16 (D. Kan. 2019) (citing Kan. Stat. Ann. § 5-428(b) for the proposition that it is for the court to determine whether an agreement to arbitrate exists).

Under the KUAA, a "court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate." K.S.A. § 5-448(a). "An agreement [to arbitrate] is valid, enforceable and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract." *Id.* at § 5-428(a). Under the KUAA, a court decides whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate, whereas the arbitrator decides whether a condition precedent to has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable. *Id.* at (b), (c).

To obtain a court order ordering arbitration based on an agreement to arbitrate in a pending action, a party must file a motion to compel arbitration in the court where the action is pending. K.S.A. § 5-429(a), (e). The court will then will summarily decide the issue and order arbitration, unless it finds there is no enforceable agreement. *Id* at (a)(2). Furthermore, once a party files the motion to order arbitration, "the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to arbitration until the court renders a final decision" on the motion. *Id.* at (f). If the court orders arbitration, "the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration," however, if a claim subject to arbitration is severable, the court may limit the stay to that claim. *Id.* at (g).

To initiate arbitration, one must give notice in a record to the other parties to the agreement to arbitrate in the agreed to manner, or in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. K.S.A. § 5-431(a). The notice must describe the nature of the controversy and the remedy sought. *Id.* Absent an objection for lack or insufficiency of notice under K.S.A. § 5-437(c) not later than the beginning of the arbitration hearing, appearance at the hearing waives any such objection. *Id.* at (b).

Additionally, while the KUAA "generally controls arbitration agreements in Kansas . . . in some instances the [FAA] preempts the KUAA." *McNally v. Beverly Enterprises, Inc.*, 2008 WL 4140635, *2, 191 P.3d 363 (2008). The Federal Arbitration Act "applies when a case involves a written agreement and interstate commerce." *Portfolio Recovery Associates, LLC v. Dixon*, 52 Kan.App.2d 365, 370, 366 P.3d 245 (2016) (quotations and citations omitted); *see also* 9 U.S.C. § 1 (defining when the FAA applies). The FAA "establishes a strong federal policy in favor of arbitrating disputes" and "all doubts about the scope of what issues are subject to arbitration should be resolved in favor of arbitration." *Hague v. Hallmark Cards, Inc.*, 48 Kan.App.2d 1148, 121 (2012) (citations omitted). "The FAA provides that arbitration provisions 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Packard v. Credit Solutions of America, Inc.*, 42 Kan.App.2d 382, 213 P.3d 437 (2009) (*quoting* 9 U.S.C. § 2 (2006)). The FAA creates a body of federal substantive law applicable in state and federal courts and "preempts conflicting state law which exempts enforcement of arbitration agreements involving interstate commerce." *Skewes v. Shearson Lehman Bros.,* 250 Kan. 574, 579, 581, 829 P.2d 874 (1992).

In Kansas, filing an answer does not by itself waive arbitration. *See, e.g., Portfolio Recovery Associates,* 52 Kan.App.2d 365, 366 P.3d 245 (2016) (it was for the arbiter to determine whether the fact that the defendant waited more than two years to compel arbitration waived the defendant's right to arbitrate); *see also Burch v. Heatron, Inc.*, 2018 WL 6427293 (Kan.App. 2018) (upholding trial court's ordering the parties to arbitration 12 days prior to trial once the defendant found and presented an originally signed arbitration agreement between the parties and further holding that the arbiter determines whether arbitration was waived by the defendant's actions); *see Beeson v. Erickson*, 22 Kan.App.2d 452, 454-455, 917 P.2d 901 (1996) (under former arbitration act, a "party's conduct must unequivocally demonstrate the intent to waive" arbitration and finding that a party did not waive arbitration when the party filed an answer asserting a right to arbitration and subsequently objected to the trial court's denial of a motion to compel arbitration). However, a parties subsequent litigation conduct may be deemed a waiver of the right to arbitration, and this issue is to be decided by the arbiter, not a court, absent the arbitration agreement stating to the contrary. *See Portfolio Recovery Associates,* 52 Kan.App.2d 365; *Burch v. Heatron, Inc.*, 2018 WL 6427293, 431 P.3d 903 (Kan.App. 2018).

Both the KUAA and the FAA have a right to immediately appeal an order denying a motion to compel arbitration. Kan. Stat. Ann. § 5-450(a)(1), 9 U.S.C. § 16(a)(1)(A). Although the Kansas courts have not yet interpreted how a motion to compel arbitration should be styled to ensure an immediate appeal under the KUAA, the Kansas court of appeals has addressed such a motion under the FAA. See *Garberg v. Advantage Sales & Marketing, LLC*, 2018 WL 2074206, 416 P.3d 1048 (2018) (the motion should be captioned as a motion to compel arbitration and explicitly request the correct relief).