

Aviation Regulatory Alert

REGULATORY UPDATE FOR THE WEEK OF MARCH 30, 2020

DOT ENFORCEMENT NOTICE REGARDING REFUNDS BY CARRIERS

On April 3, 2020, the U.S. Department of Transportation (DOT) issued an “Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel,” [available here](#).

According to DOT, there have been an increasing number of complaints and inquiries from ticketed passengers, including many with non-refundable tickets, who describe having been denied refunds for flights that were cancelled or significantly delayed. DOT issued the Enforcement Notice to remind carriers and passengers that although the COVID-19 epidemic has had an unprecedented impact on air travel, airlines’ obligation to refund passengers for cancelled or significantly delayed flights remains unchanged. As such, DOT states that carriers still have an obligation to provide a prompt refund to a ticketed passenger when the carrier cancels the passenger’s flight or makes a significant change in the flight schedule, and the cancellation is through no fault of the passenger. Under existing rules that if a passenger is owed a refund, an airline, travel agent or online travel agency must process it within seven business days if the passenger paid by credit card and 20 business days if the passenger paid by check.

However, due to the COVID-19 epidemic, DOT says it will exercise prosecutorial discretion and provide carriers an opportunity to become compliant before taking further action. Specifically, DOT has advised it will refrain from pursuing enforcement action against a carrier that provided passengers vouchers for future travel in lieu of refunds for cancelled or significantly delayed flights during the COVID-19 public health emergency so long as:

- 1) The carrier contacts, in a timely manner, the passengers provided vouchers for flights that the carrier cancelled or significantly delayed to notify those passengers that they have the option of a refund;
- 2) The carrier updates its refund policies and contract of carriage provisions to make clear that it provides refunds to passengers if the carrier cancels a flight or makes a significant schedule change; and
- 3) The carrier reviews with its personnel, including reservationists, ticket counter agents, refund personnel, and other customer service professionals, the circumstances under which refunds should be made.

The subject of cancellations and refunds is particularly nuanced, and we encourage you to contact us if you have any questions, or would like to discuss this topic on a case specific basis.

CARES ACT TAX SUSPENSIONS

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was signed into law by President Trump on March 27, 2020, includes a number of tax-related provisions, as follows:

- **Air Transportation Excise Tax Suspension**

- 1) Beginning on the date of the enactment of the CARES Act (March 27, 2020) through January 1, 2021, the 7.5% (passenger ticket) tax on amounts paid for commercial air transportation is suspended.
 - 2) All applicable domestic segment fees (\$4.30) are also subject to the suspension.
 - 3) Suspension also includes the U.S. international arrival and departure tax (\$18.90).
 - 4) In addition, the 6.25-percent tax on air transportation of property is suspended from the date of enactment through January 1, 2021.
 - 5) The excise tax on aviation kerosene used in commercial aviation (generally 4.3 cents/gallon) is also suspended from the date of enactment through January 1, 2021. This suspension does not include the 0.1 cent/gallon Leaking Underground Storage Tank Trust Fund tax.
- **Other Tax Provisions**
 - 1) Delay of payment of employer payroll taxes – This provision allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees from the date of the enactment of the CARES Act until December 31, 2020. Employers generally are responsible for paying a 6.2-percent Social Security tax on employee wages. This provision requires that the deferred employment tax be paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022.
 - 2) Employee retention credit for employers subject to closure due to COVID-19 – This provision provides a refundable payroll tax credit for 50 percent of wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose (1) operations were fully or partially suspended due to a COVID-19-related shutdown order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year. The credit is based on qualified wages paid to the employee.
 - 3) For employers with greater than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above. For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is provided for the first \$10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

CONSIDERATIONS FOR STATE, LOCAL, AND TERRITORIAL COVID-19 RESTRICTIONS THAT AFFECT AIR TRANSPORTATION

On March 28, 2020, the FAA issued guidance, [available here](#), for state, local, and territorial governments that are considering the implementation of any quarantine, movement, and/or screening requirements that impact air transportation. The guidance recommends that any government consider:

- Exempting critical air transportation workers;
- Identifying the intent of any actions and the groups to be targeted by any quarantine or travel restrictions;
- Identifying the resources necessary for implementation;
- Coordinating with all affected air transportation stakeholders, which includes;
 - Ensuring clear understanding of expectations, roles, and responsibilities of all stakeholders;
 - Encouraging the provision of pre-boarding/departure notifications; and
 - Enabling air carriers to brief aircraft crews;

- Logistics of how the government will collect information and perform screenings; and
- That proposed measures cannot close Federally-obligated airports absent prior FAA authorization.

