Airports Responding to Public Health Emergencies: Legal Considerations (2023)

DETAILS

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Airports Responding to Public Health Emergencies: Legal Considerations

This digest was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 14-01, this digest was prepared by Peter J. Kirsch and Adam E. Gerchick, Kaplan Kirsch & Rockwell LLP, Washington, DC; and Terry Kagler and Michael Spitzer, RS&H, Inc., Jacksonville, FL. The opinions and conclusions expressed or implied in this digest are those of the researchers who performed the research and are not necessarily those of the Transportation Research Board; the National Academies of Sciences, Engineering, and Medicine; or the program sponsors. The senior program officer is Jordan Christensen. The information in this digest is current as of September 2022.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Research reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Foreword

Published in 2018, *ACRP LRD 34: Airport Public Health Preparedness and Response: Legal Rights, Powers, and Duties* addressed the legal issues concerning measures to detect communicable diseases, regulations to control communicable diseases, methods for decontamination, emergency legal preparedness, privacy, and potential sources of liability. The digest included legal analysis of authorities and strategies for navigating the system of public health governance to help airports respond effectively to future pandemics. No one could have known when *ACRP LRD 34* was published that the issues in that digest would become so significant to the airport industry only 2 years later.

This digest updates *ACRP LRD 34* based on lessons learned from COVID-19. It is designed as a tool for airport attorneys and practitioners to use to prepare, plan, and coordinate with their stakeholders in response to a threat of communicable disease. The lessons learned include key practical and legal considerations to navigate the public health governance and significant challenges, and effective transitions by airports to the new reality that pandemics may not be once-in-a-century phenomena. The digest includes recommended actions and strategies to effectively navigate pandemic response in light of federalism and the unique legal and regulatory constraints on airports within the national air transportation system.

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CONTENTS

AIRPORTS RESPONDING TO PUBLIC HEALTH EMERGENCIES: LEGAL CONSIDERATIONS

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I. INTRODUCTION

A. Role of this Digest

The advent of the COVID-19 pandemic had a sudden and dramatic effect on the airport and air transportation industry. On February 27, 2020, just a few days before the widespread implementation of COVID-19 pandemic protocols domestically in the United States, 2,353,150 people passed through Transportation Security Administration (TSA) checkpoints at U.S. airports.[1] That number was higher, by some 46,000 people, than the number of individuals who passed through those checkpoints on the same day one year prior.[2] However, by March 27, 2020, just one month later, passenger throughput at TSA checkpoints had cratered: The TSA recorded 180,002 people passing through airport security; a roughly 93 percent drop from the number who had cleared security one year earlier.[3] In the interim, Americans had come to realize the impact of the novel coronavirus, or COVID-19, pandemic that was spreading rapidly within the United States and globally.

The collapse in U.S. air traffic during March 2020 illustrates the speed with which a severe public health emergency can devastate the air travel industry. It further illustrates how quickly an airport operator may have to react to a public health crisis, including one of unprecedented scale or gravity in the history of modern travel. Moreover, as the effect of, and response to, the COVID-19 pandemic revealed, such a public health emergency poses more than purely operational challenges. Rather, the extraordinary pressures and demands posed by a severe or widespread public health emergency raise tough, often-novel legal challenges as well.

This digest was prepared to help airport sponsors and other stakeholders in the airport industry consider potential legal questions that they could confront as they address a future public health emergency. The digest is intended in part to update *ACRP LRD 34: Airport Public Health Preparedness and Response: Legal Rights, Powers, and Duties* (*ACRP LRD 34*),[4] which was published prior to the COVID-19 pandemic but nonetheless contains valuable background for airport sponsors. While this digest analyzes relevant legal issues in light of the experience of the COVID-19 pandemic, these two digests are not coextensive, and readers are encouraged to review *ACRP LRD 34* in addition to this digest for valuable background.

A future public health emergency could be similar to the COVID-19 pandemic in various respects, from the nature of the pathogen to the geographic scope of the health crisis. Alternatively, the emergency could prove highly distinct from that pandemic, with very different modes of transmission or a concentration in one region of the United States. Regardless of the characteristics of a hypothetical future public health emergency, the effect of, and response to the COVID-19 pandemic offers valuable lessons that could help airport sponsors and their counsel be better prepared for the next such crisis. This digest attempts to help readers identify various legal issues that such an emergency could force them to confront and to provide information that could inform their legal decision-making in response.

Readers are advised to understand what this digest *is* and is *not*. It is a broad, forward-looking discussion of legal issues that an airport sponsor might face in responding to a future public health emergency and is designed to help sponsors and their counsel as they assess their legal courses of action. By contrast, it does not offer legal advice; this digest does not prescribe the "right answer" to any of the legal questions it considers. It does not attempt to address the whole universe of legal issues that a sponsor could potentially face in responding to a public health emergency, nor does it attempt to provide guidance for specific airport sponsors. As all lawyers appreciate, legal advice requires an application of broad legal principles to the specific facts of any situation. Since the facts surrounding any new public health emergency are unknown, readers are alerted not to apply any of the legal principles discussed in this digest as one might read a cookbook or an instruction manual. This digest focuses on legal considerations applicable across the United States and does not discuss individual state laws and policies except to illustrate broader legal concerns. Readers are urged to raise any airport-specific legal questions with their counsel in light not just of the specific factual environment but also of local and state law which may impose different legal requirements than those generally applicable throughout the United States. And for our international readers, as the COVID-19 pandemic response dramatically demonstrated, national laws and their flexibility in adapting to the vagaries of a public health emergency, vary considerably. The legal principles applicable in the United States are not universal.

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[1] *TSA Checkpoint Travel Numbers*, Transp. Sec. Admin., https://www.tsa.gov/coronavirus/passenger-throughput (last visited June 6, 2022).

[2] *Full-Year 2021 and December 2021 U.S. Airline Traffic Data*, Bureau Transp. Stat. (Mar. 10, 2022), https://www.bts.gov/newsroom/full-year-2021-and-december-2021-us-airline-traffic-data.

[3] Transp. Sec. Admin., *supra* note 1.

[4] Leila Barraza & Elizabeth Hall-Lipsy, *ACRP LRD 34: Health Preparedness and Response: Legal Rights, Powers and Duties*, Transportation Research Board of the National Academies of Sciences, Engineering and Medicine, Washington, D.C., 2018.

This digest is not an operational guide to address public health emergencies; the digest focuses on legal issues, and only discusses practical considerations where those considerations have legal implications. Finally, this digest is not a survey of legal issues that arose during the COVID-19 pandemic. That pandemic does form the backdrop of much of the legal analyses, and necessarily so, given that the pandemic highlighted many airport legal issues for the first time. Nevertheless, this digest focuses on how such legal considerations might factor into a sponsor's efforts to address a *future* public health emergency.

Consistent with the mission of the Airport Cooperative Research Program, this digest focuses on legal issues of importance to airport sponsors and their counsel. Airlines, other aircraft operators, fixed base operators, and myriad other stakeholders in the air transportation industry would face different problems and be subject to often fundamentally different legal constraints in their responses to a public health emergency. This digest does not address the legal considerations for other stakeholders in the air transportation industry.

B. Structure of the Digest

Following this introduction, the digest summarizes efforts by airport sponsors, both in the United States and abroad, to address various public health emergencies over the past two decades, culminating in the airport industry's response to the COVID-19 pandemic. Then, the digest turns to legal analysis, by considering various legal issues that an airport sponsor may encounter when responding to a future public health emergency and many of the laws—constitutional, statutory, regulatory, and common—that those issues may implicate. Finally, this digest concludes by summarizing some of the key legal issues that a sponsor may encounter when addressing a future public health emergency and encouraging sponsors to work with their own counsel to seek answers to legal issues that this digest considers.

C. Note on Terminology

In reviewing this digest, readers should note a few points regarding the terminology used herein. First, this digest offers legal analysis, not medical guidance, and the health-related terms used in this publication are not necessarily medical terms of art and may not align with medical, epidemiological, or other scientific definitions. In particular, this digest uses the term "public health emergency" broadly, as a catch-all reference to the wide range of epidemiological events that could affect airport operations. For purposes of this digest, a public health emergency might include a pandemic, epidemic, or localized outbreak of disease or any other pathogenic or infectious agent capable of causing a widespread health risk to humans. The term could also include situations in which some health danger other than a biological agent, such as the dispersal of a toxic substance over or around an airport, poses an immediate and serious threat to the health of airport users. In short, readers should regard the term "public health emergency" as broad and conceptual, rather than legally precise or technical; it is, as the term implies, an emergency specific to the health of airport users or the public generally.

By contrast, this digest *does* use the precise Federal Aviation Administration (FAA) definition of an airport "sponsor." The FAA defines "sponsor" to mean "any public agency that applies for federal financial assistance, or private owner of a public use airport, as defined in the Airport and Airway Improvement Act of 1982[.]"[5] That definition is legally significant, because airport "sponsors," as the FAA defines the term, are subject to various federal requirements, including compliance with certain standardized obligations to the federal government that a sponsor incurs as a condition of receiving federal airport grant funding.[6] Those obligations—or, more precisely, a sponsor's binding agreement to assume such obligations—are commonly known as "Grant Assurances,"[7] which is the term by which this digest refers to them. This digest frequently discusses how a sponsor's Grant Assurances may affect the sponsor's legal discretion to respond to a public health emergency. Therefore, it is important for readers to note that, when this digest discusses the federal requirements imposed specifically upon sponsors, the digest is typically referring to those Grant Assurances that the sponsor has made as a matter of contract with the FAA. (Nevertheless, in certain instances herein, context will make it clear that a reference to a sponsor's federal obligations includes both its Grant Assurances and its constitutional, statutory, and regulatory obligations.) Airport owners and operators whose operations are not subject to the strictures of the Grant Assurances are subject to less federal oversight and have different considerations in responding to a public health emergency. Since these are often small airports with no commercial airline service (with only one exception, all commercial airports in the United States at this writing are subject to the Grant Assurances), the impact of a public health emergency is likely to be far less complex than for their larger, grant-obligated colleagues. We do not, therefore, address their specific legal constraints. The effect of public health emergencies on private-sector actors on an airport—from concessions to airlines and from airport-related businesses to nonaeronautical tenants—is also beyond the scope of this digest.

Finally, readers should note that the glossary toward the end of the digest provides each of the acronyms used in this digest.

II. BACKGROUND: U.S. AIRPORTS' RESPONSES TO PAST PUBLIC HEALTH EMERGENCIES

While the COVID-19 pandemic posed a public health crisis of unprecedented magnitude for airport sponsors, it was not the first such emergency that sponsors had confronted, even within the past twenty years. Rather, since the beginning of the twenty-first century, airport sponsors, and federal agencies operating within airports, have sought to mitigate the public health risks posed by several disease outbreaks. This section of the digest

[5] FAA, Order 5190.6B Change 1, Airport Compliance Manual 1-1 (2021) (hereinafter the "Compliance Manual").

[6] *Id.*

[7] *Grant Assurances (Obligations)*, FAA, https://www.faa.gov/airports/aip/grant_assurances (last visited June 6, 2022).

briefly discusses several such outbreaks and the ways in which sponsors and other agencies at U.S. airports responded thereto. A history of all pandemics and their effect on transportation—or the reverse, the effect of transportation on pandemics—could fill an entire volume. Therefore, this digest somewhat arbitrarily starts at the beginning of the current century.

The larger historical context of pandemics and transportation is beyond the scope of this digest but provides an important foundation for the analysis here. Readers interested in a highly readable explanation of the historical role of transportation in the spread of pandemics and similar public health emergencies may want to read Edward Glaeser and David Cutler's fascinating recent book, *Survival of the City: Living and Thriving in an Age of Isolation* (2021). It provides considerable discussion about the importance of controlling the spread of public health emergencies through limitations on personal movement. Today, such limitations directly implicate the entire air transportation industry. Hence the foundation for this digest.

A. 2002–04 SARS Outbreak

The first major public health scare of the twenty-first century to hit the global aviation history arose in late 2002, when severe acute respiratory syndrome coronavirus 1—"SARS"—emerged in Guangdong, China.[8] By early 2003, the disease had reached several Southeast Asian countries and made its way to North America.[9] Evidence indicated that one mode of transmission was between passengers on commercial flights.[10] In response to the SARS outbreak, several countries began screening arriving passengers at airports for signs of infection.[11]

In response to the SARS threat, the U.S. Centers for Disease Control and Prevention (CDC) began screening travelers entering the United States for the virus. The CDC dispatched quarantine officers and other officials to 23 U.S. airports, as well as to eleven land border crossings and several ports.[12] Those CDC officers met thousands of flights, particularly those arriving from places where SARS was most prevalent.[13] The officers attempted to observe each arriving passenger for signs of SARS symptoms.[14] CDC officials and U.S. Customs and Border Protection (CBP) officers also distributed over one million brochures alerting travelers to the signs of SARS infection and urging them to report possible symptoms to a physician.[15]

The efficacy of various countries' SARS traveler-screening efforts was, at best, mixed. The United States successfully avoided substantial community transmission of the virus, with the CDC ultimately identifying only eight cases of laboratory-confirmed SARS infection in the U.S., and all among individuals who had traveled to foreign SARS hotspots.[16] However, among four places that did implement entry screening for the virus—Australia, Canada, Singapore, and Taiwan—none intercepted any travelers found to be infected with the virus.[17]

B. 2009–10 Swine Flu (H1N1) Pandemic

In April 2009, scientists confirmed the presence in Mexico of a novel strain of the H1N1 influenza virus, referred to as "H1N1" and commonly known as "swine flu."[18] The virus quickly spread throughout the world,[19] ultimately killing anywhere from 152,000 to 575,000 people globally, including an estimated 12,469 in the United States, in one year.[20]

In response to the emerging pandemic, officials in the United States and abroad took steps to intercept infected air travelers and otherwise mitigate the virus's spread. Shortly after H1N1 emerged, the U.S. Secretary of Homeland Security announced that CBP would begin observing travelers entering the United States for signs of H1N1 infection and isolating, for further medical evaluation, those who presented symptoms of the disease.[21] The secretary also announced that CBP would provide travelers with health notices, issued by the CDC, that described the virus.[22] And the Secretary noted that TSA would similarly observe travelers for "flu-like symptoms" and "tak[e] appropriate measures."[23]

U.S. airport sponsors sought to prevent H1N1 infections—and, perhaps, reassure travelers—by promoting sanitation at their airports. Sponsors across the country, including in Anchorage and Fort Lauderdale, placed hand-sanitizer dispensers in busy areas of their terminals, including around security checkpoints and at entryways.[24] Sponsors also erected signage promoting hygienic practices.[25] And the sponsor of the Los Angeles Interna-

[8] M.K. Lim & D. Koh, *SARS and Occupational Health in the Air*, 60 Occupational & Env't Med. 539 (2003), http://dx.doi.org/10.1136/oem.60.8.539.

