

December 2021 Aviation Regulatory Update

By Evelyn D. Sahr, Drew M. Derco and Alexis A. George

DOT REPORT OF DISABILITY-RELATED COMPLAINTS RECEIVED DURING CALENDAR YEAR 2021 DUE BY JANUARY 31, 2022

Each January carriers are required to submit an annual report to the U.S. Department of Transportation (“DOT” or the “Department”) which includes a categorized summary of all disability-related complaints received by the airline during the prior calendar year. The summary is to be submitted to the Department’s Aviation Consumer Protection Division (“DOT ACPD”) on or before the last Monday in January. This year’s report, covering calendar year 2021, is due no later than January 31, 2022. Carriers that did not receive any written disability-related complaints in calendar year 2021 are still required to file a zero report indicating that no complaints were received. Failure to comply with the reporting requirements can result in DOT taking enforcement action – DOT has penalized numerous carriers for failing to comply with this important reporting mandate.

Please contact us if you have any questions on the submission process or require assistance in making your annual report.

NYC MAYOR ISSUES MANDATE REQUIRING ALL IN-PERSON PRIVATE SECTOR EMPLOYEES BE VACCINATED AGAINST COVID-19

On December 15, 2021, New York City Mayor Bill De Blasio released an Executive Order announcing the “Key to NYC” program. The program includes a vaccine mandate for all private sector companies, which requires that certain private sector employees show proof of being fully vaccinated against COVID-19. The Executive Order establishing the mandate can be found [here](#).

Specifically, the mandate will apply to private sector companies with at least two employees who work in person and will require that these employees be fully vaccinated against COVID-19, and show proof that they are fully vaccinated as well as identification that bears the same “identifying information” as the proof of vaccination that they provide. The mandate does not apply to people who work alone or from home and therefore do not have in-person contact with co-workers or others in the course of business, people who enter a workplace briefly for limited purposes, and non-NYC resident performing artists, college or professional athletes and anyone who accompanies them. The mandate requires that by December 27, 2021, employers verify and keep a record of each employee’s proof of vaccination as well as records of reasonable accommodations for employees who are granted accommodations. In addition to this, employers will have to complete the certificate [available here](#) by December 27, affirming that they are in compliance with the new requirements and post it in a public place. Employers will also be required to post an official sign in an obvious spot to notify patrons of the vaccine requirement and inform them that employees and patrons are required to be vaccinated.

According to the mandate, employees may be allowed exemptions under limited circumstances such as due to reasonable accommodations for religious and medical reasons and may keep working without penalty after the mandate goes into effect on December 27 while their application for an accommodation is under review, but such employees must apply for a reasonable accommodation by December 27 to do so.

In terms of penalties for noncompliance, the mandate states that:

“any person or entity who is determined to have violated the requirements of the [mandate] shall be subject to a fine, penalty and forfeiture of not less than \$1,000. If the person or entity is determined to have committed a subsequent violation of this section within twelve months of the initial violation for which a penalty was assessed, such person or entity shall be subject to a fine, penalty and forfeiture of not less than \$2,000. For every violation thereafter, such person or entity shall be subject to a fine, penalty and forfeiture of not less than \$5,000 if the person or entity committed the violation within twelve months of the violation for which the second penalty was assessed.”

The vaccination requirement for private sector companies officially goes into effect on December 27, 2021, but as noted above, affected employers will have to complete certain requirements such as the affirmation of compliance with workplace vaccination requirements beforehand.

DECISION ISSUED IN UNITED AIRLINES V. TSA CASE REGARDING REFUNDING OF TSA FEES

On December 14, 2021, the United States Court of Appeals for the District of Columbia Circuit (the “Court”) issued a decision in the case between United Airlines (“United”) and the U.S. Transportation Security Administration (“TSA”) in which United sought refunds of TSA fees that it had erroneously remitted to TSA on two occasions.

