

Aviation Regulatory Update

June 2021 Aviation Regulatory Update

By Evelyn D. Sahr, Drew M. Derco and Andrew Orr

U.S. DEPARTMENT OF TRANSPORTATION RELEASES SPRING REGULATORY AGENDA

On June 11, 2021, the U.S. Department of Transportation (DOT or the Department) released its Spring Regulatory Agenda, [available here](#). This agenda serves to highlight actions the Department's plans for the next year to better protect and serve citizens across all sectors.

For the aviation sector, DOT's spring regulatory agenda includes rules regarding:

- Airline ticket refunds;
- Refunding fees for delayed checked bags and unused ancillary services;
- Modernizing payment of denied boarding compensation;
- Rest breaks for flight attendants on flights with large numbers of passengers receive a scheduled rest period of at least 10 hours after duty periods;
- Protecting aircraft cockpits with secondary flight-deck barriers;
- Holding workers at domestic and foreign aircraft repair stations to the same safety standards to increase safety of the flying public;
- Accessible in-flight entertainment; and
- Ensuring prompt assistance for passengers with disabilities in moving within the airport;

DOT ISSUES TENTATIVE PROHIBITION ON AIR TRANSPORTATION TO BELARUS

On June 29, 2021, DOT issued an order to show cause, [available here](#), proposing to prohibit the sale of passenger air transportation, including air transportation on an interline basis, between the United States and Belarus. The show cause order is based on a request from the U.S. Department of State, which asked DOT to limit air transportation to Belarus in light of the May 23, 2021 incident in which Ryanair flight 4978 was diverted and forced to land in Belarus. The order proposes to add a condition to all existing and future U.S. air carrier and foreign air carrier permits and exemptions, prohibiting the sale of direct and indirect passenger air transportation between the United States and Belarus. The proposed order also includes an exemption for transportation deemed to be in the national interest of the United States, including humanitarian or national security grounds. Interested parties have until July 1, 2021 to comment on or object to the show cause order.

U.S. DISTRICT COURT GRANTS UNITED AIRLINES' MOTION TO DISMISS

On June 14, 2021, the U.S. District Court for the Southern District of New York issued a decision granting United Airlines' Motion to Dismiss in a case involving a passenger who was injured on a jetway while departing an aircraft at Newark Liberty International Airport. The injured passenger initiated the case against the Port Authority of New York and New Jersey (PANYNJ) and United in New York State court, claiming negligence in the maintenance of the jetway. United successfully removed the case to a New York federal court, and subsequently filed a motion to dismiss for lack of personal jurisdiction, claiming that the federal court lacked general and specific jurisdiction over United in the state of New York.

New York courts typically exercise personal jurisdiction over any non-resident individual, such as United, when they transact any business within the state. More specifically, to exercise personal jurisdiction over a non-resident defendant, the defendant must have transacted business within the state and the plaintiff's claim must arise from that specific business activity. United argued that because the plaintiff's claim arose from alleged negligence in New Jersey, and did not arise specifically from the ticket purchase in New York, the court could not exercise personal jurisdiction over United. The court agreed with United's argument, specifically relying on past court precedent holding that the purchase of a ticket from a Defendant in New York does not, by itself, grant personal jurisdiction over a defendant. The court also rejected the plaintiff's request to transfer the case to New Jersey, finding that it was the plaintiff's duty to correctly identify the proper forum for a case and that no prejudice would occur from the dismissal. On June 24, 2021, the plaintiff advised the court that he did not intend to continue the case against PANYNJ in the district court, and on June 25, 2021, the court subsequently requested that the remaining parties file a stipulated request for a dismissal.