[9] *Id.*

[10] *Id.*

[11] Dennis Normile, *Why Airport Screening Won't Stop the Spread of Coronavirus*, Sci. (Mar. 6, 2020), https://www.science.org/content/article/why-airport-screening-wont-stop-spread-coronavirus.

[12] Ceci Connolly, *SARS Army Battling at U.S. Airports*, Wash. Post (May 26, 2003), https://www.washingtonpost.com/archive/politics/2003/05/26/sars-army-battling-at-us-airports/b5046ef8-b622-4b36-9f3c-a1203b58a083.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *SARS Basics Fact Sheet*, CDC, https://www.cdc.gov/sars/about/fs-sars.html (last visited June 7, 2022).

[17] Normile, *supra* note 11.

[18] Adrian J. Gibbs et al., *From Where Did the 2009 'Swine-Origin' Influenza A Virus (H1N1) Emerge?*, 6 Virology J. (Nov. 24, 2009), https://doi.org/10.1186/1743-422X-6-207.

[19] *Id.*

[20] *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CDC, https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html (last visited June 7, 2022).

[21] *Remarks by Secretary Napolitano at the Media Briefing on the H1N1 Flu Outbreak–April 28, 2009*, U.S. Dep't of Homeland Sec. (Apr. 28, 2009), https://www.dhs.gov/news/2009/04/28/secretary-napolitanos-remarks-third-daily-h1n1-flu-media-briefing-april-28-2009.

[22] *Id.*

[23] *Id.*

[24] Martha C. White, *Travel Sector Takes Steps to Resist Flu*, N.Y. Times (Oct. 7, 2009), https://www.nytimes.com/2009/10/08/business/global/08swine.html.

[25] *Id.*

tional Airport (LAX) announced efforts to combat the spread of the virus by disinfecting airport restrooms.[26]

Several Asian countries resurrected passenger-screening protocols they had implemented during the SARS outbreak. Officials at Bangkok's Suvarnabhumi Airport conducted specialized health screenings of travelers from certain American, European, and Japanese locations and installed infrared cameras to detect fevers in travelers.[27] Singaporean and Japanese officials also installed such thermal scanning devices at their respective Changi and Narita airports, while Japanese officials held arriving passengers on planes to screen them for H1N1.[28] Meanwhile, officials at London's Heathrow Airport reportedly held travelers on flights arriving from Mexico for additional screening.[29] Nevertheless, according to CBS News, "most health experts" felt at the time that screening efforts or travel restrictions would have little effect in stemming the virus,[30] and one study of Narita's H1N1-screening efforts concluded that "the reliance of fever alone is unlikely to be feasible as an entry screening measure against influenza."[31]

C. 2014 Ebola Outbreak in the United States

In December 2013, an 18-month-old boy in Guinea reportedly contracted Ebola, a deadly virus, from bats.[32] Within weeks, the virus spread to Guinea's capital, and by July 2014, the virus had reached the capitals of two of Guinea's neighbors, Liberia and Sierra Leone.[33] Ultimately, the outbreak killed an estimated 11,325 people, all but fifteen in those three countries.[34] The outbreak caused a vastly smaller health impact in the United States. Only eleven people were treated for the virus in the United States during the outbreak, and only four of those individuals became ill with Ebola after arriving in the country.[35] Of them, only one person, a Liberian man visiting relatives in the United States, died.[36]

Despite the low number of infections that the Ebola outbreak caused in the United States, it generated widespread public alarm.[37] In response, federal officials began screening passengers arriving from Guinea, Liberia, and Sierra Leone for signs of the virus at five U.S. airports that together served as the ports of entry for about 94 percent of travelers arriving in the United States from those three countries.[38] As part of those screenings, CBP and U.S. Coast Guard officials checked the temperatures of each of those travelers, while CDC officials were made available to address suspected cases.[39] Officials also required those passengers to fill out a questionnaire upon disembarking in the United States.[40] Notably, this was the first time that U.S. health authorities mandated temperature screenings for air travelers arriving from abroad.[41] Within two weeks of those announced screening measures, the U.S. Department of Homeland Security further required all travelers arriving from Guinea, Liberia, and Sierra Leone to pass through those five airports, which included two in the New York region, one in the Washington area, one in Atlanta, and one in Chicago.[42]

D. 2014–16 Zika Epidemic

In 2014, the same year as the Ebola outbreak, the Zika virus, commonly transmitted through mosquito bites, began to spread widely in Brazil.[43] Within two years, the virus had spread to most of that country, while Brazilian health officials began to suspect that the disease caused fetal microcephaly.[44] In early 2016, the World Health Organization (WHO) declared the outbreak a public health emergency of international concern.[45]

Several U.S. airport sponsors responded to the Zika epidemic by spraying for mosquitos and warning travelers about the virus's risk.[46] The sponsor of the Fort Lauderdale-Hollywood International Airport instructed airport vendors to offer more insect repellant to travelers, while the sponsor of the Orlando International Airport increased its on-airport mosquito-spraying efforts and turned to its wildlife management staff to moni-

[26] *Airports Defend Against Swine Flu*, Airport Tech. (Apr. 26, 2009), https://www.airport-technology.com/features/feature54216.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Barbara Hernandez, *Airports to Screen for H1N1*, CBS News, https://www.cbsnews.com/news/airports-to-screen-for-h1n1 (last updated Oct. 8, 2009).

[31] Hiroshi Nishiura & Kazuko Kamiya, *Fever Screening During the Influenza (H1N1-2009) Pandemic at Narita International Airport, Japan*, 11 BMC Infectious Diseases (2011), https://doi.org/10.1186/1471-2334-11-111.

[32] *2014–2016 Ebola Outbreak in West Africa*, CDC (accessed June 7, 2022), https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Manny Fernandez & Morimitsu Onishi, *U.S. Patient Aided Ebola Victim in Liberia*, N.Y. Times (Oct. 1, 2014), https://www.nytimes.com/2014/10/02/us/after-ebola-case-in-dallas-health-officials-seek-those-who-had-contact-with-patient.html.

[37] *See* Sabrina Tavernise & Michael D. Shear, *U.S. to Begin Ebola Screenings at 5 Airports*, N.Y. Times (Oct. 8, 2014), https://www.nytimes.com/2014/10/09/us/us-to-begin-ebola-screenings-at-5-airports.html.

[38] Zeke J. Miller & Alexandra Sifferlin, *U.S. to Screen Passengers from West Africa for Ebola at 5 Airports*, Time (Oct. 8, 2014), https://time.com/3482094/ebola-us-west-africa-airports.

[39] *Id.*

[40] Tavernise, *supra* note 7.

[41] *Id.*

[42] German Lopez, *Only 5 US Airports Will Take Travelers from Ebola-Stricken Countries*, Vox (Oct. 21, 2014), https://www.vox.com/2014/10/21/7028383/Ebola-travel-ban.

[43] Rachel Lowe et al., *The Zika Virus Epidemic in Brazil: From Discovery to Future Implications*, Int'l J. Env't Rsch. & Pub. Health (2018), https://www.mdpi.com/1660-4601/15/1/96.

[44] *Id.*

[45] *Id.*

[46] Harriet Baskas, *U.S. Airports Respond to Zika Virus Threat*, USA Today (May 4, 2016), https://www.usatoday.com/story/travel/flights/2016/05/04/zika-virus-airports/83874206.

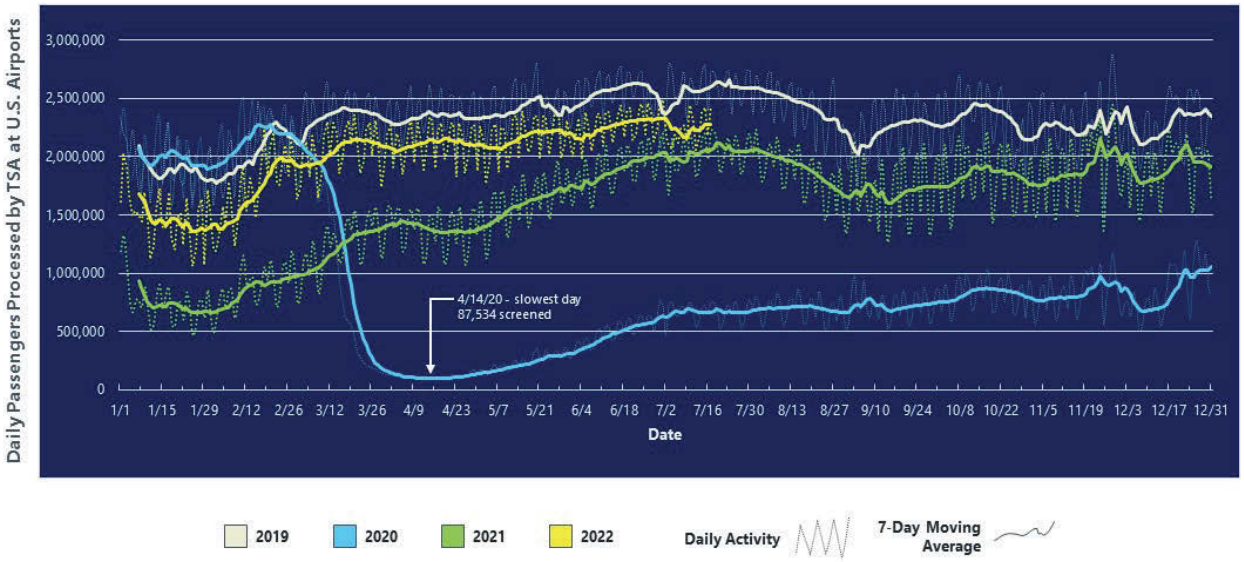

Figure 1. Daily TSA screenings 2019-2022 (data through July 17, 2022).

tor the airport's mosquito population.[47] The Houston Airport System coordinated with its mosquito vector contractor to assess its mosquito-spraying efforts while reminding airport employees to eliminate standing water, wear long clothing, stay in during hours of peak mosquito activity, and use mosquito repellant.[48] Those sponsors and others also worked with the CDC or local health officials to inform travelers of the dangers of the Zika virus and apprise them of ways to mitigate the risk.[49]

E. COVID-19 Pandemic

In December 2019, a small handful of patients presented themselves to hospitals in the city of Wuhan, China, complaining of flu-like symptoms.[50] Out of that small outbreak grew the most socially and economically disruptive, and one of the most lethal, pandemics to hit the world in 100 years: the COVID-19 pandemic. Within one month of that outbreak, Chinese officials would plunge the city of Wuhan into a strict lockdown from which the city would not emerge for 76 days.[51] By the time the city did emerge, much of the rest of the world had been hit by the pandemic. By February 2020, several European countries had imposed severe restrictions on personal movement in response to severe COVID-19 outbreaks, with Italy especially hard-hit.[52] One month later, the pandemic began its rampant spread throughout the United States, with New York City suffering an especially devastating, deadly outbreak.[53] On March 13, 2020, the President declared the pandemic a national emergency[54]—a watershed moment that, for many Americans, completed the pandemic's transition from a distressing overseas threat to a clear and present danger.

In response to the globally spreading outbreak, worldwide passenger air traffic plummeted. Globally in 2020, 60.2 percent fewer airline passengers flew than during 2019.[55] In the United States, U.S. airlines carried 96 percent fewer passengers in April 2020 than they did in April 2019.[56] Roughly in conjunction with his emergency declaration, the President announced that the United States would close its borders to citizens of Europe's Schengen Area, adding to a growing trend of border closures and restrictions that would mark the COVID-19 pandemic era.[57]

Figure 1 illustrates the catastrophic decline in demand for air travel at the height of the pandemic and the mostly steady recovery in the two years since. The graph indicates the number of individuals who passed through TSA screening at U.S.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Covid-19 Pandemic Timeline Fast Facts*, CNN, https://www.cnn.com/2021/08/09/health/covid-19-pandemic-timeline-fast-facts/index.html (last updated Sept. 4, 2022).

[51] *Id.*

[52] *See CDC Museum COVID-19 Timeline*, CDC, https://www.cdc.gov/museum/timeline/covid19.html (last updated Jan. 5, 2022) (describing Italy as a viral "hotspot" in February of 2020).

[53] *Two Years of the Pandemic in New York, Step by Awful Step*, N.Y. Times, https://www.nytimes.com/interactive/2022/nyregion/nyc-covid-timeline.html (last updated Mar. 15, 2022).

[54] CNN, *supra* note 50.

[55] *Airline Industry Statistics Confirm 2020 Was Worst Year on Record*, IATA (Aug. 3, 2021), https://www.iata.org/en/pressroom/pr/2021-08-03-01.

[56] *Preliminary Air Traffic Data, April 2020: 96% Reduction in U.S. Airline Passengers from 2019*, Bureau Transp. Stat. (June 10, 2020), https://www.bts.gov/newsroom/preliminary-air-traffic-data-april-2020-96-reduction-us-airline-passengers-2019.

[57] *President Trump Orders European Travel Ban Starting 11:59 PM EDT on Friday, March 13*, Fragomen (Mar. 12, 2020), https://www.fragomen.com/insights/president-trump-orders-european-travel-ban-starting-11-59-pm-edt-on-friday-march-13.html.

airports each day between January 1, 2019, and July 17, 2022. (Faint dotted lines represent daily screening counts; the bolder, smoother lines reflect weekly averages.) As Figure 1 shows, passenger number at U.S. airports plummeted in March 2020, reached their nadir on April 14, 2020, and then slowly recovered in late spring of 2020 before stagnating over that summer. Passenger demand did not show a sustained resurgence until the first quarter of 2021, as COVID-19 vaccines became widely available. In the year since, U.S. air travel demand has continued to recover, with early-summer 2022 screenings approaching same-week screening levels in 2019.

