



Welcome and thank you for joining us for today's Aviation Webinar Series. Our topic is **“An Update on COVID-19 and the Aviation Industry”** We have just a few announcements before we get started.

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An Update on COVID-19 and the Aviation Industry

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Presented By



Mark A. Dombroff
Partner, Fox Rothschild LLP

mdombroff@foxrothschild.com
Phone: (703) 248-7002



Mark McKinnon
Partner, Fox Rothschild LLP

mmckinnon@foxrothschild.com
Phone: (202) 794-1214



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Mask Use in Transportation

- January 31, 2021, TSA issues a security directive on mask use until May 11, 2021
- On April 30, 2021, the TSA extended the directive until September 13, 2021
- On August 20, 2021, the TSA extended the directive until January 18, 2022
- On December 2, 2021, the TSA extended the directive until March 18, 2022
- The Directive contains a preemption provision indicating that state and local laws that are less restrictive are preempted. However, the Directive goes on to provide that state and local laws that are the same or more restrictive, are not preempted and must be complied with
- On September 9, 2021, DHS increased civil penalties for mask violations
 - \$500-\$1,000 for first offense
 - \$1,000 - \$3,000 for second offense
 - These penalties are in addition to any FAA penalties



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Changes to Vaccine and Testing Requirements for Travel to the US

- **Non-US Citizens**

- As of November 8, 2021, all non-U.S. citizen, non-U.S. immigrants must be fully vaccinated against COVID-19 prior to traveling to the United States
- Passengers fully vaccinated must also provide a negative COVID test that is less than 1-day old
- The only unvaccinated travelers allowed to enter the US are US citizens and legal permanent residents, with some minor exceptions

- **US Citizens**

- When you travel to the United States by air, you are required to show a negative COVID-19 test result or documentation of recovery from COVID-19 before you board your flight
- This new CDC testing rule only applies to air travel and not to land border crossings
- Air passengers will also be required to confirm in the form of an attestation pursuant to 18 U.S.C. § 1001 that the information they present is true



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Changes to Vaccine and Testing Requirements for Travel to the US

- **Exemptions for Aircrew to testing requirements**
 - Crew members on official duty or who are involved in operation of aircraft, or the positioning of crew not operating the aircraft (i.e., on “deadhead” status), are exempt from the requirements of the new testing order provided their assignment is under an airline’s or aircraft operator’s occupational health and safety program
 - Crew members traveling for training, commuting to or from work, or for business reasons not associated with the operation of the aircraft **are not exempt** from the testing requirement. Nor are crew traveling for personal reasons, such as leisure travel
 - In a positioning or “deadhead” scenario, the crew member is on the “clock” and their time and movement are directed by the airline or aircraft operator either to, from, or between operational assignments. On the other hand, “commuting” to and from locations where official duty begins and ends is considered personal travel. Crew would not be exempted from the Order when they are in a commuting status



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Variants and How Fast Things Can Change

- On November 24, 2021, South Africa informed the WHO of the new variant B.1.1.529
- On November 26, 2021, WHO designated the variant as a “variant of concern” and named it Omicron
- On November 26, 2021, President Biden suspended entry into the US of certain persons from eight Southern African countries, including South Africa, Botswana, Mozambique and Zimbabwe
- On November 27, 2021, the CDC classified all eight countries at Level 4 "very high" risk for Covid-19
- On November 30, 2021, WHO issues guidance recommending a “risk based approach,” but comes out against “blanket travel bans,” stating they will not prevent the international spread, and they place a heavy burden on lives and livelihoods
- On December 1, 2021, first case of Omicron found in the United States
- On December 2, 2021, the testing requirement for travel to the US is amended to require a negative test within one day of travel rather than three
- On December 2, 2021, the masking requirement is extended until March 18, 2022



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Federal Vaccine Mandates

- On September 9, 2021, President Biden announced that the government would be issuing rules for private sector emergency vaccine mandates. He also issued executive orders for vaccine mandates for federal employees, contractors, and most health workers
- November 5, 2021, OSHA issued an Emergency Temporary Standard requiring employees of covered employers (100 employees or more) to undergo COVID-19 vaccination or take weekly COVID-19 tests and wear a mask. The rule affects two-thirds of all US workers
- November 5, 2021, Centers for Medicare & Medicaid Services issued an interim final rule formalizing the vaccine mandate for 10.3 million healthcare workers
- Because these orders were issued as an “emergency” there was not notice and comment rulemaking performed
- Numerous lawsuits were filed against the mandates by private individuals, employee organizations, and a number of states
- Motions for temporary restraining orders and injunctions were filed and a number were successful
- Aviation industry affected by both the OSHA mandate and government contractor mandate



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Vaccine Mandate – Timeline of Legal Challenges

