# February 2022 Aviation Regulatory Update

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## UKRAINIAN AIRSPACE CLOSED FOLLOWING RUSSIAN INVASION

On February 24, 2022, the U.S. Federal Aviation Administration ("FAA") issued several Notices to Air Missions ("NOTAM" or "NOTAMs") to advise of the closure of Ukrainian airspace, Belarusian airspace, airspace in Western Russia, and developing restrictions in this area due to potential hazards for civil aviation in response to an invasion of Ukraine by Russia. Accordingly, airspace in the above-mentioned countries and areas will be closed, meaning no arrivals, departures, or overflights can be conducted, until further notice due to military restrictions.

The restrictions and closure of Ukrainian, Belarusian, and some Russian airspace to civilian flight operations came just after Russia launched an air, land, and sea invasion of Ukraine. Based on continued developments, some European aviation bodies have warned about potential hazards when flying to regions bordering Ukraine as well. Specifically, the European Union Aviation Safety Agency ("EASA") issued a Conflict Zone Information Bulletin ("CZIB") which stated that due to high risks to the flight safety of civilian flights, all airspace users should "avoid an area of at least 100 NM within the borders of Belarus and Russian Federation surrounding the borders of Ukraine." EASA decided to issue its CZIB due to the perceived risk of both intentional targeting and misidentification of civil aircraft and the presence and potential use of a wide range of ground and airborne warfare systems. The CZIB is currently under revisions and EASA has advised that more restrictions could soon follow. To compensate for the closures of various country's airspace, several re-routings of flights have been utilized via Turkey, Bulgaria, Romania, Hungary, and Slovakia.

## DOT FINES AIR CHINA AND FLIGHTHUB GROUP $300,000 EACH FOR VIOLATING AVIATION CONSUMER PROTECTION RULES

On February 9, 2022, the U.S. Department of Transportation ("DOT") issued a press release, available here, announcing the issuance of civil penalties against Air China and the ticket agent, FlightHub Group, for alleged violations of certain federal statutes and DOT aviation consumer protection regulations. DOT's assessment of civil penalties against the two entities comes as the Department continues its efforts to protect airline consumers from unfair and deceptive practices.

DOT fined Air China $300,000 for violations of the tarmac delay rule after DOT's Office of Aviation Consumer Protection ("OACP") determined that in 2018, the airline allowed two international flights to remain on the tarmac at JFK airport in New York City for over five hours without providing passengers an opportunity to deplane. OACP found this to be a violation of DOT's tarmac delay rule, which, subject to certain limited exceptions, mandates that airlines' international flights cannot remain on the tarmac for more than four hours at U.S. airports without providing passengers an opportunity to deplane and that carriers must take certain actions during the delay such as providing adequate food and water, ensuring lavatories are working, and providing medical attention to passengers during long delays if necessary.

In a separate investigation, OACP found that FlightHub Group and its Brand, JustFly.com violated the Department's aviation consumer protection rules and federal law prohibiting unfair and deceptive practices by ticket agents by posting

misleading online advertising displays. Specifically, OACP found that FlightHub Group had advertised prices for air transportation that were not actually available and, therefore, had failed to state the entire price to be paid for air transportation in its advertisements. OACP also accused FlightHub Group of making misrepresentations regarding fares, cancellation charges, and ticket refunds in connection with air transportation, and providing inaccurate information on the applicable fee for checked baggage in e-ticket confirmations. Given the OACP's investigative findings, DOT fined FlightHub Group $300,000, which is the highest civil penalty ever assessed against a ticket agent.

## 11TH CIRCUIT REVIVES CLASS ACTION SUIT ALLEGING BREACH OF CONTRACT OF CARRIAGE

On February 3, 2022, a three-judge panel for the 11th Circuit Court of Appeals (the "Court") ruled to revive a proposed class action lawsuit against Avior Airlines alleging that it breached its contract of carriage by requiring passengers to pay an $80 "exit fee" before boarding their flights from Miami to Venezuela that was not explicitly disclosed during the booking process. The ruling has caused many airlines to begin reevaluating how they disclose information on ticket taxes and other fees in their contracts of carriage as the Court's ruling has shown how some claims may be able to proceed despite Airline Deregulation Act protections.

The Airline Deregulation Act (the "ADA") generally provides air carriers with protections against lawsuits that seek to enforce state or local laws that relate to the air carriers' prices, routes or services. Following institution of the ADA, the U.S. Supreme Court in American Airlines, v. Wolens, granted plaintiffs a narrow exception to preemption to be able to sue airlines for breach of the carrier's self-imposed contractual obligations. In other words, a plaintiff cannot simply rely on state tort law or other policies to try to create an airline obligation that the airline itself did not create and agree to in its contract of carriage. Nevertheless, according to the Court, because the plaintiffs' breach of contract claims against Avior sought merely to "enforce the parties' private agreements regarding the cost of passage " and in fact, did not invoke state laws or regulations to alter the agreed upon price, the Court determined that the plaintiffs could proceed with their claim because it was not preempted. The Court's decision has prompted new guidance to airlines including the suggestion to incorporate more robust language in their contracts of carriage to ensure as much as possible that their contracts of carriage cover all prices, taxes, and fees that passengers will be required to pay, including airfare, ancillary fees and/or government-imposed charges and taxes to better guard against the type of claim that was successfully brought against Avior. The Court's ruling comes as several other ADA preemption cases continue in many states including, Alabama, Florida, and Georgia.

## FAA ISSUES LETTER ON ILLEGAL CHARTER OPERATIONS

On January 31, 2022, the U.S. Federal Aviation Administration ("FAA") issued a public notice, available here, addressing illegal charter operations, specifically the misuse of expense sharing and other misunderstandings related to pilots' certificate privileges in regard to unauthorized operations involving compensation. In the letter, the FAA targeted unauthorized Part 135 operations, or carrying passengers for compensation, as it said these operations put the "public in danger" and undercut the business of "legitimate operators."