Recognizing the potential for economic devastation, in March 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), a massive economic relief bill that, among many other provisions, provided $25 billion to the U.S. airline industry on the condition that they retained most of their workforce for much of the year.[58] Just before the end of that year, in December, Congress infused U.S. air carriers and certain air carrier contractors with an additional $16 billion of aid via the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA).[59] The CARES Act and CRRSAA also provided relief to U.S. airports: CARES included $10 billion in emergency grants, while CRRSAA provided an additional $2 billion.[60] Then, in March 2021, Congress passed and President Biden signed into law the American Rescue Plan Act (ARPA), which included an additional $8 billion in economic relief for U.S. airports.[61]

The year 2021 brought both relief and pain to the American aviation industry. In December 2020, the United States granted emergency use authorization to two COVID-19 vaccines, inspiring hope that the United States could finally bring the pandemic to heel.[62] After a slow start, vaccine-distribution efforts in the U.S. picked up speed throughout the first quarter of 2021, with most Americans receiving at least one vaccine dose that year.[63] And, in November 2021, the U.S. airline industry experienced meaningful relief when President Biden finally rescinded President Trump's restrictions on Schengen Area visitors to the United States.[64] However, the United States, like much of the world, continued to suffer waves of COVID-19 infection, culminating with an unprecedented spike in cases in December 2021 due to the highly communicable omicron variant of the virus.[65] That variant in particular wreaked havoc on the U.S. commercial aviation industry, which had spent much of the past year dealing with a social side effect of the pandemic: a historic number of "unruly passenger" cases, including instances of violence, due in part to federal mask mandates intended to reduce the risk of viral spread during travel.[66]

Frustrated with the emergence of new COVID-19 variants and growing public resistance to vaccination, President Biden in late 2021 issued a series of vaccination and virus-testing mandates aimed at various elements of the American workforce.[67] However, federal courts enjoined several of these mandates.[68] And, in April 2022, a federal district court in Florida enjoined the CDC mask mandate for public transportation, which had required airline passengers within the United States to wear masks while flying.[69] Regardless of the health implications of that mandate, U.S. airlines saw a resurgence in passenger numbers during the first half of 2022, with nearly as many passengers passing through U.S. airport security checkpoints as during the same dates in 2019.[70] That resurgence strained U.S. airlines' ability to operate their full schedules, with many struggling in the midst of staff shortages resulting largely from retirements, resignations, and layoffs during the pandemic.[71]

At the time of this writing, the threat of COVID-19 remains far from over. However, the global airline industry is on a path to recovery. The past two years of this global pandemic have provided countless lessons to the U.S. aviation industry, including American airlines, and the officials who regulate them. This digest discusses some of those lessons.

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[58] *The Airline Industry and the CARES Act: What Secured Lenders Need to Know*, JD Supra (Nov. 13, 2020), https://www.jdsupra.com/legalnews/the-airline-industry-and-the-cares-act-99825.

[59] *Breaking Down the $48 Billion of Airline Industry Payroll Support in Coronavirus Relief Legislation*, Peter G. Peterson Found. (Feb. 3, 2021), https://www.pgpf.org/blog/2021/02/breaking-down-the-48-billion-of-airline-industry-payroll-support-in-coronavirus-relief-legislation.

[60] *2020 CARES Act Grants*, FAA, https://www.faa.gov/airports/cares_act (last updated Aug. 25, 2022); *Airport Coronavirus Response Grant Program*, FAA, https://www.faa.gov/airports/crrsaa (last updated Aug. 25, 2022).

[61] *Airport Rescue Grants*, FAA (June 3, 2022), https://www.faa.gov/airports/airport_rescue_grants.

[62] CDC, *supra* note 52.

[63] *Id.*; Gypsyamber D'Souza & David Dowdy, *Rethinking Herd Immunity and the Covid-19 Response End Game*, Johns Hopkins: Bloomberg Sch. Pub. Health (Sept. 13, 2021), https://publichealth.jhu.edu/2021/what-is-herd-immunity-and-how-can-we-achieve-it-with-covid-19 (noting that "just over half" of U.S. population fully vaccinated against COVID-19 by September 2021).

[64] Elizabeth Olivera & Frances Rayer, *UPDATE: President Biden Lifts COVID-19 Travel Ban*, JD Supra (Nov. 3, 2021), https://www.jdsupra.com/legalnews/update-president-biden-lifts-covid-19-8566537.

[65] Aya Elamroussi, *Omicron Surge Is 'Unlike Anything We've Ever Seen,' Expert Says,* CNN, https://www.cnn.com/2021/12/30/health/us-coronavirus-thursday/index.html (last updated Dec. 31, 2021).

[66] Marnie Hunter, *FAA Numbers Confirm It–2021 Was Terrible for Bad Behavior in the Skies*, CNN (Jan. 13, 2022), https://www.cnn.com/travel/article/unruly-airline-passengers-faa-2021/index.html.

[67] David A. Lieb & Geoff Mulvihill, *EXPLAINER: Who Must Follow Biden's Vaccine Mandates?*, Associated Press (Jan. 27, 2022), https://apnews.com/article/covid-explainer-must-employers-follow-biden-vaccine-mandates-2d05c688115e139b034ec4a497140c3b.

[68] *Id.*

[69] Jessica Wehrman, *Federal Judge Overturns Travel Mask Mandate*, Roll Call (Apr. 18, 2021), https://rollcall.com/2022/04/18/federal-judge-overturns-travel-mask-mandate.

[70] *Air Travel Is Taking Flight Again*, Economist (June 9, 2022), https://www.economist.com/business/2022/06/09/air-travel-is-taking-flight-again (citing passenger statistics for North America).

[71] Stephen Jones, *Why Are So Many Flights Being Canceled? Aviation Analysts Say It's Due to Airlines' Inability to Plan Amid a Tight Labor Market*, Bus. Insider (July 23, 2022), https://www.businessinsider.com/airlines-labor-shortage-cancelling-flights-aviation-jobs-market-2022-6.

F. Themes from Past Public Health Emergencies

While the previous examples illustrate that public health emergencies—or at least potential emergencies—are not new for U.S. airports, none of the other recent public health emergencies other than COVID-19 cause the severe impact of COVID-19 on air transportation. As a result, the legal issues that airport sponsors faced during those emergencies were limited in both time and scope. Those emergencies did not yield the sort of nationwide regulatory response that could have provided a clear legal precedent for the problems encountered during the COVID-19 pandemic. That does not mean that COVID-19 is *sui generis* or is likely to represent a once-in-a-lifetime public health crisis. In fact, reputable health researchers have found that pandemics of the severity of COVID-19 are likely to become more, not less, frequent.[72]

III. ANALYSIS: LEGAL IMPLICATIONS OF A PUBLIC HEALTH EMERGENCY

The remainder of the digest considers various legal questions that an airport sponsor may confront in addressing a public health emergency. As discussed in the digest's introduction, the following analysis does not purport to offer legal advice regarding a sponsor's emergency response efforts. Rather, it addresses many of the legal authorities, including laws, regulations, and federal guidance, that sponsors may wish to keep in mind as they consider their options to address a public health emergency.

A. Prior to an Emergency: Identifying Points of Contact and Preparing a Task Force

The sudden transition of COVID-19 from a foreign threat to a domestic crisis in the United States reflects the rapidity with which a public health emergency may arise, and the lack of time airport sponsors and stakeholders may have to prepare for it. As such, the experience of the COVID-19 pandemic emphasizes the importance of preparing a comprehensive, practicable airport emergency plan (Emergency Plan) that a sponsor can readily implement. That experience further highlights the reality that merely having an Emergency Plan on file may not be sufficient; sponsors should also gather stakeholders, well in advance of any potential public health emergency, to review the airport's Emergency Plan in anticipation of a public health emergency (or any other emergency) and identify the proper points of contact for coordinating a response should an emergency arise.

This section of the digest discusses the legal implications of certain steps that a sponsor might consider taking prior to the emergence of a public health crisis to prepare for such a risk. In particular, this section addresses the identification of relevant emergency contacts, the formation of a group of airport stakeholders (referred to in this section as a "Task Force") to review and refine Emergency Plans, and legal considerations relevant to each of those topics.

1. Identifying Points of Contact

Sponsors can both improve their ability to respond to a public health emergency and reduce their risk of regulatory violations by identifying points of contact at various agencies and organizations *before* a public health emergency arises. For example, sponsors would be well-advised to determine who at the FAA or the U.S. Department of Transportation (DOT) is authorized and able to help the sponsor access available federal financial assistance or obtain emergency regulatory waivers that may be necessary in the event of a public health emergency. Likewise, a sponsor should develop a working relationship with representatives of the CDC and state and local health authorities so that, in the event of a public health emergency, the sponsor can readily coordinate with such officials. Furthermore, a sponsor may choose to meet with regional hospitals or emergency medical services providers to discuss how the sponsor might transport infected travelers or airport workers for medical care, particularly in the event that a public health emergency has strained hospital or other medical resources.

The sponsor may also find it advantageous to coordinate emergency response planning with state or local law enforcement agencies or National Guard units, particularly in the event that health-related closures cause protests, lead to unruly-passenger incidents, or require the establishment of a field hospital or other treatment or quarantine facilities at the airport. Meanwhile, to minimize travel disruptions, the sponsor will undoubtedly need to reach out to representatives of the TSA and, if relevant, CBP to discuss how a public health emergency might affect airport security and passenger-processing measures.

Sponsors should also consider including their own commercial tenants in their emergency planning efforts. Fixed base operators (FBOs) and other aeronautical service providers may have even more-intimate familiarity with the day-to-day operations of an airport than the sponsor has, especially for airports in which such FBO or service provider handles airport operations or logistics. Likewise, a sponsor may wish to coordinate with concessionaires, who could be severely affected by a public health emergency that reduces or effectively eliminates passenger traffic at the airport. Coordinating with concessionaires early on could also help sponsors identify any potential concessionaire contractual issues or conflicts that might arise if a sponsor were to take a certain action during an emergency that disadvantage one or more concessions operators. Additionally, because concessionaire staff will generally occupy passenger facilities and may need to clear security, sponsors will likely find it advantageous to work with concessionaires before an emergency strike to consider alternatives in the event TSA, CBP, or

[72] Intergovernmental Platform on Biodiversity & Ecosystem Servs., IPBES Workshop on Biodiversity and Pandemics: Executive Summary 5 (2020) ("The risk of pandemics is increasing rapidly, with more than five new diseases emerging in people every year[.]"); Michael Penn, *Statistics Say Large Pandemics Are More Likely Than We Thought*, Duke Global Health Inst. (Aug. 23, 2021), https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought; Jeff Tollefson, *Why Deforestation and Extinctions Make Pandemics More Likely*, Nature (Aug. 7, 2020), https://www.nature.com/articles/d41586-020-02341-1.

other airport operations are disrupted. Finally, a sponsor would be well-advised to coordinate with its major air carrier tenants. Because air carriers would be the entities positioned to adjust their schedules during an emergency, and because sponsors have little authority to control such schedules (as discussed later in this digest), coordinating early, developing emergency plans, and maintaining lines of communications with air carriers could be critical to minimizing disruptions during a public health emergency.

Key to any such planning is to ascertain the respective roles and legal authorities of such potential partners. In particular, sponsors should work to understand the respective jurisdictions of the FAA, CBP, TSA, and state and local law enforcement as it pertains to the authority to direct or bar passenger access to airport facilities. Likewise, as discussed in a later section of this digest, public health officials often have greater authority than the sponsor or even law enforcement officials to issue quarantine requirements or other health-related mandates. Furthermore, understanding the authority of the FAA to permit or prohibit certain health-related actions by airport sponsors, including efforts to suspend operations at all or portions of an airport, could be crucial to a sponsor's ability to gain timely authorization to modify its operations in response to a public health emergency.

2. Establishment of Emergency Management Task Force

The concept of collaborating with various airport stakeholders to prepare for emergencies is neither new nor, for many sponsors, optional. Airports certificated under Part 139 of the Federal Aviation Regulations must "develop and maintain" an airport Emergency Plan in a manner prescribed by the agency.[73] Furthermore, Part 139 requires that a certificated airport's sponsor develop its Emergency Plan in coordination with other stakeholders. Specifically, the regulations require the sponsor to "[c]oordinate the plan with law enforcement agencies, rescue and firefighting agencies, medical personnel and organizations, the principal tenants at the airport, and all other persons who have responsibilities under the plan."[74] Likewise, the regulation directs sponsors to review the Emergency Plan with those same parties at least annually to confirm the Emergency Plan's currency and to ensure that such parties understand their respective responsibilities under it.[75] While regulatorily mandated Emergency Plans have existed for decades, many of these plans may not have been revised to address the specific lessons of the COVID-19 pandemic. And, while the FAA requires that Emergency Plans be up-to-date, not all sponsors have engaged in a comprehensive assessment of their Emergency Plans and their usefulness for responding to a public health emergency. Until or unless regulatory requirements are changed, sponsors will have to take the initiative to address the lessons of the COVID-19 pandemic in revising their Emergency Plans.

To assist airport sponsors, the FAA has compiled a list of "potential team members" that a sponsor might include in developing its Emergency Plan.[76] That list includes, among a long list of roles, airport leaders and operational managers, air carrier representatives and aircraft operators, airport tenants, hospital and rescue officials, federal officials from the FAA and other agencies, law enforcement officials, and public-information officers.[77] (While some of the agencies the FAA suggests including in the planning group, such as the National Weather Service,[78] may not be pertinent to a public health emergency, sponsors will likely find the list a useful starting point.) Meanwhile, a recent national survey of airport executives indicates that sponsors have found it valuable to retain emergency management consultants to advise them and other stakeholders on emergency planning considerations and to boost stakeholders' support for the sponsor's Emergency Plan.[79]

In the interests of expertise and efficiency, it seems natural for a sponsor to invite that same "team" of officials, public agencies, medical organizations, and airport tenants to double as the sponsor's Task Force. Sponsors may also find it helpful to convene such a Task Force in the early stages of a public health emergency. However, sponsors should be mindful of legal concerns that may arise if the sponsor relies on that Task Force—and, particularly, on private-sector airport tenants within it—to coordinate the sponsor's response to an ongoing or potentially impending public health emergency. Sponsors would be well-served to keep in mind three legal concerns: the potential for Task Force communications to be subject to open-records laws or other public disclosure, the risk that tenants not invited to participate in the Task Force may allege that the sponsor has unjustly discriminated against them, and the danger that a sponsor could cede too much of its own authority to the Task Force or a third party, in violation of the Grant Assurances.