Specifically, United said that it had erroneously remitted overpayments of TSA fees of (a) \$1,059,743.06 for tickets associated with passengers who purchased their tickets from other airlines but who were later involuntarily transferred to United flights; and (b) \$478,244.88 for tickets for which, because of currency and exchange rate fluctuations, the recorded and remitted fee amount deviated from the fee amount statutorily required. United asserted that in the first instance, the responsibility for collecting and remitting TSA fees was maintained by the transferring airline, therefore relieving it of this responsibility, while in the second instance it explained that due to foreign currency fluctuations, United often adjusted upward and remitted a higher amount of TSA fees if the converted fee amount was less than the statutorily required amount, but did not adjust downward if the converted amount of fees was more than the statutory amount, resulting in it paying the higher amount of fees in both instances which resulted in an overpayment to TSA. TSA denied United’s refund request for both sets of tickets, which resulted in United filing a complaint in the hopes of obtaining a refund.

In its complaint, in addition to making the above-mentioned assertions, United also alleged that TSA’s rejection of its refund request was arbitrary and capricious. In response to United’s assertions, TSA alleged that the burden to establish the fact that a net overpayment had actually occurred was on United, and that in this instance, United failed to demonstrate that it had not simply remitted fees to TSA that another airline had collected and then transferred to United along with the rest of the funds associated with an involuntarily transferred passenger. In regard to the exchange rate difference tickets (“ERD”), TSA asserted that “material limitations” in the overarching methodology and accounting data used by United and provided to TSA when it requested a refund rendered the submission “insufficiently reliable to warrant a refund.”

In the end, the Court found that TSA’s denial of a refund for the first set of tickets related to involuntarily transferred passengers was arbitrary and capricious because even though United did not verify that it did not receive TSA fees as part of the funds it received from transferring airlines, TSA merely put forth conclusions and unsupported hypotheticals to support its denial. This in effect vacated the TSA’s decision with respect to the involuntary transfer tickets. On the ERD issue, the Court found that TSA’s decision to deny United’s refund request was “reasonable” given the facts presented and therefore denied United’s petition for a refund on the ERD tickets.

NY TAX ON PETROLEUM DISTRIBUTORS TO RISE 5%

Recently, the state of New York announced plans to raise the state fuel tax that is charged to petroleum distributors by 5% on January 1, 2022.

The petroleum business tax is charged to fuel distributors across New York and is assessed on heating fuel for businesses, colleges, hospitals, and diesel motor fuel and jet fuel used by aircraft during takeoffs from New York airports. On January 1, the tax will increase from 4.8 cents per gallon to 5.1 cents per gallon of fuel. One of the main concerns regarding the tax increase is that costs associated with the increase levied on distributors will then be passed on to consumers. For example, the additional costs could be passed on in the form of higher prices, which in the context of the aviation industry could mean higher jet fuel and diesel motor fuel prices.

It is important to note however that there has not yet been an indication from distributors that they will raise fuel prices to offset the costs they will incur as a result of the 5% tax increase. If and when we receive any additional information to the contrary, we will provide a further update.

TSA ISSUES NEW RULES REQUIRING AVIATION AND RAIL OPERATORS COMPLETE BASIC CYBER PREPARATIONS

On Thursday, December 2, 2021, the Transportation Security Administration (“TSA”) issued an Information Circular detailing new rules for the aviation and rail industries. Specifically, the rules require that high-risk freight rail, passenger rail and rail transit operators (1) designate a cyber coordinator; (2) report incidents to CISA within 24-hours; (3) conduct a vulnerability assessment of their systems; and (4) develop an incident response plan. In terms of the aviation industry, the TSA has said that large airports and aircraft operators would need to complete all four steps while smaller airports and aircraft operators would only be required to complete the first two steps, but are recommended to complete all four steps as well.