INFORMATION FOR AIRPORT SPONSORS CONSIDERING COVID-19 RESTRICTIONS OR ACCOMMODATIONS

On March 28, 2020, the FAA issued guidance, [available here](#), for airport sponsors that are considering restrictions or accommodations in light of the COVID-19 epidemic. The primary concern is that federally obligated airports remain safe and open to the traveling public and aircraft, particularly during a public health emergency. For this reason, the FAA will evaluate specific requests regarding restrictions or accommodations on a case-by-case basis, in order to retain maximum flexibility when considering the unique circumstances of each airport.

The FAA guidance instructs that airport sponsors should be cognizant of, and assume the responsibility for, the implications of their proposed actions in response to COVID-19. These considerations include, among others: (1) coordination with the FAA, (2) coordination with other Federal, state, or local agencies as needed, including airport law enforcement or local law enforcement entities serving the airport; (3) understanding of applicable Federal obligations, (4) impacts on aeronautical use and airport infrastructure; (5) impact on the safe and efficient functioning of air traffic and the National Airspace System; (6) communications and notice requirements; (7) evolving safety and security requirements; (8) the need to document actions; (9) plans for following up on or amending actions as the situation evolves; and (10) the impact to emergency services that rely on air transportation.

FAA EXEMPTION REGARDING RECURRENT TRAINING AND QUALIFICATION REQUIREMENTS FOR PART 135 OPERATOR

On March 26, 2020, the FAA also granted an exemption to Part 135 operators pertaining to the time-frames for completing recurrent training and qualification requirements for ground personnel and crew-members, and is [available here](#). The exempted requirements include training, testing, checking, evaluation, recency, and observation activities.

Among other requirements, this exemption applies only to part 119 certificate holders who have been granted authorization by their assigned principal operations inspector in operations specification A005. The exemption applies only to crew-members and ground personnel who are required to complete recurrent training, testing, checking, recency, or observation through May 31, 2020. Any part 119 certificate holder requesting to use this exemption must provide a plan to its assigned principal operations inspector. Finally, certificate holders may operate outside of the United States under this exemption, unless otherwise prohibited by a foreign country.

COVID-19 LEGAL UPDATE – BUSINESS INTERRUPTION INSURANCE LITIGATION AND RELATED LEGISLATION

In response to many state and local governments issuing civil orders directing the mandatory shut down of commercial activity deemed non-essential or non-life sustaining, Eckert Seamans has published an article on business interruption coverage and related legislation, which is [available here](#). The article discusses business interruption coverage, which is designed to protect businesses from lost revenue, which may result from a natural disaster, emergency or other devastating event, and its potential application during the COVID-19 epidemic. The article also discusses potential state legislation which will seek to insure such coverage for claims related to the COVID-19 epidemic. Any business with questions or concerns about business interruption insurance should contact us to review any potential coverage.

FAA TO TEMPORARILY ACCEPT EXPIRED MEDICAL CERTIFICATES FOR PART 135 CREWMEMBERS

On March 31, 2020 the FAA granted an exemption, [available here](#), that extends until June 30, 2020, the duration of medical certificates for pilots who conduct part 135 operations outside the United States, employed by NATA members and other part 119 certificate holders, if those medical certificates expire between March 31, 2020, and May 31, 2020. FAA has acknowledged that aviation medical examinations are a non-emergency medical service, and due to the COVID-19 epidemic, such non-emergency access to the medical system has become severely limited. Additionally, the FAA noted that aviation medical examinations are likely increase the risk of transmission of the virus through personal contact between the physician and the applicant for an airman medical certificate.

This exemption applies only to pilots employed by a part 119 certificate holder if that carrier has submitted a Letter of Intent to the FAA at the following address: <mailto:9-AVS-AFS200-COVID-Exemptions@faa.gov>. If you have questions or need assistance in preparing the required Letter of Intent please contact us.