Many airport tenants, including both air carriers and concessionaires, may not initially understand the extent to which their Task Force-related communications could be subject to public disclosure. State and local public-records laws and ordinances vary widely across the country, with certain states requiring a broad array of government-related materials to be open to public inspection. For example, Florida's open-records statute subjects to public disclosure what one organization has characterized as a "vast number" of public records[80]—among

[73] 14 C.F.R. § 139.325(a). Part 139-certificated airports are those that hold operating certificates, issued by the FAA, that permit such airports to host scheduled and unscheduled air carrier operations with aircraft holding more than a small number of seats. *What is Part 139?–Part 139 Airport Certification*, FAA, https://www.faa.gov/airports/airport_safety/part139_cert/what-is-part-139 (last updated Jan. 25, 2022).

[74] 14 C.F.R. § 139.325(g)(1).

[75] 14 C.F.R. § 139.325(g)(4).

[76] FAA, Advisory Circular 150/5200-31C, Airport Emergency Plan, Change 2, at 9, 10 (2009).

[77] *Id.* at 10.

[78] *See id.*

[79] Stephanie Murphy et al., *ACRP Synthesis 115: Practices in Airport Emergency Plans*, Transportation Research Board of the National Academies of Sciences, Engineering and Medicine, Washington, D.C., 2021.

[80] *Access to Public Records in Florida*, Digit. Media L. Project, https://www.dmlp.org/legal-guide/access-public-records-florida (last visited Apr. 29, 2022).

them "all state, county, and municipal records."[81] That statute defines "public records" to include, among other things, "all documents, papers, letters, […] tapes, photographs, data processing software, or other material […] made *or received* pursuant to law or ordinance or in connection with the transaction of official business by any agency."[82] Florida law considers the email addresses of those who email public agencies to be public records as well.[83] Thus, an airport sponsor in Florida or another state with similarly broad public-records laws should be aware of them and should advise participants in its Task Force—particularly those private-sector participants not likely used to such records disclosure—that their Task Force communications could be subject to public distribution.

A sponsor that considers inviting certain airport tenants to join its Task Force would also be well-advised to take steps to avoid giving, or appearing to give, undue influence or favor to such a tenant at the expense of tenants not on the Task Force. Under Grant Assurance 22, a sponsor commits that it "will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities[.]"[84] The FAA has read the "unjust discrimination" prong of Grant Assurance 22 to preclude a sponsor from showing favor to one aeronautical user of the airport over another "similarly situated" user.[85] In addition, the FAA has emphasized that a sponsor must include minority-owned and other Airport Concession Disadvantaged Business Enterprises (ACDBEs or, in this digest, "Disadvantaged Businesses") in discussions regarding rent relief and other assistance, and must prioritize relief to minority-owned businesses under certain federal COVID-19 relief programs.[86]

A sponsor risks inviting the ire of those airport tenants who compete with Task Force members if the sponsor allows such members, such as particular airlines, to coordinate closely with the sponsor on emergency protocols that could disadvantage tenants who do not participate in the Task Force. Likewise, by inviting only major airport tenants to participate in the Task Force, the sponsor might run afoul of regulations and federal or state grant requirements concerning Disadvantaged Businesses, including nonaeronautical Disadvantaged Business tenants.[87] Thus, sponsors may consider inviting all air carriers and tenants at its airport to participate in the Task Force or, at least, to elect representative tenants to participate. Alternatively, the sponsor could make its Task Force proceedings as open and transparent as prudence dictates so that no aeronautical tenant believes it has not had the opportunity to provide input. Furthermore, sponsors are encouraged to advise their aeronautical tenants of Task Force decisions on a timely basis and to consider whether a particular emergency decision might benefit a Task Force member to the detriment of that member's competitor or another airport tenant.

Finally, a sponsor could run afoul of its Grant Assurance obligations if it delegates the Task Force the authority to make binding decisions on the sponsor's behalf, rather than being limited to recommendations or serving as a consultative body. Grant Assurance 5, *Preserving Rights and Powers*, requires a sponsor to commit that it "will not take or permit any action which would operate to deprive it of any of its rights and powers necessary" to uphold the Grant Assurances.[88] Even if the Task Force does not actually take actions that are facially in violation of Grant Assurances, e.g., discriminate against certain aeronautical operators or grant exclusive rights to some, the sponsor might find itself in breach of Grant Assurance 5 if it gives the Task Force the *authority* to make decisions that could even potentially give rise to Grant Assurance violations. Thus, sponsors should ensure that, even as they consult with, and consider the perspectives of, the Task Force, they retain ultimate decision-making authority regarding Task Force recommendations and do not delegate to the Task Force the ability to bind the sponsor.

B. Emergency Procurement

As a public health emergency unfolds, airport sponsors may race—and struggle—to secure personal protective equipment and other supplies to protect travelers and airport workers, conduct health screenings, or otherwise respond to the emergency. In addition to the logistical challenges a sponsor may face in obtaining and storing needed equipment quickly, public-sector sponsors may face the added challenge of conforming with federal, state, and local procurement policies that may not clearly be compatible with emergency situations. This section considers procurement requirements that may apply to sponsors as they obtain goods and services to prepare for or respond to a public health emergency.

During the first several months of the COVID-19 pandemic, the United States suffered severe and persistent shortages of protective equipment.[89] State and local governments were not immune to those shortages, with state officials complaining that global shortages and insufficient federal coordination had "pitted states against one another and other purchasers—including the federal government" in efforts to obtain protec-

[81] § 119.01(1), Fla. Stat.

[82] § 119.011(12), Fla. Stat. (emphasis added).

[83] § 668.6076, Fla. Stat.

[84] FAA, Airport Improvement Program Grant Assurances for Airport Sponsors 10 (updated May 2022) (hereinafter "Grant Assurances").

[85] *See, e.g.*, Compliance Manual at 9-3 (advising that sponsor align airport rates for "similarly situated" tenants to avoid claims of unjust discrimination).

[86] FAA, Airport Coronavirus Response Grant Program Frequently Asked Questions 22 (2021), https://www.faa.gov/sites/faa.gov/files/2022-08/ACRGP-FAQs-20211124.pdf.

[87] *See id.* at 25 (providing that sponsor "should conduct one-on-one consultation with ACDBEs" regarding financial relief programs using funds from the federal Coronavirus Response and Relief Supplemental Appropriation Act).

[88] Grant Assurances at 5.

[89] Michael H. Cecire et al., Cong. Rsch. Serv., R46628, COVID-19 and Domestic PPE Production and Distribution: Issues and Policy Options 1, 11 (2020).

tive equipment.[90] Even the federal government found itself at the mercy of protective-equipment vendors charging exorbitant prices: Shortly after the President declared the pandemic a national emergency, the federal government, struggling to obtain N95 respirator masks, paid nearly eight times for each mask what it would have paid two months prior.[91]

That scramble for protective equipment highlights both the advantages of maintaining an adequate reserve of protective equipment and other hygiene supplies and the risk that, during a public health emergency, airport sponsors may have to rush to obtain needed supplies. That experience should also remind sponsors that, given the potential need to procure supplies quickly during a public health emergency, sponsors should be aware of the procurement laws and regulations that apply to them.

When conducting procurement, federal agencies are subject to the Federal Acquisition Regulation (Acquisition Regulation), a 53-part regulation jointly issued by the federal General Services Administration, the U.S. Department of Defense, and NASA.[92] Among the Acquisition Regulation's provisions is Part 52, which includes a series of often-detailed and complex clauses that the Acquisition Regulation directs federal procurement officers to include in a wide range of procurement contracts.[93] While the Acquisition Regulation governs federal agencies, an airport sponsor or other non-federal entity may be subject to the Acquisition Regulation's mandatory contract clauses if such entity becomes a federal contractor, such as by contracting with the FAA, TSA, or CBP to provide certain services to those agencies.[94] Importantly, the Acquisition Regulation also requires federal contractors, subject to its provisions, to follow certain procedures when subcontracting, and to include various clauses in their own subcontracts issued pursuant to a federal contract.[95] However, the Acquisition Regulation does, per that regulation's issuing agencies, include several "flexibilities" to "expedite acquisitions of supplies and services during emergency situations."[96] Acquisition Regulation Part 18 specifies those flexibilities, some of which the federal government may only invoke in the event of a declared emergency.[97] For example, as Part 18 notes, Acquisition Regulation § 6.302-2 waives certain competitive-bidding requirements in the event of "unusual and compelling urgency."[98] Other sections of the Acquisition Regulation allow for acquisition through oral requests for proposal or from vendors not then registered with the federal government's contracting system, in emergency situations.[99]

In the event that an airport sponsor is a federal contractor and must respond to a public health emergency, the sponsor would be well-advised to determine whether any of its federal contracts limit its procurement authority in its role as a federal contractor. If so, the sponsor, in coordination with its federal contracting point of contact, might assess whether any of the Acquisition Regulation's emergency exemptions reduce the sponsor's procedural obligations for conducting procurement under its relevant federal contract(s).

Even sponsors that are not federal contractors may find themselves limited by the terms of federal grants or emergency funding that they receive to respond to a public health emergency. For example, the Airport Improvement Program (AIP), the primary FAA grant program for sponsors, includes certain procurement-related conditions, including requirements to purchase U.S.-made goods and to prioritize small, minority-owned, and women-owned business applicants for contracts.[100] Generally, a sponsor receiving a grant under that program would need to adhere to such requirements, at least unless the FAA waives such obligations.[101] While it would be unusual for public health emergency measures to be eligible for AIP funding, it is not impossible, and sponsors should determine whether AIP funding requirements apply to their response measures.[102]

Federal emergency grant programs might impose other procurement-related requirements. In response to the COVID-19 pandemic, the FAA administered billions of dollars in congressionally appropriated grants to sponsors.[103] Through the

[90] Memorandum from Bill McBride, Exec. Dir., Nat'l Governors Ass'n, to Governors' Offices Titled Governor Actions to Address PPE and Ventilator Shortages (Apr. 13, 2020), https://www.nga.org/wp-content/uploads/2020/04/NGA-Medical-Equipment-Memo.pdf.

[91] Isaac Stanley-Becker et al., *In Coronavirus Scramble for N95 Masks, Trump Administration Pays Premium to Third-Party Vendors*, Wash. Post (Apr. 15, 2020), https://www.washingtonpost.com/national/coronavirus-trump-masks-contracts-prices/2020/04/15/9c186276-7f20-11ea-8de7-9fdff6d5d83e_story.html.

[92] 48 C.F.R. Chapter 1.

[93] Fed. Acquisition Reg. Part 52, *Solicitation Provisions and Contract Clauses*, U.S. Gen. Servs. Admin. (effective Jan. 30, 2022), https://www.acquisition.gov/far/part-52#FAR_Subpart_52_1.

[94] *See* Fed. Acquisition Reg. § 37.000 ("This part applies to all contracts and orders for services regardless of the contract type or kind of service being acquired.").

[95] Fed. Acquisition Reg. §§ 44.204 (requiring inclusion of Acquisition Regulation subcontracting provision in various federal contracts), 44.403 (same), 52.244-2 (specifying subcontracting procedures), 52.244-6 (specifying clauses that contractors must insert into subcontracts for commercial products or services).

[96] Cecire, *supra* note 89, at 54, *quoting Federal Acquisition Regulation; FAR Case 2005-038, Emergency Acquisitions*, 72 Fed. Reg. 46,342 (Aug. 17, 2007).

[97] *Id.*

[98] *Id.*

[99] *Id.* at 54–55.

[100] *See AIP Buy American Preference Requirements*, FAA, https://www.faa.gov/airports/aip/buy_american (last updated Mar. 29, 2022); *Procurement and Contracting Under AIP*, FAA, https://www.faa.gov/airports/aip/procurement (last updated Aug. 25, 2021).

[101] *See AIP Buy American Preference Requirements*, *supra* note 100; *Procurement and Contracting Under AIP*, *supra* note 100.

[102] Generally, AIP funding is available only for certain designated capital projects; operational measures are not eligible. *Overview: What Is AIP & What Is Eligible?*, FAA, https://www.faa.gov/airports/aip/overview (last updated Aug. 2, 2022); As airport sponsors discovered during the COVID-19 pandemic, however, other grant programs with broader eligibility may be created and those programs may borrow from AIP procedures and requirements.

[103] FAA, Airport Coronavirus Response Grant Program Frequently Asked Questions, *supra* note 86, at 1.

Coronavirus Response Grant Program, the FAA authorized sponsors to seek federal reimbursement for certain "operational expenses," which, the FAA stated, specifically included protective equipment and cleaning supplies.[104] Such grant programs were subject to certain spending restrictions. For example, sponsors were prohibited from investing those grant funds or depositing them into their general reserve accounts.[105] While the terms of any future grant or relief program would likely vary from the specific provisions of the COVID-19 response grants, the COVID-19 response grants illustrate how grant funding might limit a sponsor's procurement flexibility during a public health emergency.

Regardless of specific procurement policies, sponsors are subject to FAA revenue use restrictions, as embodied in the FAA's Revenue Use Policy[106] and reflected in the agency's internal Airport Compliance Manual (Compliance Manual) and other FAA guidance. The Revenue Use Policy generally prohibits sponsors from using airport revenues to make payments that exceed the "fair and reasonable value of those services and facilities provided to the airport."[107] As the Revenue Use Policy states, "The FAA generally considers the cost of providing the services or facilities to the airport as a reliable indicator of value."[108] Such requirement gives sponsors a further reason to consider whether a potential purchase of protective equipment at a given price is reasonable under the circumstances.

In addition to any applicable federal requirements, public-sector airport sponsors will want to keep in mind state procurement laws and regulations and any waivers or exemptions to such policies that may apply during a public health emergency. Virtually every state has laws, regulations, or other policies pertaining to procurement, and most have state procurement offices.[109] At least some states regulate municipalities' procurement practices as well as those of state agencies.[110] Certain states also have laws or regulations addressing emergency procurement specifically. For example, under Massachusetts's Uniform Procurement Act, a procurement officer "may make an emergency procurement" without following a certain requirement of that statute if "the time required to comply with [that] requirement … would endanger the health or safety of the people or their property[.]"[111] Meanwhile, sponsors may be subject to municipal or county procurement requirements, which may, in turn, contain emergency exemptions.[112] Sponsors should take care to understand the emergency provisions of any state or local procurement laws that may apply to them—and, ideally, identify and analyze such provisions before a public health emergency, or any other emergency, arises.