- On November 12, 2021, the Fifth Circuit issued broad stay of the OSHA mandate
- On November 17, 2021, Government announced it is suspending compliance with the mandate pending resolution of the legal challenges
- On November 18, 2021, a “lottery” was “won” by the United States Court of Appeals for the Sixth Circuit consolidating review of the vaccine mandates in that Court
- On November 30, 2021, a Federal District Court issued a stay of the vaccine mandate related to healthcare workers
- On November 30, 2021, a Federal District Court issued a stay of the mandate for federal contractors. This stay was limited to Kentucky, Ohio, and Tennessee
- On December 2, 2021, the Centers for Medicare & Medicaid Services announced it is staying enforcement of its mandate pending resolution of the legal challenges
- On December 7, 2021, a Federal District Court issued a nationwide stay of the mandate for federal contractors



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Vaccine Mandate – Basis for Injunctions

- OSHA Mandate

- The Occupational Safety and Health Act does not give broad power over vaccines to the federal government.
- It is arbitrary because the 100-worker cut off is simultaneously overinclusive and underinclusive
 - It can apply to some workers even if they work alone
 - It might not apply to high-risk workers who are closely involved with the public and coworkers
- The authority claimed by OSHA violates the nondelegation doctrine
- The timing shows there is no emergency sufficient to avoid compliance with the Administrative Procedure Act
- Prior statements on the issue by the executive branch negate the claim that the mandate is an emergency and that OSHA has authority to issue the requirement
- The mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power



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Vaccine Mandate – Basis for Injunctions

- Federal Contractors

- Vaccine mandate is outside the procurement powers given to the president under the Federal Property and Administrative Services Act and violates the nondelegation doctrine
- The mandate is really a workplace health issue, not a procurement issue, and is better addressed by OSHA (which the court noted has its own nondelegation issues)
- Violated the Competition in Contracting Act because it failed to provide for full and open competition and effectively barred non-compliant companies from providing the best value to the government
- Tenth Amendment issues

- Healthcare Workers

- Violated the Administrative Procedure Act, because there was insufficient emergency to avoid notice and comment rulemaking
- The Social Security Act does not give the authority over vaccine mandates claimed by the government, nondelegation doctrine issues. SSA also precludes control over manner in which medical services are provided, or supervision, selection, tenure or control over medical workers
- Violated provisions requiring consultation with state agencies and analysis of impact on small and rural hospitals
- One-size-fits-all rule is arbitrary and capricious and Tenth Amendment issues



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International Travel and COVID-19 Passports

- Given that there are many vaccines that have been developed around the world and only a few are approved in each country, one of the early questions was what vaccines will countries accept for travel purposes
- US will accept that a person is fully vaccinated if they have taken one of the vaccines approved by the FDA or the WHO. These are:
 - FDA
 - Pfizer-BioNTech
 - Moderna
 - Janssen/J&J
 - WHO accepts the 3 US vaccines and:
 - AstraZeneca
 - Covaxin
 - Covishield
 - BIBP/Sinopharm
 - Sinovac



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Airline Covid Liability

- At the start of the pandemic, there were concerns of widespread tort liability and class action lawsuits against the transportation industry
 - Passengers claiming exposure to COVID and serious illness
 - Claims from relatives of employees claiming exposure indirectly due to unsafe conditions at work
- Some suits have been filed but have been unsuccessful
 - Proximate Cause
 - Duty
 - Public Policy
- Suits have been more prevalent arising from flight cancellations due to COVID
 - Suits have met with very limited success, mainly turning on the specific facts surrounding a cancellation and force majeure principles



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Response to Air Rage Incidents

- On January 13, 2021, the Administrator issued an Order stating that the FAA would not be using its normal compliance methods against disruptive passengers, and instead:
 - When a passenger commits any such regulatory violation, or when a passenger's conduct is proscribed under 49 U.S.C. § 46318, FAA investigative personnel will send the case to the Office of the Chief Counsel's Enforcement Division (AGC-300) for legal enforcement action. Compliance actions and administrative actions will not be used to address such conduct.
 - The FAA will address any such conduct through legal enforcement action. The FAA will assess a civil penalty for any such conduct consistent with the guidance provided in chapter 9 of this order
- On March 31, 2021, FAA issued 2150.3C CHG 6, keeping the new enforcement guidance in effect at least as long as the TSA mask mandates stay in effect
- FAA has issued an unprecedented number of press releases involving civil penalties against passengers
- On July 30, FAA releases its "Zero Tolerance for Unruly and Dangerous Behavior" Toolkit
- On August 3, 2021, FAA sends a letter to airports asking them to coordinate more closely with local law enforcement and institute criminal proceedings; also asks airports to curtail sale of alcohol to-go in the airport



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Response to Air Rage Incidents – FAA Terminal Signs



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Response to Air Rage Incidents