DOT/FAA GUIDANCE ON COMPLIANCE WITH DOT DRUG AND ALCOHOL TESTING REGULATIONS

On March 23, 2020, the DOT issued guidance, [available here](#), to provide clarity to DOT-regulated employers, employees, and service agents on conducting DOT drug-and-alcohol testing given concerns about the Coronavirus Disease 2019 (COVID-19). The DOT guidance recommends:

- DOT-regulated employers must comply with applicable DOT training and testing requirements. However, DOT recognizes that compliance may not be possible in certain areas due to the unavailability of program resources, such as collection sites and personnel. Employers should make a reasonable effort to locate the necessary resources.
- Employers must continue to comply with existing applicable requirements to document why a test was not completed.
- Employers should review applicable DOT requirements for testing to determine whether flexibilities allow for collection and testing at a later date.
- Employers be sensitive to employees who indicate they are not comfortable or are afraid to go to clinics or collection sites.
- Employers should revisit back-up plans to ensure the plans are current and effective for the current outbreak conditions.

In addition to the DOT general guidance above, FAA issued more specific guidance, [available here](#), for FAA regulated entities, which recommends:

- **Random Testing** – Disruptions to current testing schedule should be made up by the end of the year in order to achieve the required 25% rate for drug testing and 10% for alcohol testing. Employers should document in writing what specific actions taken and reasons why they were unable to conduct tests on employees who were selected;
- **Pre-Employment Testing** – There are no exceptions for these provisions;
- **Return-to-Duty Testing** –Employers may not allow safety sensitive employees return until the return-to-duty test is conducted and employers have a negative result;

- **Follow-Up Testing** - If follow-up drug or alcohol testing cannot be completed due to an employee being furloughed, his or her follow-up testing plan stops during the extended absence.
- FAA again notes that, as the COVID-19 outbreak poses a novel public health risk, employers are asked to be sensitive to employees who indicate they are not comfortable or are afraid to go to clinics or collection sites;

STATES IMPOSE ADDITIONAL RESTRICTIONS DUE TO COVID-19

In recent days, the governors of several states have implemented new restrictions that could potentially impact the aviation industry. For example, **Maryland** and **Washington, D.C.** have issued executive orders that require all businesses to close that are not open to the general public. In both states, an exemption to this restriction is provided for companies that are part of the critical infrastructure sectors identified by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA") (<https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>).

CISA identifies transportation as one of these critical infrastructure sectors, and, as such, the aviation industry should be exempt from their effects. Likewise, **Florida** has issued a similar order with respect to Miami-Dade County, Broward County, Palm Beach County and Monroe County. Florida's multi-county order also contains an exemption for "essential businesses." "Essential businesses" are in turn defined by reference to a previous order issued by Miami-Dade County — which explicitly lists both airlines and businesses operating within an airport as essential.

Virginia also issued a similar order, although its restrictions are focused on retail operations and should not directly impact most air carriers.

Regardless of which jurisdiction an employer is operating within and regardless of whether an exemption may apply to their industry, employers may want to consider providing their essential employees with a letter, on company letterhead, stating that his/her physical presence at work and/or travel for work is essential. To the extent an employer believes that any ambiguity remains regarding the applicability of the aforementioned orders to their particular industry or company, the employer may also file a petition for clarification or for a specific exemption from any potentially applicable order.

FAA REGISTRY UPDATE – COVID 19 TEMPORARY PROCEDURES

Effective as of March 18, 2020, the FAA Registry has closed the "filing window" in the Public Documents Room. FAA has instead placed drop boxes near the Public Documents Room to allow for the continued submission of documents to the Registry. In addition, the FAA is temporarily allowing digital submission of documents by Public Documents Room licensee if the closing consists only of digitally signed documents, and no document exceeds twenty pages.

Submitters should therefore expect a delay between depositing documents and confirmation of their filing to range between several hours and one business day.

ORDER GRANTING TEMPORARY DORMANCY AND STARTUP WAIVER

On March 27, 2020, DOT issued an order, [available here](#), granting all U.S. carriers holding limited-entry international route authority a waiver of the startup and dormancy conditions applicable to their authorities through October 24, 2020, subject to certain conditions.