It is also advisable for a sponsor to assess whether its own procurement authority and policies enable it to respond quickly to a public health emergency. In particular, a sponsor may wish to ensure that its own on-call or open vendor contracts allow for emergency procurement. For example, a sponsor may have a contract with a custodial service to clean airport facilities and stock soap, hand towels, and toilet paper in airport restrooms. During a public health emergency, the sponsor may consider it prudent to increase cleaning frequency beyond that contractor's capacity or to replace the contractor with one better equipped to address a disease outbreak. If the sponsor's agreement with the original contractor is exclusive, or if the sponsor's normal procurement protocols might enable the original contractor to stall or block the switch to another provider through a protest or challenge, the sponsor should proactively consider adding language to all of its applicable agreements that clearly and expressly permits the sponsor to enter into contracts with other providers or to terminate the original contractor as the sponsor deems necessary during a public health emergency. Of course, sponsors would likely be better served by including such emergency language in their contracts prior to an emergency, rather than trying to renegotiate such contracts in the midst of a crisis. In any event, sponsors would be well-advised to consult counsel to ensure that any such provisions are enforceable and comport with state and local (and, if applicable, federal) procurement policies.

C. Airport Sponsors' Authority to Impose Public Health Measures

From the start of a public health emergency, airport sponsors may consider it appropriate, prudent, or even necessary to impose various requirements and other measures to protect public health at their airports. Sponsors may consider vaccination, mask, physical distancing, or protective-equipment requirements to reduce disease transmission, screening or testing requirements to identify infectious passengers, and quarantine or isolation protocols for those suspected of having the disease.

In many respects, during the COVID-19 pandemic, sponsors' efforts to implement public health protocols within their facilities were some of the most controversial (and most difficult to implement) of all responses to that particular public health emergency. Efforts to control the COVID-19 pandemic in the

[104] *Id.* at 6.

[105] *Id.* at 7.

[106] *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696 (Feb. 16, 1999) (hereinafter "Revenue Use Policy").

[107] *Id.* at 7720.

[108] *Id.*

[109] Nat'l Ass'n of State Procurement Offs., 2018 Survey of State Procurement Practices 1, 2, 5 (2018), https://www.naspo.org/wp-content/uploads/2019/12/2018-FINAL-Survey-Report_6-14-18.pdf.

[110] *E.g.*, Mass. Gen. L. ch. 30B, §§ 1(a), 2 (applying state procurement law to "governmental bodies," including "a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county"); Scott Houston, *Municipal Procurement At-a-Glance*, Tex. Mun. League (Jan. 2017), https://www.tml.org/DocumentCenter/View/238/Bidding---Procedures---Purchasing-Cheat-Sheet---2017-01-PDF (noting municipal-procurement requirements of Texas Local Government Code).

[111] Mass. Gen. L. ch. 30B, § 8.

[112] *See, e.g.*, Cty. of Ventura Gen. Servs. Agency, Emergency Purchasing Manual (2019), https://cdn.ventura.org/wp-content/uploads/2020/07/EMERGENCY-PROCUREMENT-MANUAL-November2019.pdf.

United States demonstrated the intense controversy that various public health measures may yield. Disputes over, and backlash against, public health requirements were particularly common at airports and on airplanes, with anti-pandemic measures driving a burst of unruly-passenger incidents.[113] The legal uncertainty over whether sponsors had the authority to implement particular measures only added to the controversy and public confusion.

Public health orders in response to COVID-19 yielded a bevy of lawsuits and, as a result, substantial case law regarding the powers of government officials, at different levels and in different branches of government, to impose health orders to mitigate a public health emergency. Several such rulings specifically addressed mask and other mandates in the airport context. (These lawsuits are specifically discussed later in this section.)

This section of the digest concerns the authority of public airport sponsors and other governmental agencies to impose and enforce various health-related requirements at airports in response to a public health emergency. First, this section provides a summary of reported federal decisions regarding COVID-19 restrictions that concern airports. Then, the section discusses general principles of federal constitutional and statutory law with respect to public health mandates. Finally, the section considers each of the various public health requirements and other measures a sponsor or government might impose at an airport in response to a public health emergency and certain legal implications of each such measure. As with the other sections of this digest, the analysis in this section focuses on federal policy; it does not analyze the myriad state laws and policies that may influence an airport sponsor's ability to impose or enforce various public health requirements. It is critical that sponsors recognize that the specific state and local authorizations are absolutely pivotal in understanding the scope of—and limitations on—sponsors' legal authority; sponsors are advised to consult those authorizations with great precision.

1. Summary of Federal Cases Concerning COVID-19 Restrictions at Airports

Since the beginning of the COVID-19 pandemic, federal courts have adjudicated myriad challenges to the authority of federal, state, and local government entities and officials to impose requirements concerning public health. While earlier public health emergencies generated some limited litigation, none of those emergencies generated anywhere near the level of legal activity that the COVID-19 pandemic did. Both the number of cases and the novelty of legal questions that the courts were forced to address make court decisions concerning responses to the COVID-19 pandemic especially important for lawyers to consider. (Some commentators have suggested that the proliferation of litigation over responses to COVID-19 was not the result of the legal complexity of the pandemic but instead an artifact of the political climate in the United States during that time. Regardless of whether such extrinsic factors were at play, courts were called upon to rule on novel questions of law that established precedents that will have *stare decisis* implications for future public health emergencies.)

Tables 1 and 2 present brief descriptions of certain key federal cases, concerning COVID-related health requirements, that sponsors may find particularly relevant. The following is not intended to be an exhaustive catalog of all the federal cases addressing COVID-related health policies; rather, the digest's authors have selected those cases that seem most pertinent to airport sponsors. Importantly, most of these cases do not concern a *sponsor's* health mandates, but rather policies issued by federal agencies, airlines, and other parties that nonetheless involve or affect an airport or its sponsor.

As the case summaries reflect, federal courts generally recognized individual states' broad latitude to impose their own health-related requirements during the COVID-19 pandemic, including quarantine requirements, mask mandates, business closures, and other orders and restrictions, subject to First Amendment strictures. Federal courts have also recognized private corporations' broad, though not unlimited, powers to impose health-related requirements on their own employees. However, federal courts have proved less receptive to various federal attempts to address the COVID-19 pandemic: While the Supreme Court and D.C. Circuit have, respectively, upheld the federal vaccination mandate for healthcare workers and the TSA mask mandate for air and mass transit passengers, the Supreme Court and lower federal courts have struck down other federal mandates to combat the pandemic on the basis that the relevant agencies lacked the statutory authority to impose them. The latter point is critical: virtually all of the cases that have stricken pandemic-related measures have done so on narrow questions of the specific agency's authority or procedural process for implementing such measures. Few, if any, courts have addressed the wisdom of pandemic-related restrictions.

2. Sponsors' Authority to Impose Health Measures Generally

Because of their unique role in the national air transportation system, their importance in facilitating interstate commerce, and pervasive regulation of their operations, airport sponsors are not like other units of local or state government. As a result, the authority of an airport sponsor to impose health requirements on travelers and other airport users implicates a wide range of constitutional, statutory, and regulatory questions that do not normally apply to state and local public health regulation. Under the Constitution, states and local governmental bodies acting under their authority have broad latitude to impose health requirements within their respective jurisdictions. However, federal law limits states' authority to regulate the aviation industry, including, in many cases, airlines' prerogative to decide who can board their aircraft. Furthermore, the power of an airport sponsor to impose health-related mandates, even

[113] Monica Buchanan Pitrelli, *'Air Rage' Is Complicating Travel in North America and Europe–But Not So Much in Asia*, CNBC (Feb. 23, 2022), https://www.cnbc.com/2022/02/23/air-rage-during-the-pandemic-where-it-is-and-isnt-happening-.html (citing approximately 4,000–6,000 percent spike in unruly-passenger reports during pandemic, with 72 percent due to mask disputes).

Table 1. Selected Cases That Address Health Requirements in Airport Context

Case	Summary of Decision
Topic: Vaccine Mandate	
Sambrano v. United Airlines, Inc., No. 21-11159, 2022 U.S. App. LEXIS 4347 (5th Cir. Feb. 17, 2022)	Airline's alleged efforts to coerce plaintiff employees to get vaccinated against COVID-19 despite plaintiffs' religious objections likely irreparably harmed plaintiffs
Barrington v. United Airlines, Inc., Civil Action No. 21-cv-2602-RMR-STV, 2021 U.S. Dist. LEXIS 201633 (D. Colo. Oct. 14, 2021)	Declining to preliminarily enjoin airline's furlough of employee who refused COVID-19 vaccination on religious grounds and holding that airline had no duty under Civil Rights Act to create new position for employee, that employee's proposed "reasonable accommodation" would likely unduly burden airline, and that public interest favored vaccination mandate
Topic: Mask Mandate	
Corbett v. Transp. Sec. Admin., 19 F.4th 478 (D.C. Cir. 2021)	Upholding TSA's statutory authority to mandate mask-wearing in airports, on commercial aircraft, and in other public conveyances in light of COVID-19s threat to transportation
Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-cv-1693-KKM-AEP, 2022 U.S. Dist. LEXIS 71206 (M.D. Fla. Apr. 18, 2022)	Striking down CDC mask mandate for public conveyances on grounds that CDC exceeded its statutory authority and failed to follow Administrative Procedures Act when imposing mandate
Bezzina v. United Airlines, Inc., No. CV 21-05102-JFW(JPRx), 2022 U.S. Dist. LEXIS 36243 (C.D. Cal. Feb. 24, 2022)	Upholding airline's authority to require employee to wear face mask despite employee's claim that his disability prevented him from wearing one
Jeffrey-Steven of the House of Jarrett v. Ige, No. 21-00272 LEK-RT, 2021 U.S. Dist. LEXIS 219425 (D. Haw. Nov. 12, 2021)	Upholding state's mask mandate under *Jacobson*
Topic: Authority to Quarantine	
Carmichael v. Ige, 470 F. Supp. 3d 1133 (D. Haw. 2020)	Preliminarily upholding state's quarantine order under *Jacobson* and finding lack of evidence that order infringed constitutional right to travel, substantive or procedural due process, or equal protection
Bannister v. Ige, No. 20-00305 JAO-RT, 2020 U.S. Dist. LEXIS 129127 (D. Haw. July 22, 2020)	Denying preliminary injunction against governor's pandemic-related quarantine order and holding that such order likely satisfied U.S. Constitution whether assessed under rational-basis test, strict scrutiny, or "highly deferential" *Jacobson* standard
Topic: State Health Inspection	
Weisshaus v. Cuomo, 544 F. Supp. 3d 300 (E.D.N.Y. 2021)	Declining to preliminarily enjoin state from requiring arriving international travelers to fill out COVID-related health form, reasoning, *inter alia*, that form served public interest, did not deter interstate travel, was rationally related to state's legitimate interest in preserving public health and did not infringe reasonable expectation of privacy, which is "especially diminished" in the airport context
Weisshaus v. Cuomo, 512 F. Supp. 3d 379 (E.D.N.Y. 2021)	Congress has not preempted state's power to conduct public health inspections at state's borders
Topic: State Authority to Regulate Aviation	
Seaplane Adventures, LLC v. Cty. of Marin, No. C 20-06222 WHA, 2021 U.S. Dist. LEXIS 225101 (N.D. Cal. Nov. 22, 2021)	County's pandemic-related suspension of leisure charter flights was preempted by federal law, but its suspension of recreational sightseeing flights was not because sightseeing is not "transportation" within the meaning of the applicable federal preemption provision

Table 2. Selected Other Cases Potentially Relevant to Airport Sponsors

Case	Summary of Decision
Topic: Vaccine Mandates	
Nat'l Fed'n of Indep. Bus. v. U.S. Dep't of Labor, OSHA, 142 S. Ct. 661 (2022)	OSHA lacked statutory authority to mandate that most U.S. workers get vaccinated or tested for COVID-19, which was not an *occupational* hazard within its jurisdiction
Biden v. Missouri, 142 S. Ct. 647 (2022)	Secretary of Health and Human Services had statutory authority to condition Medicare and Medicaid payments on medical facility's confirmation that staff were vaccinated against COVID-19, with medical and religious exceptions
Georgia v. Biden, No. 1:21-cv-163, 2021 U.S. Dist. LEXIS 234032 (S.D. Ga. Dec. 7, 2021), *aff'd in part and vacated in part*, 2022 U.S. App. LEXIS 24119 (11th Cir. Aug. 26, 2022)	District court preliminarily enjoining COVID-19 vaccination mandate for federal contractors on grounds that President lacked authority under Federal Property and Administrative Services Act to impose it via executive order; Eleventh Circuit affirming injunction with respect to plaintiffs but vacating injunction with respect to nonparties
Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022)	Declining to stay district court's injunction against vaccination mandate for federal contractors, primarily on the ground that mandate lacked statutory basis
Feds for Med. Freedom v. Biden, 30 F.4th 503 (5th Cir.), *vacated pending en banc review,* 37 F.4th 1093 (5th Cir. 2022)	Fifth Circuit panel decision dismissing challenge to federal employee vaccination mandate for lack of jurisdiction vacated pending en banc review
BST Holdings, L.L.C. v. OSHA, 17 F.4th 604 (5th Cir. 2021)	OSHA vaccination mandate exceeded OSHA's statutory authority and likely exceeded the federal government's constitutional authority
Kentucky v. Biden, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021)	Preliminarily enjoining executive order mandating COVID-19 vaccination for federal contractors on grounds that order likely exceeded President's statutory authority and infringed on states' Tenth Amendment rights
Topic: Authority to Restrict Gatherings	
Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020)	Applying strict scrutiny to, and enjoining, executive order that limited attendance at religious gatherings despite allowing "essential" businesses, including "all transportation facilities," to operate without capacity limits
S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020)	Upholding California governor's order to limit capacity of in-person worship services and some, but not all, secular activities during COVID-19 pandemic
League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125 (6th Cir. 2020)	Upholding governor's order closing fitness centers to mitigate COVID-19 spread
Mich. Rest. & Lodging Ass'n v. Gordon, 504 F. Supp. 3d 717 (W.D. Mich. 2020)	Declining to preliminarily enjoin order limiting restaurant and bar service and, in relevant part, distinguishing plaintiff establishments from airport restaurants because the latter are "much more transitional than a sit-down, dine-in restaurant"
Topic: Quarantine and Travel Restrictions	
Jones v. Cuomo, 542 F. Supp. 3d 207, 211 (S.D.N.Y. 2021)	Upholding state's quarantine requirement for travelers from certain states under both *Jacobson* and rational-basis standards and dismissing claims that requirement unconstitutionally discriminated against other states' residents or denied equal protection
Roberts v. Neace, 457 F. Supp. 3d 595 (E.D. Ky. 2020)	Preliminarily enjoining state's ban on most out-of-state travel by state's residents, implicitly applying strict scrutiny and holding that ban infringed upon right to interstate travel without being narrowly tailored to serve compelling state interest
Topic: Compensation for Health Screening	
Boone v. Amazon.com Servs., LLC, No. 1:21-cv-00241-DAD-BAM, 2022 U.S. Dist. LEXIS 44138 (E.D. Cal. Mar. 11, 2022)	Holding that plaintiff employees had adequately alleged that time spent undergoing employer's mandatory COVID-19 screening constituted "hours worked" for purposes of state wage laws and that such time was not de minimis under federal or state law, and therefore declining to dismiss complaint for unpaid wages

within its own airport, turns largely on the sponsor's authority under state or local law. Finally, even if a sponsor has statutory authority to impose health requirements, FAA regulation may limit the sponsor's ability to use airport funds to do so. Because of the unique legal standing of airport sponsors, the following discussion focuses on sponsors' powers, in contrast to the authority more generally available to government agencies.