The FAA's letter begins with a clarification of the limitations around expense sharing. According to FAA, one commonly misapplied provision is the expense sharing exception in 14 C.F.R. § 61.113(c), which permits a pilot to share operating expenses of a flight with passengers as long as the pilot pays at least his or her pro rata share of the operating expenses for the flight, which is expressly limited to fuel and oil costs, airport expenditures, and/or rental fees. Additionally, FAA reiterated that only reimbursement from passengers is allowed under this provision and cautioned pilots to be careful of giving the appearance that they are "publicly holding out" their services to the public. The FAA also noted that a great test to determine whether it is permissible to collect contributions from passengers is the "common purpose test," which requires a pilot collecting expense money to show and document that they have their own reason for travelling to the given destination that is apart from simply transporting the passengers to the destination.

The FAA's letter also includes guidance regarding a common misunderstanding about the privileges afforded with pilots' certificates and the limitations on the type of operations pilots may perform. The FAA said that it has come to its attention that, in general, many pilots do not know or completely understand the difference between pilot certification rules vs. operational rules. Specifically, the FAA noted that commercially rated pilots sometimes mistakenly believe that they can legally carry passengers for hire without complying with 14 C.F.R. Part 119 requirements for the operational rules involved. For example, a pilot operating a flight under 14 C.F.R. Parts 135 or 121 must not only hold a commercial pilot or Airline Transport Pilot ("ATP") certificate but must also meet additional qualification requirements such as training, checking, and experience requirements. In fact, according to FAA, prior to conducting any operation, a pilot must determine what operational rules the flight will be conducted under, they should determine whether they have the appropriate operational certificate (i.e., a Part 119 certificate), and they should determine whether they have the requisite qualifications to conduct the operation.

## U.S. DISTRICT COURT ISSUES ORDER IN DISCRIMINATION CASE AGAINST AMERICAN AIRLINES

On January 31, 2022, the U.S. District Court for the Northern District of California (hereinafter "the Court") issued an Order effectively allowing a case brought by a passenger who alleged racial discrimination on the part of American Airlines ("American") to continue. The passenger alleged that she was discriminated against while trying to board her flight from Miami, Florida to San Francisco, California. According to the passenger, following a disagreement between herself and an American gate agent regarding the size of her carry-on luggage, she was prevented from boarding her fight due to the size of her luggage, while other Caucasian and Hispanic passengers with luggage that was roughly the same size were allowed to board.

In early January, the plaintiff filed a lawsuit against Defendant American alleging three causes of action, (1) breach of contract; (2) negligence under California law; and (3) a federal claim for racial discrimination. American subsequently filed a Motion to Dismiss the plaintiff's negligence and breach of contract claims for failure to state a claim upon which relief could be granted under Rule 12(b)(6) and a Motion to Strike several paragraphs of the plaintiff's complaint arguing that American had a travel advisory issued against it by the National Association for the Advancement of Colored People for "a pattern of disturbing incidents reported by African-American passengers." The Court granted American's motion to dismiss the plaintiff's negligence and breach of contract claims as the plaintiff had alleged that California law should apply to the negligence claim, even though the event in question occurred in Florida, and failed to identify which states' contract law should be applied for the breach of contract claim. The Court did, however, deny American's Motion to Strike because it believed that the relevance of the challenged allegations was at least in doubt, American failed to show how the plaintiff's allegations of publicly available facts prejudiced it in this case, and it believed the motion to strike would do nothing to streamline the resolution of the case.

The Court has yet to issue a final determination on the plaintiff's remaining claim asserting racial discrimination.

## FAA ISSUES POLICY TO PROTECT EMPLOYEES CERTIFYING AIRCRAFT

On February 7, 2022, the U.S. Federal Aviation Administration (the "FAA") released a draft notice including details on a new policy intended to protect employees that certify aircraft and other equipment so that they are shielded from undue corporate influence such as that which occurred during the Boeing 737 MAX's certification. According to FAA, the notice is intended to supplement FAA Order 8100.15B – "*Organization Designation Authorization Procedures,*" available here, by providing instructions and procedures intended to prevent interference with employees during the performance of their authorized functions during the certification process and ensure that free communication between these employees and the FAA can occur.

The FAA's new policy is its latest action aimed at remedying issues that occurred during the certification process of Boeing's 737 MAX aircraft and mitigating the airplane-related safety issues that contributed to two 737 MAX crashes in 2018 and 2019. According to FAA, long-standing issues at Boeing related to how the 737 MAX and 787 Dreamliner were manufactured also caused several current and former employees of Boeing to come forward in recent months to blow the whistle on actions that they deemed as safety risks. Additionally, in August the FAA launched a new review into Boeing after the Boeing Aviation Safety Oversight Office determined that employees who were involved in safety inspection at Boeing and who worked on the FAA's behalf through the ODA program were unable to openly communicate with FAA without undue interference. In response to this, the FAA decided to issue its new policy under which employees will be able to take certain steps to report acts of harassment or undue pressure from their superiors who may urge them to "cut corners" in order to speed up aircraft certifications. The new policy will also establish a "clear path for these employees to speak freely with FAA certification officials at any time." According to the FAA's notice, an entity's interference with employees involved in safety and certification inspections who work on behalf of the FAA could result in suspension or termination of the ODA and/or civil penalties.

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This Aviation Regulatory Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact author Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202-659-6665 or dderco@eckertseamans.com; or Alexis George at 804-788-7772 or ageorge@eckertsemans.com or any other attorney at Eckert Seamans with whom you have been working.