FIFTH CIRCUIT DECISION LIMITS FOIA DISCLOSURES REQUIRED BY NTSB

On June 17, 2021, the United States Court of Appeals for the Fifth Circuit issued a decision in *Jobe v. National Transportation Safety Board*, deciding what internal communications must be disclosed by the National Transportation Safety Board (NTSB) in response to a FOIA request. The case arose out of a 2011 helicopter crash in Hawaii. The NTSB investigated the accident, and the helicopter operator, the helicopter manufacturer, and the helicopter engine manufacturer were all included as consultants to assist NTSB with their investigation. After the NTSB completed the investigation and issued their final report, an attorney for the families of accident victims filed a broad FOIA request to include all relevant documents in the NTSB's possession that were related to the accident. NTSB responded, providing thousands of pages of documents, but ultimately withheld certain documents from disclosure under FOIA Exemption 5, which exempts government agencies from producing certain intra-agency and inter-agency work product. Specifically, NTSB withheld certain internal communications with the three consultants. The attorney for the victims' families appealed on the grounds that the NTSB's communications with the three consultants, all of which were outside parties and possible defendants in litigation brought by the victim's families, should not be considered intra-agency communications. A U.S. District Court agreed with the plaintiffs, finding that communications between the NTSB and outside parties to an investigation were not intra-agency communications subject to Exemption 5 of FOIA.

The Fifth Circuit Court reversed, deciding that NTSB's communications with outside parties to the investigation should be considered intra-agency communications free from disclosure under Exemption 5 because these outside parties to the investigation are required to sign agreements which limit their ability to take certain actions, release information, or use anything found in the investigation to help prepare for any potential litigation. Furthermore, the court found that allowing these outside companies' party status and protecting their communications with the NTSB facilitated the investigation and advanced the goal of aviation safety.

DELTA FILES ANSWER TO THIRD-PARTY COMPLAINT REGARDING REFUND OF TSA PASSENGER FEES

On June 17, 2021, Delta Airlines filed an answer to a third-party complaint before the DOT which claimed that Delta had failed to refund TSA fees in the amount of \$16.80 (\$5.60 for a one-way segment on one ticket and \$11.20 for a round-trip itinerary on another ticket) to the complainant, Benjamin Edelman. In its answer, Delta admitted that it had originally failed to provide a refund of the complainant's TSA security fees, but that any alleged failure was due to an inadvertent mistake made by Delta's customer care team. Delta further claimed that the mistake was not discovered in a timely manner because the request for the refund was in April 2020 when Delta was already overwhelmed with refund request during the start of the COVID-19 pandemic. Finally, Delta claimed that the matter was moot as Delta has subsequently refunded the TSA fees to the complainant and asked DOT to decline to initiate an enforcement proceeding without further investigation. On June 23, 2021, Mr. Edelman filed a motion for leave to file a reply, and a reply, alleging that the proceeding should continue because Delta has failed to refund TSA fees to other passengers.

CDC ISSUES NEW TRAVEL ADVICE FOR MORE THAN 120 COUNTRIES

On June 7, 2021, the U.S. Center for Disease Control and Prevention (CDC) updated its international travel guidance to give more country-specific advice for both vaccinated and unvaccinated travelers.

The CDC's revised COVID-19 Travel Health Notice guidelines seek to "better differentiate countries with severe outbreak situations" from countries in which COVID-19 is "sustained, but controlled." In doing so, the CDC is consistently updating each country's threat levels determined by the number of COVID-19 cases. As such, guidance varies by how severe the pandemic is in each country.

For example, the lowest-risk, level 1 countries, have low incidence rates of COVID-19 (fewer than 50 new cases over the past 28 days per 100,000 people) or low case counts (fewer than 50 cases over the past 28 days in countries with populations of 100,000 or fewer). In contrast, the highest risk, level 4 countries are experiencing high incidence rates (more than 500 new cases over the past 28 days per 100,000 people), or high case counts (more than 500 cases over the past 28 days in countries with populations of 100,000 or fewer).

For the full, descriptive list of countries and guidance, please visit the CDC website [here](#).

FAA LAUNCHES VOLUNTARY REPORTING PROGRAM FOR SAFETY OFFICE

On June 21, 2021, FAA issued an order, [available here](#), launching the Voluntary Safety Reporting Program (VSRP), for all Aviation Safety (AVS) personnel (i.e., engineers, safety inspectors, system safety specialists, and other aviation safety employees). This program provides an additional avenue for AVS employees to voluntarily report aviation-safety-related issues and concerns confidentially. The program will provide a non-punitive mechanism for AVS employees to report issues that may otherwise have gone unnoticed due to fear of repercussion.

