

Aviation Regulatory Update

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DOT ANNUAL REPORT OF DISABILITY-RELATED COMPLAINTS RECEIVED IN 2023 DUE BY JANUARY 30, 2024

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 2023, is due no later than January 30, 2024. Carriers that did not receive any written disability-related complaints in calendar year 2023 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, and DOT has historically 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.

EU AIRLINES GIVE CAUTIOUS WELCOME TO NEW PASSENGER RIGHTS RULES

The European Commission (EC) proposes new rules related to passenger rights. The proposed rules place emphasis on passengers with disabilities or reduced mobility who need special accommodations when switching between transport modes. The proposed rules also protect passengers who book through intermediary channels. “The EC’s proposed revision of existing rules aims to strengthen enforcement mechanisms and introduce rules for air passengers who booked their flights via an intermediary, including on reimbursement.” The EC also laid out new rules for multimodality, or the combination of transport modes, as a means to encourage the reduction of emissions. The new rules also protect passengers who book package deals by speeding up the refund process and requiring package deal organizers to keep passengers better informed. “The EC also adopted an initiative on a common European mobility data space, aimed at allowing access to and sharing of real-time data from transport and mobility sources, enabling travelers to stay up to date with the transport situation and traffic conditions and plan their journeys better.”

NEW LAWSUIT FILED AGAINST UNITED ALLEGING ENVIRONMENTAL AND CARBON EMISSIONS REDUCTION CLAIMS

United Airlines has become latest target of a lawsuit alleging exaggerated environmental claims (i.e. “greenwashing”). This follows recent court actions against Delta Air Lines and Austrian Airlines. The claim against United is based on the contention that advertising by United related to United’s efforts to be “100% green” and “carbon-neutral by 2050”, as well as statements made regarding sustainable aviation fuels (SAF), are misleading. Specifically, the claim alleges that claims to use SAF and “sustainable aviation biofuels” overstates the benefit of such fuels because it implies such fuels have no greenhouse gas impact, when in fact

they merely have a lower carbon dioxide impact than fossil fuels. Additionally, the claim alleges that United's advertising is also misleading because it implies that the use of SAF is much greater than it actually is in practice.

Caution is advisable when making claims or promises to customers and potential customers about environmental commitments and practices. Challenges to potentially excessive or inaccurate environmental claims are growing against all types of businesses as litigation over allegedly inaccurate claims becomes commonplace. The airline industry is in the unique position of being a heavy user of carbon-emitting fossil fuels while also having a diverse and global customer base that can be responsive to marketing claims about reducing the carbon footprint of flights. The incentive for airlines to promote their carbon reducing activities is clear. But, as these cases show, special care needs to be taken to ensure that advertising claims do not go beyond actual success in reducing emissions. It is prudent advice for any airline making carbon reduction or other environmentally beneficial claims to have an independent review of validity of those claims and an assessment made of whether there is legal risk associated with such claims.

BOEING TO OFFER SETTLEMENTS IN ETHIOPIAN AIR CASES

On November 28, 2023, an Illinois federal judge gave Boeing one week [to offer settlements](#) in the 46 remaining lawsuits over a 2019 Ethiopian Airlines crash which tragically killed 157 people. Notwithstanding this instruction, the judge also agreed to wait to set more trials at Boeing's request "for a chance to negotiate without a trial date lurking in the shadows." Boeing is alleged to have "shortcut safety in pursuit of profits as it rushed the design and development of the 737 Max and a unique automated feature that affected the jet's flight handling and controls, called the Maneuvering Characteristics Augmentation System, or MCAS." The court has taken a "bellwether-style process" in this litigation. Under this process, the parties test a select number of cases in a trial format to evaluate the value of the broader litigation for settlement purposes. So far, each of the three batches of test cases have resulted in settlements prior to trial. Boeing has already accepted liability for the crash in exchange for waiving punitive damages, allowing the families of the deceased to "collect compensatory damages under Illinois law, by claiming loss of economic support, loss of consortium, pain and suffering, and emotional distress, among other things." Despite differences in their evaluations of the tactics employed by the other side, both parties remain confident in the mediator, Judge O'Connell, as the litigation continues.