a. Constitutional Authority to Regulate Public Health

(1) State authority. The Constitution grants state governments, and localities acting under state authority, broad power to impose public health mandates and requirements. Modern courts regularly cite *Jacobson v. Massachusetts*,[114] a supercentenarian Supreme Court decision, for that proposition. In *Jacobson*, the Court upheld the authority of local health officials in Massachusetts to mandate public vaccination against smallpox.[115] A Massachusetts statute granted local boards of health the power to require that their residents be vaccinated "when necessary for public health or safety."[116] Rejecting a constitutional challenge to the statute, the Court upheld the law, and the authority of local health officials to issue vaccination mandates thereunder, as constitutionally valid exercises of state power.[117]

First, the Court observed that it had previously "distinctly recognized the authority of a State to enact quarantine laws and health laws of every description."[118] "According to settled legal principles," the Court continued, "the police power of a State must be held to embrace, at least, such reasonable" laws passed by the legislature to "protect the public health and the public safety."[119] In addition, the Court held, "It is equally true that the State may invest local bodies [...] with authority in some appropriate way to safeguard the public health and the public safety."[120]

Furthermore, the *Jacobson* Court held that the Massachusetts statute did not infringe upon any constitutional right.[121] As the Court explained, it could only strike down a state public health law that (a) had "no real or substantial relation to" public health or (b) was, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]"[122] In light of the local prevalence of smallpox and the scientific support for vaccination as a means to combat it, the Court deemed the statute a reasonable public health measure.[123] The Court also held that the vaccination requirement was not "in palpable conflict with the Constitution."[124] Given the public right "to protect itself against an epidemic of disease"[125] and the state's reasonable conclusion that smallpox vaccination was necessary to achieve such protection,[126] the Court concluded that the statute did not infringe upon the Constitution.[127]

At its core, *Jacobson* stands for the proposition that state governments, and local governmental bodies acting under their authority, have extensive, though not unlimited, discretion under the Constitution to impose health orders, including vaccination mandates, in response to public health emergencies. Despite its age, *Jacobson* remains good law, and federal courts have relied on it to adjudicate challenges to state public health mandates during the COVID-19 pandemic.[128] That is not to say that *Jacobson* is immune to reconsideration. According to one U.S. district court, the Supreme Court has recently "call[ed] into question" *Jacobson*'s "continued applicability" by evaluating a public health order under the strict scrutiny standard rather than applying, or addressing, *Jacobson*.[129] Similarly, the Second Circuit has called courts' reliance on *Jacobson* "as support for the notion that courts should defer to the executive in the face of the COVID-19 pandemic" "misplaced," in part because *Jacobson* predates the "tiers of scrutiny" standard that courts now regularly apply to constitutional challenges.[130] Nonetheless, other federal courts have recently reiterated that *Jacobson* remains "controlling precedent," still "directly controls," or has not been overruled.[131]

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[114] 197 U.S. 11 (1905).

[115] *Id.* at 24, 39.

[116] Wendy K. Mariner et al., Jacobson v. Massachusetts: *It's Not Your Great-Great-Grandfather's Public Health Law*, 95 Am. J. Pub. Health 581, 582 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449224/pdf/0950581.pdf.

[117] *Jacobson*, 197 U.S. at 25, 38.

[118] *Id.* at 25 (internal quotation marks omitted).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 25–26, 31.

[122] *Id.* at 31.

[123] *Id.* at 27–28, 30.

[124] *Id.* at 31.

[125] *Id.* at 27.

[126] *Id.* at 30–31 (noting that Massachusetts legislature had acted on the theory that vaccination is at least effective against smallpox); *id.* at 35 (observing that vaccination was widely regarded as an effective means of controlling smallpox).

[127] *Id.* at 38.

[128] As the U.S. Court of Appeals for the Second Circuit observed last year, "*Jacobson* remains binding precedent." We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 293 n.35 (2d Cir. Nov. 4, 2021). *Accord* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 127 (6th Cir. 2020) (observing that *Jacobson* "has been reaffirmed just this year by a chorus of judicial voices, including our own"); *In re* Rutledge, 956 F.3d 1018, 1028 (8th Cir. 2020) ("the district court's failure to apply the *Jacobson* framework produced a patently erroneous result"); Underwood v. City of Starkville, No. 1:20-CV-00085-GHD-DAS, 2021 U.S. Dist. LEXIS 90739, at *7, 17 (N.D. Miss. May 11, 2021) (calling *Jacobson* "[t]he cornerstone case" regarding a state's power to issue restrictions during a public health emergency); Altman v. Cty. of Santa Clara, 464 F. Supp. 3d 1106, 1118 (N.D. Cal. 2020) ("Although Plaintiffs attempt to dismiss *Jacobson* as 'arcane constitutional jurisprudence,' … the case remains alive and well—including during the present [COVID-19] pandemic."); Carmichael v. Ige, 470 F. Supp. 3d 1133, 1142 (D. Haw. 2020) ("Courts presented with emergency challenges to governor-issued orders temporarily restricting activities to curb the spread of COVID-19 have consistently applied *Jacobson v. Massachusetts* to evaluate those challenges.").

[129] Jones v. Cuomo, 542 F. Supp. 3d 207, 217 (S.D.N.Y. 2021).

[130] *Id.* at 218, *quoting* Agudath Israel v. Cuomo, 983 F.3d 620 (2d Cir. 2020).

[131] *Id.* (citing federal cases).

(2) Federal authority and questions of federalism. While *Jacobson* and its progeny recognize the broad authority of *states* to impose public health requirements, federal courts have recently indicated that the *federal* government's authority to impose such requirements is far more constrained. Last year, the U.S. Occupational Safety and Health Administration (OSHA) issued an "emergency temporary standard" (Standard)—essentially, an emergency regulation—that would require about two-thirds of American workers to either be vaccinated against COVID-19 or undergo weekly testing for the disease and wear a mask at work.[132] In response, various petitioners sought to enjoin the Standard and the Fifth Circuit granted a preliminary stay pending further review.[133] While the court held that OSHA had exceeded its statutory authority by issuing the Standard, the court went further, opining that the Standard "likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power."[134] As the court held, "The Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power."[135] "And to mandate that a person receive a vaccine or undergo testing," the court stated, "falls squarely within the States' police power."[136] (Quoting the Supreme Court, the Fifth Circuit described the "police power" as "broad authority to enact legislation for the public good" and observed that "[t]he Federal Government[…] has no such authority."[137]) Thus, the Fifth Circuit concluded, "[T]he [Standard] would far exceed current constitutional authority."[138]

A federal district court in Kentucky, within the Sixth Circuit, has since endorsed the Fifth Circuit's narrow view of federal authority over vaccination. Enjoining a federal vaccination mandate, the district court observed that "[t]he Fifth Circuit recently addressed federalism concerns in [that] similar governmentally imposed vaccine mandate context[.]"[139] Deeming the Fifth Circuit's holding "persuasive," the district court concluded, "[T]here is a serious concern that [the federal] Defendants have stepped into an area traditionally reserved to the States, and this provides an additional reason to temporarily enjoin the vaccine mandate."[140]

The Fifth Circuit's (and Kentucky district court's) view that the Constitution likely prohibits the federal government from imposing a vaccination mandate is more restrictive than the Supreme Court's position. When the Supreme Court, by a 5–4 vote, upheld the federal government's authority to require healthcare workers to be vaccinated against COVID-19 as a condition of receiving continued Medicare and Medicaid funding, even the four conservative dissenters suggested that the federal government could impose a vaccination requirement so long as Congress clearly authorized it.[141] As Justice Thomas wrote for the dissenters,

> [W]e expect Congress to use exceedingly clear language if it wishes to significantly alter the balance between state and federal power. […] Vaccine mandates also fall squarely within a State's police power […] and, until now, only rarely have been a tool of the Federal Government. If Congress had wanted to grant [a federal agency] authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly.[142]

While that dissent did not explicitly state that such congressional action would resolve any constitutional infirmities in such a federal mandate, the passage suggests that Congress does have the power to "alter the state-federal balance" with respect to states' otherwise plenary authority over vaccination mandates (and, presumably, other health-related mandates).

The Sixth Circuit has adopted a view of federalism that seems to accord with the Supreme Court dissenters' position but arguably moves closer to the Fifth Circuit's position that even Congress lacks the power to mandate vaccination. Denying the federal government's appeal of the Kentucky district court's aforementioned injunction, the Sixth Circuit looked to "the federalism canon," which it described, quoting the Supreme Court, as "the notion that Congress must use 'exceedingly clear language if it wishes to significantly alter the balance between federal and state power.'"[143] However, the Sixth Circuit focused little on that canon of interpretation and instead emphasized its view that the federal government, through its vaccination mandate, had impinged upon the rights of the states. As the court reasoned, "The Supreme Court has recognized [the] principle time after time" that "[t]he States, not the Federal Government, are the traditional source of authority over safety, health, and public welfare."[144] What the federal government "seeks to do," the court opined, "is to transfer this traditional prerogative from the states to the federal government[.]"[145] Thus, the court held, states "may validly complain when the federal government seeks to usurp those roles by doing something that it has no traditional prerogative to do—deploy [a procurement statute] to mandate an irreversible medical procedure."[146]

The Sixth Circuit opinion does not overtly deny the federal government's power to assume authority over "safety, health, and public welfare."[147] Nonetheless, the court's rhetoric—condemning the federal government's effort to "usurp" the states' role "by doing something that it has no traditional pre-

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[132] BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 609, 619 (5th Cir. 2021).

[133] *Id.* at 619.

[134] *Id.* at 617.

[135] *Id.*

[136] *Id.*

[137] *Id.*, *quoting* Bond v. United States, 572 U.S. 844, 854 (2014).

[138] *Id.*

[139] Kentucky v. Biden, 2021 U.S. Dist. LEXIS 228316, at *30 (E.D. Ky. Nov. 30, 2021).

[140] *Id.* at *31.

[141] Biden v. Missouri, 142 S. Ct. 647, 658 (2022) (Thomas, J., dissenting).

[142] *Id.* (internal citations and quotation marks omitted).

[143] Kentucky v. Biden, 23 F.4th 585, 609 (6th Cir. 2022), *quoting* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021).

[144] *Id.* at 609 (internal quotation marks omitted).

[145] *Id.*

[146] *Id.* at 610.

[147] *See id.* at 609.

rogative to do"[148]—evinces hostility to such federal power that suggests the court would be open to holding that Congress, regardless of the statutory vehicle, cannot transfer the police power over health regulation from the states to the federal government.

Taken together, these decisions call into question the extent of the federal government's constitutional authority to impose vaccination mandates and other public health measures—measures traditionally regarded as within the states' police power. While the Supreme Court has not foreclosed the potential that Congress could authorize federal agencies to exercise such public health power through unambiguous legislation, at least one federal appellate court has indicated that Congress lacks the constitutional authority to do so. Certainly, that question could provide critical if the federal government were to impose a health-related mandate on an airport sponsor, or the sponsor's contractors or airport tenants, during a future public health emergency. But regardless of whether Congress *can* shift that power from the states to the federal government, it is now undisputed that such power resides, by default, with the states. Thus, if a sponsor wishes to enforce a public health requirement at or with respect to its airport, it will at least need to consider whether the applicable state government has either issued such mandate or delegated—or denied—the sponsor the authority to impose it.

b. Federal Statutory Limitations on Sponsors' Authority Over Passengers

The federal Airline Deregulation Act (Deregulation Act) limits the power of airport sponsors to bar potentially ill passengers from aircraft or from traveling through the airport, but the extent to which the Deregulation Act does so has not definitively been established. Enacted in part to standardize regulation of air carriers across the United States,[149] the Deregulation Act provides that, with certain exceptions, a "State, political subdivision of a State, or political authority of at least two states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier" that is subject to federal aviation law.[150]

As the Tenth Circuit has explained, "The Supreme Court has interpreted [that] provision broadly to preempt all 'State enforcement actions having a connection with or reference to airline rates, routes, or services.'"[151] However, the Deregulation Act does make a limited exception (the Proprietors Exception) for airport sponsors, providing, "This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by [a federally certificated] air carrier […] from carrying out its proprietary powers and rights."[152]

In keeping with the Supreme Court's broad reading of the Deregulation Act, federal courts have repeatedly constrained the power of an airport sponsor to limit the operations of an air carrier. When an airport sponsor attempted to place a moratorium on applications to provide scheduled passenger service at its airport, the Tenth Circuit held that the Deregulation Act preempted the moratorium.[153] In that case, *Arapahoe County Public Airport Authority v. FAA* (*Arapahoe*), the circuit court "easily conclude[d]" that the moratorium "relates to both services and routes," observing that the sponsor was effectively "banning scheduled passenger service."[154] The court further held that the moratorium did not fall within the sponsor's Proprietors Exception.[155] The sponsor had attempted to justify the moratorium as a safety measure, pointing out that one Grant Assurance enabled it to "prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."[156] However, the court observed that "local proprietors play an extremely limited role in the regulation of aviation[,]" undermining the notion that sponsors "enjoy carte blanche power" to regulate "so long as they declare their regulatory action necessary for safety or to satisfy aviation needs[.]"[157] Furthermore, the court held that the sponsor had provided a "dearth of evidence" to support its claim that the moratorium was needed to address congestion, safety, or environmental concerns.[158] Thus, even if the Proprietors Exception protects a sponsor's "reasonable or nonarbitrary" safety regulations, the court held that the sponsor had failed to prove that its moratorium was reasonable or nonarbitrary.[159] And, having found that the Proprietors Exception did not apply, the court concluded that the sponsor had "exceeded its legitimate scope of power as a state or local gov-

[148] *Id.* at 610.