TSA'S ANNOUNCES OPPORTUNITY TO BECOME A SECURED PACKING FACILITY IN THE AIR CARGO SUPPLY CHAIN

On June 8, 2021, the Transportation Security Administration (TSA) issued a notice in the Federal Register, available here, announcing its new Secured Packing Facility (SPF) program. This program provides an opportunity for manufacturers, shippers, suppliers, warehouses, vendors, e-commerce fulfillment centers, and third-party logistics providers in the air cargo supply chain to bypass originally TSA-required screenings for international requirements beginning June 30, 2021. In short, the SPF serves as an alternative framework that will permit all-cargo aircraft operators to accept cargo from "other entities" that demonstrate a system of government approved security controls sufficient to prevent the introduction

of concealed explosives into the air cargo supply chain. Since all cargo transferred to an SPF will have been subject to physical security measures, the cargo can be accepted for transport without requiring additional screening. The SPF benefits from this framework because it will not bear the costs or delays associated with screening all international outbound cargo.

Interested entities must first register as an Indirect Air Carrier (IAC) and be approved as a holder of the Indirect Air Carrier Standard Security Program (IACSSP). Once approved as an IAC, entities can request to operate as an SPF by completing an SPF certification validation process, which includes, but is not limited to the following:

1. Undergo an Onsite Facility Assessment performed by TSA;
2. Provide additional Facility Management Information, such as the identity of the Primary Facility Security Coordinator, alternate contact information, results of the Security Threat Assessment (STA) and other supporting documentation; Physical Security Control: Review the proposed SPF facility physical floor plan, such as access controls, secure cargo storage areas, perimeter security and identification of the area within the facility (whole facility, if applicable) where cargo is secured and stored;
3. Emergency Plan and Notification: Review the emergency and notification plan to ensure that approved procedures are followed and authorities notified at the time of an emergency;
4. Chain of Custody Procedures: Evaluate the chain of custody processes when handling and transporting secured packaged cargo to prevent unauthorized access, deter the introduction of any unauthorized explosives, incendiaries, and other destructive substances; and
5. Provide a written plan of how the operator will implement the specific requirements of program and satisfy certain performance-based standards;

AIRLINES FOR AMERICA CASE AGAINST STATE OF MASSACHUSETTS WILL GO TO TRIAL

On June 3, 2021, the United States District Court for the District of Massachusetts issued a decision denying cross summary judgement motions in a case filed by Airlines for America (A4A) against the Attorney General of Massachusetts. A4A is challenging the Massachusetts Earned Sick Time Law (the "MESTL"), which guarantees earned sick leave, and provides other sick leave-related protections, to Massachusetts based employees. A4A asserted that the law is unconstitutional as applied to airline flight and ground crewmembers and that the MESTL: (1) violates the dormant Commerce Clause by placing an undue burden on interstate commerce; and (2) is preempted by the Airline Deregulation Act (the "ADA") because it substantially impacts airline prices, routes, and/or services. After each party filed motions for summary judgement, the court held a hearing to determine if summary judgement was warranted for either side. The court found that there are still numerous factual issues to be resolved, such as whether MESTL will have any impact, let alone a significant impact, on flight delays, cancelations, and other airline services, and for that reason denied both parties' motions.

GENERAL AVIATION ADVOCACY GROUPS CLASH WITH FAA OVER NEW INTERPRETATION OF FLIGHT TRAINING LIMITATIONS

On June 4, 2021, FAA issued a letter, [available here](#), in response to an April 19, 2021 letter from the Airplane Owners and Pilots Association (AOPA), the General Aviation Manufacturers Association (GAMA), and the Experimental Aircraft Association (EAA) seeking clarification of FAA policy with regard to flight training following the D.C. Circuit Courts' decision in *Warbird Adventures, Inc. et. al. v. Federal Aviation Administration*. In the letter, the Associate Administrator for Aviation Safety explained that though a person may hold the appropriate privileges to conduct flight training under part 61, the regulations in part 91 may restrict the exercise of those privileges in a particular category of aircraft under certain conditions, such as operations conducted for compensation or hire. FAA specifically referred to §§ 91.315, 91.319, &

91.325 which prohibit the operation of limited category aircraft, experimental aircraft, and primary category aircraft while carrying persons or property for compensation of hire without a letter of deviation authority (LODA) or specific exemption. Understanding that this could severely limit the ability of individuals to obtain flight training in these categories of aircraft, FAA recommended that owners of these categories of aircraft obtain an exemption or deviation as appropriate to allow training in their aircraft.