PROTEST DAMAGE AND ILLEGAL CHARTERS FUEL INSURANCE CONCERNS

After [protestors caused \\$1 million in damage](#) to a privately owned Cessna Citation CJ1+, the International Transport Intermediaries Club (ITIC) discussed carrier exposure to liability and what insurance may cover. Private charter operators must "carefully consider risks that might be excluded from the hull insurance, such as whether pilots were suitably qualified for a flight, which could have an impact on flight crew managers or those responsible for all aspects of operations." Involved parties must not assume that everything is covered by the policies on the aircraft itself. This is especially important because coverage can be denied for "illegal operations" which occur when charter brokers deliberately or negligently arrange illegal or "gray" charters. "Indemnity insurance can provide an important defense and backstop for companies and individuals, with payouts for things like legal costs but is not substitute for due diligence."

CLASS ACTION COMPLAINT FILED AGAINST TAP AIR PORTUGAL FOR BIOMETRIC SCANNING

On November 9, 2023, a class action complaint was filed in Cook County, Illinois Court against Transportes Aéreos Portugueses, S.A. d/b/a TAP Air Portugal (TAP). The class action alleges that TAP, operating out of

O'Hare International Airport, collected customer biometric data using facial scans without consent and in violation of the Illinois Biometric Information Privacy Act ("BIPA"). BIPA was enacted in 2008 in order to protect biometric information of Illinois citizens. The complaint alleges that these scans expose TAP's "customers to serious and irreversible privacy risks, especially given that its customers are unaware that their biometric data is being collected in the first place." TAP is alleged to have scanned customers prior to boarding but after TSA security screenings. The demand asks for a declaration that TAP's conduct violates BIPA, a cease and desist of the aforementioned conduct, and the award of damages to the Plaintiffs and the proposed class.

SECOND CIRCUIT REJECTS FIELD PREEMPTION DEFENSE AS APPLIED TO MILITARY AIRCRAFT

The United States Court of Appeals for the Second Circuit (the "Second Circuit") ruled that the implied field preemption defense pursuant to the Federal Aviation Act (the Act) does not apply to military aircraft. The dispute at issue began after surviving family members of two deceased United States Army pilots sued various engine manufacturers, alleging that a fatal helicopter crash resulted from design and manufacturing defects. While the district court rejected the family members' arguments and subsequently granted summary judgment for the engine manufacturers on the grounds that the Act's field preemption applies to military aircraft, the Second Circuit disagreed. Noting that field preemption is always a matter of congressional intent, the Second Circuit reasoned that Congress' removal of military aircraft from the Act's scope indicates that it did not intend to include military aircraft in the preempted field. More precisely, the Second Circuit noted that the Act only vests the Federal Aviation Administration with the authority to "promote safe flight of civil aircraft" thereby excluding aircraft owned and operated by the armed forces. Accordingly, the Second Circuit reasoned that Congress intended the Department of Defense and related military branches should have authority over military aircraft, and such aircraft should not be covered under the statutory scheme for civil aircraft outlined in the Act.

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 [Evelyn Sahr](mailto:Esahr@eckertseamans.com) at 202.659.6622 or [esahr@eckertseamans.com](mailto:Esahr@eckertseamans.com); [Drew Derco](mailto:Dderco@eckertseamans.com) at 202.659.6665 or [dderco@eckertseamans.com](mailto:Dderco@eckertseamans.com); [David Rockman](mailto:Drockman@eckertseamans.com) at 412.566.1999 or [drockman@eckertseamans.com](mailto:Drockman@eckertseamans.com); or [Jay Julien](mailto:Jjulien@eckertseamans.com) at 202.659.6648 or [jjulien@eckertseamans.com](mailto:Jjulien@eckertseamans.com), or any other attorney at Eckert Seamans with whom you have been working.