[149] The official U.S. House and Senate reports regarding the Deregulation Act each explain that the respective house of Congress intended the act to inhibit regulatory interference from the states. As the House report stated, the House intended to "prevent conflicts and inconsistent regulations" by preempting state regulation, while the Senate report asserted that "a Federal grant of authority […] to engage in interstate transportation […] should give the Federal Government the sole responsibility for regulating that air carrier." John W. Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. Air L. & Com. 747, 755 (1979), *citing* H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16 (1978) *and* S. Rep. No. 631, 95th Cong., 2d Sess. 98 (1978).

[150] 49 U.S.C. § 41713(b)(1).

[151] Arapahoe Cty. Pub. Airport Auth. v. FAA, 242 F.3d 1213, 1221 (10th Cir. 2001), *quoting* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383–84 (1992) (internal quotation marks within *Morales* quotation omitted).

[152] 49 U.S.C. § 41713(b)(3).

[153] *Arapahoe*, 242 F.3d at 1216, 1224.

[154] *Id.* at 1222.

[155] *Id.* at 1223–24.

[156] *Id.* at 1222, *quoting* Grant Assurance 22(i).

[157] *Id.* at 1222–23, *quoting* Am. Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 806 (5th Cir. 2000) (internal citations and quotation marks omitted).

[158] *Id.* at 1223.

[159] *Id.* at 1223–24.

ernment" under both the Deregulation Act and the Constitution's Supremacy Clause.[160]

A federal district court considering a locality's COVID-19 pandemic restrictions took a similarly narrow view of the Proprietors Exception. That case, *Seaplane Adventures, LLC v. County of Marin* (*Seaplane*), concerned Marin County, California's efforts to respond to the pandemic by suspending recreational sightseeing flights and charter flights for leisure travel, but not air transportation for what the court termed "essential activities."[161] The court held that the Deregulation Act preempted Marin's suspension of leisure charter flights but *not* the suspension of sightseeing flights.[162] Citing Ninth Circuit precedent, the court held that the Deregulation Act's references to "price," "route" and "service" were "used by Congress in the public utility sense."[163] "Recreational sightseeing," the court held, "is not a 'public utility'" because such flights "leave from and return to the same spot, so there are no markets to or from which transportation is provided."[164] Therefore, the court determined that the Deregulation Act did not preempt Marin's ban on sightseeing flights.[165]

On the other hand, the court held that the Deregulation Act *did* preempt Marin's order with respect to charter operations. As the court explained, "Unlike the prohibition on sightseeing flights, the health order's ban on recreational charter travel *did* limit the type of routes and services" an air carrier could offer.[166] The Deregulation Act's preemption provision "includes no public health exception," the court held.[167] Thus, the court concluded, "[Marin's] health order stepped too far into the space cordoned off by the Airline Deregulation Act, but only as to the prohibition on charter travel to other destinations."[168]

The court's ruling against Marin indicates that the extent to which federal preemption limits state or local regulation of aeronautical activities turns largely on whether the activity to be regulated is a transportation service by an air carrier or another aeronautical activity.[169] If the former, the court's decision indicates that the Deregulation Act would preempt such state or local regulation.[170] If the latter, the court concluded that express preemption, via the Deregulation Act, would not apply.[171] Separately, the court held that field preemption, another type of preemption in which the federal government so completely regulates a field of law that it leaves no room for state or local regulation, does not preclude "aviation-related restrictions during a public health emergency."[172]

While the Deregulation Act and its case law constrain a sponsor's health-regulatory authority, sponsors are reminded that other federal statutes, especially those related to disability rights, may also directly implicate the permissible scope of health policies. As the federal government's *Runway to Recovery* guidance advised airport sponsors and airlines last year,

> [Public health] [m]easures should reflect the full range of passenger needs, including requirements under the Rehabilitation Act, the Americans with Disabilities Act, and the Air Carrier Access Act. Consistent with these laws, it may be necessary for airports and airlines to modify certain measures to accommodate passengers with a disability while maintaining public health.[173]

While *Runway to Recovery* focuses on the COVID-19 pandemic, it provides guidance that sponsors will likely find helpful if responding to a future public health emergency. Such guidance, issued jointly by DOT and the United States departments of Health and Human Services (HHS) and Homeland Security in late 2020, addresses the allocation of health responsibilities between aviation "stakeholders," recommends certain public health measures that airports and airlines might implement, and discusses challenges concerning international travel, among other content.[174]

Figure 2 provides an overview of the many kinds of airport users whom a sponsor's health measures might affect. The figure is a reminder that a health restriction may implicate a host of laws, regulations, contracts, and even constitutional provisions, some of which may apply to certain classes of airport users but not others. The legal parameters and constraints are a function not only of the specific public health emergency measure but also of the targeted (or even unintentional) population. In evaluating possible measures, it is therefore important for sponsors to consider whom their health policies may affect and whether the targeted population has been appropriately tailored to the sponsor's objectives.

c. Sponsors' Authority to Regulate Health Under State Law

In addition to considerations of federal law, sponsors should be mindful that applicable state laws may limit their authority to impose public health measures in their airports. As *Jacobson*

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[160] *Id.* at 1224, *citing* U.S. Const. art. VI, cl. 2, *and* 49 U.S.C. § 41731(b). (The citation to § 41731(b) appears to be a typographical error, with the final "1" and "3" of the U.S. Code section switched. The Proprietors Exception is in fact codified at § 41713(b)(3), whereas § 41731(b) concerns eligibility for inclusion in the Essential Air Service program.)

[161] Seaplane Adventures, LLC v. Cty. of Marin, No. C 20-06222 WHA, 2021 U.S. Dist. LEXIS 225101, at *1 (N.D. Cal. Nov. 22, 2021).

[162] *Id.* at *5.

[163] *Id.* at *7, *quoting* Air Transp. Ass'n of Am. v. City & Cty. of S.F., 266 F.3d 1064, 1070 (9th Cir. 2001) (internal quotation marks omitted).

[164] *Id.* at *8 (internal quotation marks omitted).

[165] *Id.*

[166] *Id.* at *11.

[167] *Id.*

[168] *Id.* at *11–12.

[169] *Id.* at *7–8.

[170] *Id.* at *11–12.

[171] *Id.* at *5.

[172] *Id.* at *13.

[173] U.S. Dep't of Transp. et al., Runway to Recovery: The United States Framework for Airlines and Airports to Mitigate the Public Health Risks of Coronavirus 7 (2020) (hereinafter "Runway to Recovery"). While Runway to Recovery is not a regulatory document, it does reflect federal government policy at the time of its issuance and is, therefore, highly instructive on how applicable federal agencies will interpret their powers and those of airport sponsors.

[174] *See generally id.*

Figure 2. Overview of airport users potentially affected by airport sponsor's health restrictions.

held, the states have broad constitutional authority to enact public health mandates, and it is the *state* that may delegate such authority to "local bodies."[175] Thus, a sponsor considering whether to implement its own health requirement during a public health emergency would be well-advised to work with counsel to assess the bounds of its authority under state law. Sponsors should be mindful that their legal status may influence their regulatory authority: For instance, a city that sponsors an airport may have more authority under its state's laws to issue public health orders by virtue of its municipal status, whereas an independent airport authority may lack the ability to promulgate or even enforce health policies. In various states, the power to order certain health mandates, such as a quarantine requirement, is vested in a state or local health board or department, while some states assign that authority to the governor or to some other official or governmental entity.[176]

State law may prohibit *any* state or local entity within the jurisdiction from enforcing certain health requirements. For example, in May 2021, Texas Governor Greg Abbott issued an executive order prohibiting any governmental body in the state, including counties, cities, and public health authorities, from requiring individuals to wear masks.[177] In November of last year, Florida enacted legislation banning local governments from imposing mask or vaccine mandates.[178] Several other states have taken similar action.[179] By contrast, even after a federal judge struck down a federal mask mandate governing mass transit in April 2022, the County of Los Angeles, the Port Authority of New York and New Jersey (the Port Authority), and New York City's state-controlled transit system affirmed their own mask mandates for their respective transit facilities, including, for Los Angeles and the Port Authority, airports.[180] Of course, the exact nature of a sponsor's authority to issue health regulations will vary between sponsors, and this digest does not provide specific guidance for any individual sponsor regarding its state statutory authority.

3. Sponsors' Authority to Impose Certain Specific Health Measures

a. Health Screenings

During a public health emergency, an airport sponsor may conclude that it is prudent or necessary to screen travelers and workers[181] for evidence of infection. However, constitutional, statutory, and regulatory constraints may limit the sponsor's ability to do so. This subsection discusses those considerations on a national level (it does not address state or local laws or regulations in detail, given the potential regulatory variation between jurisdictions).

As discussed below, despite limited caselaw, airport sponsors appear to have relatively broad powers to use non-invasive temperature-screening systems to identify travelers and workers with fevers. Temperature screening is only likely to implicate constitutional (specifically, Fourth Amendment) concerns if it requires physical contact with passengers or involves stopping them for a substantial period of time. Modern temperature-screening technology (especially technology that unobtrusively screens all persons walking past a screening device) generally does not impose constitutionally offensive burdens on screening subjects. However, other forms of health screening could implicate constitutional concerns, particularly if they are physically intrusive or require stopping a traveler for some meaningful period to conduct the screening.

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[175] *Jacobson*, 197 U.S. at 25.

[176] *State Quarantine and Isolation Statutes*, Nat'l Conf. of State Legs. (Sept. 24, 2021), https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx.

[177] Christina Aguayo, *Gov Abbott Ban on Mask Mandate in Texas Back in Place After Federal Appeals Court Ruling*, KRQE News (Dec. 5, 2021), https://www.krqe.com/news/politics/gov-abbott-ban-on-mask-mandate-in-texas-back-in-place-after-federal-appeals-court-ruling.

[178] Alex Pickett, *Florida Governor Signs Sweeping Laws Against Vaccine, Mask Mandates*, Courthouse News Serv. (Nov. 18, 2021), https://www.courthousenews.com/florida-governor-signs-sweeping-laws-against-vaccine-mandates.

[179] Rich Mckay & Brendan O'Brien, *Court Rules for Florida Governor, Reinstates Ban on Mask Mandates in State's Schools*, Reuters (Sept. 10, 2021), https://www.reuters.com/world/us/appeals-court-rules-favor-florida-governor-reinstates-ban-mask-mandates-florida-2021-09-10.

[180] Luke Money & Rong-Gong Lin II, *L.A. County Keeps Mask Mandate at Airports, On Public Transit, Despite Federal Changes*, L.A. Times (Apr. 21, 2022), https://www.latimes.com/california/story/2022-04-21/california-strongly-recommends-transit-masking-despite-federal-changes.

[181] In this section, "workers" refers to employees not only of the sponsor, but also of airlines, concessionaires, and other businesses operating at the airport.

(1) Constitutional constraints. Irrespective of a sponsor's potential health-screening authority under federal and state law, sponsors who consider screening travelers for illness should keep in mind that the Fourth Amendment could constrain their ability to do so. Under the Fourth Amendment, the key question is whether such screening constitutes a "search" or a "seizure"—and, if either, whether such search or seizure is "unreasonable."[182] Whether such screening meets any of those standards is a fact-specific question that turns, largely, on how much the screening procedure (and any follow-up measures) impedes the traveler or invades his or her privacy. The Supreme Court has discussed what constitutes a search or seizure when considering the constitutionality of regulations requiring railway workers to be tested for drug and alcohol use. As the Court articulated,

> The initial detention necessary to procure the evidence may be a seizure of the person if the detention amounts to a meaningful interference with his freedom of movement. Obtaining and examining the evidence may also be a search, if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable.[183]

The Court has held that blood draws and analysis, breathalyzer tests, and urinalysis all constitute searches under the Fourth Amendment.[184] In holding the blood and breath tests to be searches, the Court observed that the "physical intrusion" required to conduct each test "implicates … concerns about bodily integrity."[185] Meanwhile, the Court observed that, while collecting a urine sample does not "entail a surgical intrusion into the body,"[186] it nonetheless "can reveal a host of private medical facts" about the test subject, such as whether he or she is diabetic or pregnant, while the process of compelling a subject to provide a urine sample undoubtedly "implicates privacy interests."[187]

Under the Fourth Amendment, a person is "seized" "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[188] A seizure need not require physically restraining a subject: The Court has held, for example, that "a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint."[189]

Even if a person is "searched" or "seized" in the Fourth Amendment context, the Constitution only prohibits such search or seizure it if is "unreasonable."[190] Traditionally, a seizure is reasonable under the Fourth Amendment only if an officer seizing a subject has probable cause to suspect the subject has committed an offense.[191] However, the Court, and lower federal courts, has upheld various types of "administrative" searches and seizures, including sobriety checkpoints[192] and, in the airport context, passenger security screenings.[193] As the Court has explained, determining whether a search or seizure is reasonable requires "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[194] Therefore, if a screening were to constitute a seizure, a sponsor could argue that the seizure is conducted administratively for a legitimate governmental interest.[195] In that case, however, the sponsor would have to demonstrate that the governmental interests involved do, in fact, outweigh the traveler's Fourth Amendment interest in not being seized.[196] That would presumably require the sponsor to show that it has a legitimate interest in knowing whether persons in the airport are infectious and that its health screening is at least somewhat effective at identifying infected travelers. If either the sponsor's interest was not legitimate or the screening method was demonstrably ineffective, a court could well hold that there is little governmental interest in conducting the screening, rendering it on balance unreasonable.

It is unlikely that a temperature screening, at least using the methods employed by U.S. airports during the COVID-19 pandemic, would itself constitute either a search or a seizure under the Fourth Amendment. The thermal scanners and imaging technology that several U.S. airports used during that pandemic do not require physical contact with the person whose temperature they are measuring,[197] much less any "physical intrusion" into the body.[198] Likewise, they presumably do not reveal the sort of extensive "private medical facts" that a urinalysis or blood test might uncover.[199] Meanwhile, the use of a thermal imaging device on an individual likely would not constitute a "seizure," particularly if the device used does not actually require the subject to stop walking through the terminal, as the subject would not reasonably feel detained.