In response to the FAA's June 4th letter, 10 aviation industry groups issued a joint response letter on June 8, 2021, [available here](#), urging FAA to immediately revise what they considered to be an unnecessary change in policy. The groups were concerned that this new prohibition on owners receiving flight training in these aircraft without additional specific authorization to do so from FAA would adversely affect aviation safety. Finally, the groups urged FAA to correct this apparent change in policy, and further asked FAA to issue a statement that it will not take legal enforcement action against pilots and flight instructors under this new policy until the matter is resolved.

FAA PROPOSES TWELVE CIVIL PENALTIES AGAINST PASSENGERS FOR ALLEGEDLY INTERFERING WITH FLIGHT ATTENDANTS

The FAA issued two separate Press Releases on June 14th and June 22nd in regards to twelve instances in which passengers interfered with flight attendants on commercial flights. Federal law currently requires that passengers refrain from interfering with aircraft crew and strictly prohibits threatening to assault, or actually physically assaulting, aircraft crew or any other passengers on board an aircraft. The FAA has strictly enforced a zero-tolerance policy in these cases for several months.

- \$15,500 – A passenger allegedly failed to properly wear a facemask properly after being asked at least ten times. Additionally, the passenger drank mini bottles of alcohol that the airline did not serve to him, which is against FAA regulations;
- \$10,500 – A passenger allegedly failed to properly wear a facemask and continued to yell and use profanity after being asked to read a warning note that a flight attendant issued to her. Consequently, due to the disruptive behavior, the captain was forced to divert the flight to Fort Lauderdale, FL;
- \$10,300 – A passenger allegedly failed to properly wear a facemask, walked through the cabin without a facemask, and activated a lavatory smoke detector system after smoking an e-cigarette;
- \$7,500 – A passenger allegedly failed to comply with numerous instructions to wear a facemask;
- \$22,000 – A passenger allegedly failed to comply with numerous instructions to wear a facemask, walked through the cabin while the fastened seatbelt sign was on, and drank alcohol the airline did not serve, which is against FAA regulations;
- \$21,000 – A passenger allegedly failed to comply with numerous instructions from flight attendants and the captain, which resulted in the captain returning the aircraft from the runway to the gate. After a customer service supervisor boarded to escort the passenger, the passenger threw the mask at the supervisor and hit him in his jaw and was detained and cited by Dallas police for assault;
- \$19,000 – A passenger allegedly became angry when the crew notified passengers that the flight needed to be returned to Phoenix due to unfavorable weather in Mexico. The passenger began hitting the ceiling of the aircraft, began using offensive language, and hit a neighboring passenger upon being escorted off the aircraft;
- \$15,000 – A passenger allegedly assaulted a flight attendant when he reached the passenger's row while documenting who was not wearing a mask during the flight;

- \$14,000 – A passenger allegedly drank alcohol from a bottle that the airline did not serve him which is against FAA regulations. Upon attempts to retrieve the bottle from the passenger, he began shouting profanities at the flight attendant and other passengers; refused to wear a mask; and was moved to the back of the plane in an attempt to separate him from other passengers;
- \$14,000 – A passenger allegedly failed to comply with facemask instructions and unfastened her seatbelt and stood while the “Fasten Seat Belt” sign was illuminated;
- \$10,500 – A passenger allegedly refused to wear his mask and was talking on the phone prior to take off, which resulted in the captain returning the flight to the gate;
- \$9,000 – A passenger allegedly failed to comply with facemask instructions. Upon being instructed, he loudly argued with a flight attendant and began to unbuckle his seatbelt to stand and “get into it and get to the bottom of this;

Passengers have 30 days after receiving an FAA enforcement letter to respond to the agency.