Under the terms of the Order, any limited-entry authorities that have not been used for the applicable dormancy period and for which services have not resumed prior to October 25, 2020, will be deemed dormant as of that date and will revert to DOT. Additionally, any limited-entry authorities that are subject to a startup condition and have not begun prior to October 25, 2020, will revert to DOT. The Order also requires all U.S. air carriers to notify the Department, in writing, no later than October 1, 2020, of the limited-entry route rights that they will not be using beginning October 25. Carriers may seek extension of the waiver beyond October 24, 2020, for specific city-pair limited-entry services where they can demonstrate that circumstances warrant such an extension.

CALIFORNIA ANNOUNCES COVID-19 WILL NOT DELAY CCPA ENFORCEMENT

On March 26, 2020, the California Attorney General (AG) announced that the state will not delay the date on which enforcement of California Consumer Privacy Act (CCPA) begins. The law went into effect on January 1, 2020, but enforcement of its requirements was not set to begin until July. A coalition of more than 60 companies requested that the AG postpone enforcement of the CCPA due to hardships arising from the COVID-19 epidemic. While acknowledging the COVID-19 epidemic, the AG declined to postpone the enforcement because all companies were expected to be in compliance with the law by the January 1, 2020 start date, and the law specifically allows the AG's office to "look back" to that start date for any given company's compliance.

Notably, the California AG's office did not explicitly deny that companies may be able to use COVID-19 as an excuse for non-compliance. However, any such excuse will likely be reviewed on a case-by-case basis. Because the COVID-19 epidemic is likely to make many business more vulnerable to cyber attacks, it is recommended that all businesses covered under the CCPA should continue to respond to consumer requests, continue to comply with the CCPA, and continue to be vigilant about any potential for cyber breaches.

NTSB FAMILY SERVICES WEBINAR

On March 26, 2020, the National Transportation Safety Board (NTSB) held a webinar for aviation industry stakeholders on the status of the NTSB's family assistance operations during the COVID-19 epidemic. The webinar discussed a number of topics including the NTSB's current operating status and readiness in the event that an aviation accident occurs during the COVID-19 epidemic, as well as remote operating capabilities, and the potential for the Board and affected carriers to conduct virtual or remote family assistance in light of the COVID-19 epidemic.

Finally, the NTSB recommended that all carriers review their accident planning, with a special emphasis on:

- Carrier's response posture;
- How response plans have changed in light of COVID-19;
- Carrier engagement with a hub/primary airport response partners;
- Modifying any initial 800# scripts and messaging in light of COVID-19;
- Plans on how carrier will deploy staff;
- How will carrier manage family contact; and
- How will carrier meet family assistance obligations.

REAL ID DEADLINE EXTENDED TO OCTOBER 2021

On March 26, 2020, Chad Wolf, the Acting Secretary of the Department of Homeland Security (DHS) announced that the Trump Administration will be extending the REAL ID deadline by an additional year until October 1, 2021. The REAL ID requirements are intended to establish minimum security standards for license issuance and production and prohibits Federal agencies from accepting for certain purposes driver's licenses and identification cards from states not meeting those minimum standards. The deadline extension is in part due to the COVID-19 epidemic, and the nationwide closing of many DMVs. DHS is expected to publish a notice in the Federal Register confirming the deadline extension in the next few days.

FAA PROPOSED SUPERSONIC PLANE NOISE RULE

The FAA is prepared to issue a notice of proposed rule-making regarding noise certification of supersonic airplanes. This rule would add new supersonic airplanes to the applicability of noise certification regulations, and proposes landing and takeoff noise standards for a certain class of new supersonic airplanes. Existing regulations only include standards for the Concorde, which is no longer flying. The noise limits in the proposed rule will aim to account for technological advancements in supersonic flight over the last few decades. However, the proposed rule makes clear that the FAA is not currently proposing to lift a ban on supersonic flight over U.S. land. The notice should be published in the federal register in the next few days. Once published, interested parties will have 90 days to comment on the proposed rule.

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 Andy Orr at 202-659-6625 or aorr@eckertseamans.com or any other attorney at Eckert Seamans with whom you have been working.