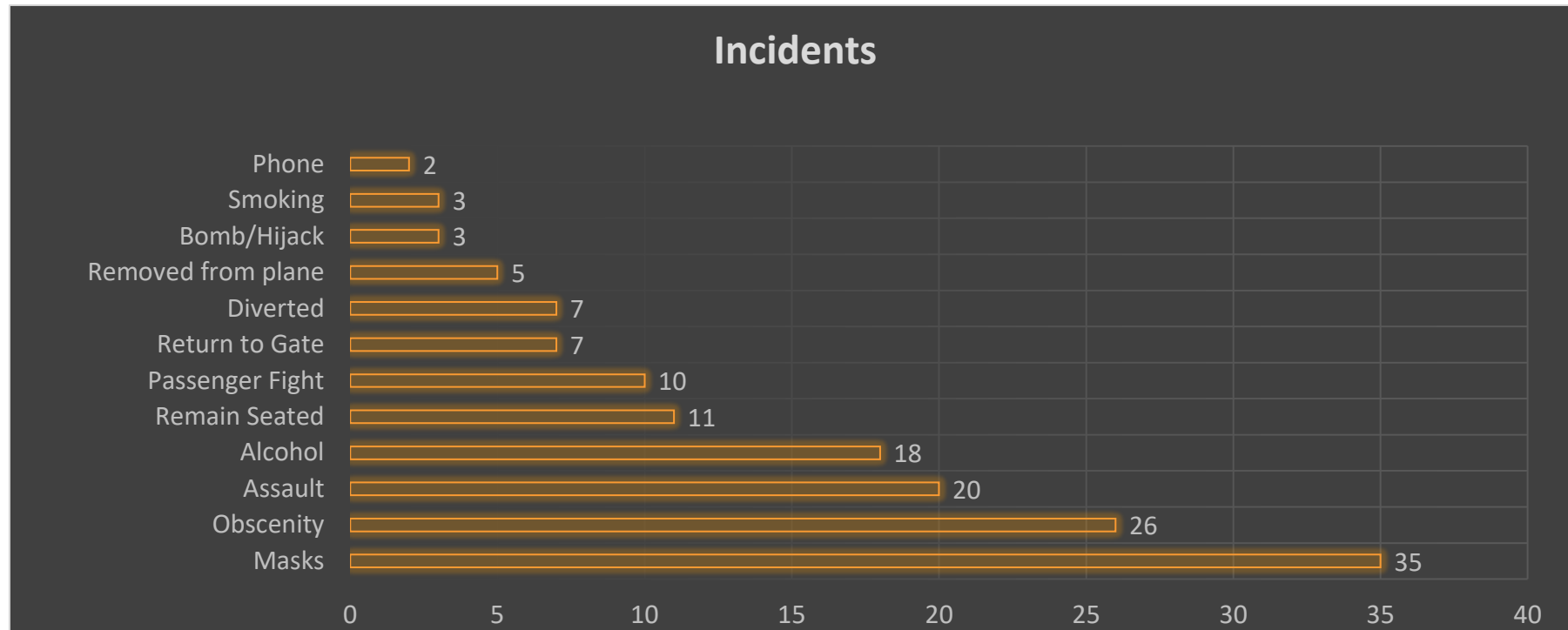
- As of November 30
 - 5,433 Unruly Passenger Reports
 - 3,923 Mask Related Incidents
 - 1,017 Investigations Initiated
 - 266 Enforcement Cases Started
 - Report to enforcement ratio approximately 20:1
- Passenger Incidents per 10,000 flights
 - Pre-Covid 2.5
 - First 6 Months of 2021 12
 - Second half of 2021 6
- Total fines announced - \$1,325,000



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Reported Air Rage Incidents – Common Factors

- FAA has Reported the details of 58 fines it levied this year
- Fines range from \$7,500 to over \$50,000



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Supply Chain Issues

- Primarily caused by issues at US Ports
 - Processing capacity
 - Storage Capacity
 - Container Availability
 - Increased Shipping costs for overseas cargo
- Impact on Air Cargo
 - Steadily increasing demand for air freight
 - More flexibility to divert capacity to other airports unlike ports
 - Increasing strain on cargo ground handling
 - Need for harmonized rules so that Omicron and other variants does not impact the ability of aircraft to travel efficiently



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Save the Date for the 2022 Aviation Symposium

February 1-3, 2022



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Thank You

If you have any questions, please contact us:

Mark A. Dombroff
Fox Rothschild LLP

8300 Greensboro Drive, Suite 1000
McLean, VA 22102

mdombroff@foxrothschild.com
Phone: 703.248.7002

Mark McKinnon
Fox Rothschild LLP

2020 K Street N.W., Suite 500
Washington, DC 20006

mmckinnon@foxrothschild.com
Phone: 202.794.1214



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