TSA’s new rules were issued in response to concerns expressed by the Biden administration about the U.S.’s cybersecurity as it relates to vital infrastructure. Earlier this year, TSA issued similar cyber directives for pipeline operators in response to the ransomware attack on the Colonial Pipeline, which caused gasoline supply issues, and shortages in the U.S.

The first two rules (i.e. the requirement of having a cyber-coordinator and an incident-reporting deadline) are now in effect for the aviation sector and the other two rules are expected to take effect in the coming weeks. The effective date of all four rules for the rail and aviation industries is December 31, 2021.

UPDATE ON NEW STATE CYBERSECURITY AND PRIVACY LAWS

In the coming year, it is expected that several states will enact or consider new laws related to data security, cybersecurity and privacy. Some states will have new bills that will go into effect in 2023 that generally incorporate the basic concepts regarding access, notice, restrictions on the sale of information and affirmative rights for consumers that originated with the EU’s General Data Protection Regulation (“GDPR”) and the California Consumer Privacy Act (the “CCPA”). For example, the CCPA (which was technically effective as of December 16, 2020) has several revising provisions that will become operative on January 1, 2023, which include (a) an expansion of existing consumer rights and a creation of four new consumer rights; (b) the creation of a new class of vendors and contractors with associated obligations; and (c) the establishment of the California Privacy Protection Agency which will have investigatory, enforcement, and rulemaking authority.

Similarly, New York is currently considering legislation to address privacy and cybersecurity issues including bills incorporating new obligations such as imposing fiduciary duties and impact assessments for automated decision-making. One such bill is the New York Privacy Act, which if passed would cover all companies that process the personal data of New York residents, create fiduciary duties of care, loyalty, and confidentiality, and create a private right of action for claimants asserting any violations of consumer rights.

For a more in depth review of cybersecurity and privacy issues to be aware of going into 2022, please see Eckert Seamans' December 2021 Data Security & Privacy Alert, [available here](#).

AMAZON FILES PETITION FOR AMENDMENT TO EXEMPTIONS RELATED TO COMMERCIAL DRONE PROGRAM

On Monday, November 29, 2021, Amazon.com Services LLC d/b/a Amazon Prime Air ("Amazon") submitted an application to the U.S. Department of Transportation ("DOT") requesting amendments to its two previously approved exemptions, which allowed it to use unmanned aircraft systems (i.e. "UAS" or "drones") without first obtaining formal certification from the Federal Aviation Administration ("FAA").

Amazon submitted its original application for an exemption under 49 U.S.C. § 44807 and 14 C.F.R. Parts 61, 91, and 135 on July 16, 2019, in which it asked DOT for the exemption to be able to "facilitate the operations" of its Prime Air delivery service by using UAS in the U.S. without first holding an airworthiness certificate as required under Part 135. Following this initial application, the FAA then conducted a full review of Amazon's proposal and conducted a safety evaluation of its MK27 UAS. The FAA granted Amazon's exemptions on August 27, 2020 on the condition that it adhere to several conditions and limitations including not operating the UAS higher than 400 feet above ground level, not operating the UAS over or within 250 feet laterally of moving vehicles, and not operating the UAS over humans and structures.

According to Amazon's petition, it is requesting amendments to its exemptions to add type certificate candidate drone and modify certain other conditions and limitations to cover its new "second generation" MK27 drone system. Amazon argued in its petition that it has been researching its drone system for over a year and has determined the second-generation MK27-2 can operate safely "without many of the conditions and limitations the Exemptions placed on the original MK27." Some such conditions and limitations that Amazon is requesting removal of include: (a) a condition/limitation that Amazon provide sufficient Aircraft Observers and Safety Officers so that adequate visual or audible identification of abnormal aircraft behavior during flight from the ground can be performed, (b) a removal of the requirement that Amazon designate emergency landing areas, (c) a removal of "redundant hazardous materials program requirements," and (d) removal of the requirement for private pilot certificates.

The FAA has yet to issue a decision in the matter.