The same fact dependent Fourth Amendment analysis applies to other forms of health screening. Whether another type

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[182] *Cf.* U.S. Const. amend. IV.

[183] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989).

[184] *Id.* at 616–17.

[185] *Id.*

[186] *Id.* at 617.

[187] *Id.*

[188] California v. Hodari D., 499 U.S. 621, 627–28 (1991).

[189] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990).

[190] *Skinner*, 489 U.S. at 619 ("[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.").

[191] Adams v. Williams, 407 U.S. 143, 160 (1972) (Brennan, J., dissenting), *quoting* Stacey v. Emery, 97 U.S. 642, 645 (1878).

[192] *Sitz*, 496 U.S. at 455.

[193] United States v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007) ("We have held that airport screening searches, like the one at issue here, are constitutionally reasonable administrative searches because they are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings" (internal quotation marks omitted).).

[194] *Id.*

[195] *Cf. id.*

[196] *Id.*

[197] Hugo Martín, *Airports Are Testing Thermal Cameras and Other Technology to Screen Travelers for COVID-19*, L.A. Times (May 13, 2020), https://www.latimes.com/business/story/2020-05-13/airports-test-technology-screen-covid-19.

[198] *Cf. Skinner*, 489 U.S. at 616.

[199] *Cf. id.* at 617.

of health screening constitutes a search likely turns on whether such screening constitutes a "physical intrusion" or reveals detailed private medical facts. And whether such screening effects a "seizure" likely depends on whether it causes a reasonable person to feel detained, at least for any meaningful period. Therefore, when considering imposing a health-screening requirement on travelers, sponsors would be well-advised to consider whether the screening would meet any of those criteria.

(2) Regulatory considerations. Even if the value of temperature or similar screening were unassailable, an airport sponsor would still need to demonstrate that it has a legitimate governmental interest in conducting such screening. Here is where the legal limitations on sponsors' authority (and therefore their governmental interest as airport sponsors, not public health agencies) are highly relevant, both from a financial and an authority perspective.

If a federally obligated airport sponsor decides to screen passengers for illness, the sponsor should consult then-current FAA guidance regarding whether the sponsor may use airport revenues to do so. In March 2020, in the early weeks of the COVID-19 pandemic, the FAA issued a guidance document, *Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations*, regarding the health measures a sponsor might undertake in response to the pandemic.[200] As the May 2020 revision to that guidance (the May 2020 Guidance) reminded sponsors, under federal law, "federally obligated airports must use airport revenue for the capital or operating costs of the airport."[201] Notwithstanding that admonition, the May 2020 Guidance stated, "Under the extraordinary circumstances of the COVID-19 public health emergency, some activities the airport may undertake to minimize the spread of COVID-19 may be legitimate capital or operating costs of the airport."[202] The agency advised that, "in this exceptional context, the FAA considers the testing and health screening of *airport employees* to be a legitimate operating cost of an airport to sustain the airport's workforce, upon which the continuity of airport operations depends."[203] "In contrast," the May 2020 Guidance stated, "the use of airport employees for public health screening is generally not considered a proper use of airport revenue."[204] That line—between airport employees and other persons within the airport—confused many airport sponsors, who reasoned that, if the objective of the screening were to protect public health within a terminal building, it would not matter for what purpose the persons to be screened were accessing the terminal.

Partly in response to this confusion, the FAA revised that guidance in late 2020 (the December 2020 Guidance)[205] and then, in the midst of federal efforts to promote COVID-19 vaccination, in early 2022 (the 2022 Guidance).[206] The FAA's revised guidance recognized that various health-related activities, especially with respect to COVID-19 pandemic mitigation, may constitute permissible uses of airport revenue. In several places in the 2022 Guidance, the FAA added COVID-19 vaccination to COVID-19 testing and health screening as activities for which a sponsor might allocate airport revenues or certain airport facilities.[207] By contrast, the 2022 Guidance eliminated a reference in the December 2020 Guidance to temperature screening as a potentially permissible use of airport revenue,[208] likely given the low efficacy of temperature screening as a tool for detecting COVID-19 infections.[209]

Building on prior guidance, the 2022 Guidance advised that, during the COVID-19 pandemic, sponsors could use airport revenues "to cover certain costs of testing, health screening, and vaccination activities for passengers and people entering sterile areas" so long as, to quote the 2022 Guidance,

1) The health screening program or other COVID-19 mitigation is approved by federal, state, or local public health departments;
2) The health screening or other COVID-19 mitigation activities are conducted by certified health professionals and not airport staff;
3) The airport sponsor has consulted with the airlines and other tenants in accordance with their lease agreements about the proposed health screening program or other COVID-19 mitigation. This consultation should include, at a minimum, notice of the elements and cost of the proposed program, a reasonable period of time to provide comment, and some means by which to record comments and conclusions in regard to the proposed program for consideration by the airport sponsor; and

[200] FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations (Mar. 28, 2020), https://doav.virginia.gov/globalassets/pdfs/airports/2020.03.28-information-for-airport-sponsors-on-covid-19.pdf.

[201] FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations 5, https://www.faa.gov/news/media/attachments/UPDATED%20Information%20for%20Airport%20Sponsors%20Considering%20COVID-19%20Restrictions%20or%20Accommodations.pdf (updated May 29, 2020) (hereinafter "May 2020 Guidance").

[202] *Id.*

[203] *Id.* (emphasis added).

[204] *Id.*

[205] FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations (updated Dec. 2020) (hereinafter "Dec. 2020 Guidance").

[206] FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations, https://www.faa.gov/airports/airport_compliance/media/Information-for-Airport-Sponsors-COVID-19-Updated-8Apr2022.pdf (updated Apr. 2022) (hereinafter "2022 Guidance").

[207] *Id.* at 5, 6, 7; *e.g.*, *id.* at 6 ("During the COVID-19 public health emergency, airports may use airport revenue to cover certain costs of testing, health screening, and vaccination activities for passengers and people entering sterile areas"); *id.* at 7 ("Health screening or other COVID-19 mitigation activities that may be eligible for use of airport revenue could include, for example, COVID-19 testing and vaccination activities.").

[208] *Compare* 2022 Guidance at 7, *with* Dec. 2020 Guidance at 6.

[209] Runway to Recovery at 32 ("Temperature screening has limited reliability in detecting individuals with COVID-19[.]"); *Temperature Screening of Health Care Workers Is Ineffective*, Am. Coll. Occupational & Env't Med. (May 16, 2022), https://acoem.org/Publications/Press-Releases/Temperature-Screening-of-Health-Care-Workers-Is-Ineffective.

4) The airport sponsor regularly evaluates the program for effectiveness and to ensure it meets federal and state health guidelines.[210]

The 2022 Guidance also suggested that, at least during the COVID-19 pandemic, sponsors could use airport revenue not only to mitigate the spread of COVID-19 but also to fight disease spread generally within the airport. The May 2020 Guidance had acknowledged that, "[u]nder the extraordinary circumstances of the COVID-19 public health emergency, some activities of the airport may undertake to minimize the spread of COVID-19 may be legitimate capital or operating costs of the airport."[211] However, the 2022 Guidance added the phrase "and combating the spread of pathogens at the airport" after "the spread of COVID-19," suggesting that the FAA regarded efforts against other types of disease as comparably veritable airport capital or operating costs—at least, as the sentence provides, "[u]nder the extraordinary circumstances" of the COVID-19 pandemic.[212]

The 2022 Guidance also indicated that sponsors had limited latitude to help their local communities, other than airport users, mitigate COVID-19. After observing that some "activities" to "minimize the spread of COVID-19" may qualify as legitimate uses of airport revenue, the 2022 Guidance stated, "In general, the FAA also recognizes the value of these temporary activities within the context of community support as an element in addressing COVID-19.[213] Likewise, the 2022 Guidance provided, "The airport may support, but cannot become a provider of[,] COVID-19 medical services to the public at large."[214] This added language indicates that sponsors could at least offer certain facilities or support for anti-COVID-19 measures to the general public, provided that the sponsor was not serving the public as a medical provider itself.

The 2022 Guidance reiterated other limitations on the use of airport revenues to combat the COVID-19 pandemic. Although that guidance stated that "[p]roviding physical space to accommodate vaccinates administrated through a third-party provider," such as a state or local health agency, could "be considered a legitimate operating cost" of the airport, it clarified that airport revenue "cannot be used for the costs of the vaccines[.]"[215] Likewise, the 2022 Guidance advised, "Using airport employees for public health screening or vaccination activities is not considered a proper use of airport revenue."[216]

Thus, while the FAA appeared to become increasingly flexible in allowing the use of airport revenue and certain airport facilities for disease-mitigation measures over the course of the COVID-19 pandemic, the FAA continued to draw the line at using airport revenues or employees for vaccination or using airport staff for health screening generally. Furthermore, the 2022 Guidance confined much of its information to what it termed the "extraordinary" or "exceptional" circumstances of "the COVID-19 public health emergency."[217] The 2022 Guidance applied that qualification to passages permitting sponsors to allocate certain airport facilities for,[218] or otherwise "support[,]"[219] testing, health screening, and vaccination efforts, among other measures.

This latter point cannot be overstressed: The FAA made it clear that its guidance was limited to the exigencies of the COVID-19 pandemic. It would be imprudent, therefore, to draw too many long-term precedential implications from its statements in the various guidance documents. This qualification is important because, as the discussion at the beginning of this digest about historical public health emergencies suggests, many potential public health emergencies never reach the severity of the COVID-19 pandemic. Thus, it is unclear whether those emergencies would have met the standard set forth in the guidance documents. The agency also couched much of the guidance in highly qualified terms and emphasized that the documents were mere guidance, not definitive interpretations of federal law or federal regulations, and were not intended to change law or regulations. While the guidance documents did provide immediate and helpful direction to airport sponsors in the midst of the pandemic, one cannot assume that the agency will allow identical flexibility during another, different public health emergency. Notwithstanding those caveats, it is important to remember that, in 2020 and 2021, the FAA, like airport sponsors, needed to make rapid decisions in response to the COVID-19 pandemic, and the exigencies of time did not allow the normal formal consultative processes that ordinarily accompany formal agency policy pronouncements under the Administrative Procedure Act and similar procedural statutes. The fact that the FAA interpreted airport revenue use limitations flexibly in light of the COVID-19 emergency bodes well for—but does not guarantee—future interpretive and enforcement flexibility during the next public health emergency.

In any event, sponsors should look to the FAA for contemporary, issue-specific guidance regarding the use of airport revenues for health screening in the event that a public health emergency occurs in the future. Sponsors should not assume that they have carte blanche authority based upon the COVID-19 precedents to conduct health screening, to use airport employees or revenue for such purposes, or even to provide facilities for public health agencies to do so.

[210] 2022 Guidance at 6.

[211] May 2020 Guidance at 5.

[212] *See* 2022 Guidance at 5.

[213] *Id.* at 6.

[214] *Id.* at 7.

[215] *Id.* at 5–6.

[216] *Id.* at 6 ("Using airport employees for public health screening or vaccination activities is not considered a proper use of airport revenue.").

[217] *E.g.*, *id.* at 5 ("Under the exceptional circumstances of the COVID-19 public health emergency, airport revenue can be used in the health screening of passengers…"); *id.* ("Under the extraordinary circumstances of the COVID-19 public health emergency, some activities the airport may undertake to minimize the spread of COVID-19 and combat[] the spread of pathogens at the airport may be legitimate capital or operating costs of the airport.").

[218] *Id.* at 6.

[219] *Id.* at 5.

(3) Other considerations. Even if a sponsor's health screening is permissible, how the sponsor handles a passenger whom it identifies as potentially infected raises additional legal questions. This digest discusses the sponsor's ability to prevent passengers from traveling under the subsection "Authority to Quarantine," below. That subsection also discusses jurisdictional questions—e.g., whether the sponsor, a local health official, or federal agents are entitled to detain travelers for health reasons—and issues related to the rights of those with disabilities.

b. Testing Requirements

During a public health emergency, a sponsor may consider requiring travelers to be tested for a given disease in order to access the airport, whether by requiring evidence of a negative test result or by mandating testing on the airport premises. In either case, federal and state constitutional and statutory law may constrain the options for such screening. Furthermore, the question of whether a sponsor may require a negative test to access the airport—either to board a flight or to deplane one—breaks down into two separate inquiries: Whether the sponsor may require a traveler to take a test (or present a negative test result) for an illness, and whether the sponsor may thereafter exclude the traveler from accessing the airport if the traveler refuses the requirement or tests positive for the disease.

(1) Authority to require a test. Sponsors that are state governments, or local governments authorized by their respective states to issue public health directives, will generally face the fewest limitations on their power to require air travelers to be tested during a public health emergency. As discussed at the beginning of this section of the digest, the Supreme Court in *Jacobson* upheld the broad authority of state governments, and localities with state-delegated public health authority, to issue even physically invasive requirements in the interest of public health.[220] Legal commentators have specifically cited *Jacobson* as the basis for finding that states have the authority to test travelers for COVID-19: In defending Hawaii's requirement that inbound passengers provide a negative COVID-19 test result to avoid quarantine, two law professors cited *Jacobson* as constitutional justification for the state's policy.[221] However, *Jacobson* only upholds the health authority of a state, state subsidiary, or local governmental entity acting under state authority; the case does not appear to hold that a locality may issue public health mandates entirely without, or contrary to, state-delegated authority.[222] (Notably, Hawaii's commercial airports are owned and operated by the state, through its DOT,[223] avoiding that potential constitutional wrinkle.) Thus, sponsors who are not states or other governmental bodies authorized by their states to issue public health requirements may lack the authority to require a passenger to present a negative test to enter the airport.

Despite the broad latitude that *Jacobson* found states to have in mandating public health requirements, airport sponsors would be well-advised to consider whether a testing requirement could run afoul of the Fourth Amendment. As discussed above, the Supreme Court has held that a blood draw constitutes a "search" under the Fourth Amendment because it is a "physical intrusion, penetrating beneath the skin, [that] infringes an expectation of privacy that society is prepared to recognize as reasonable."[224] Applying that ruling, at least one federal district court has held that "Fourth Amendment privacy rights are inarguably raised by a requirement that [an individual] submit to mandatory COVID-19 tests," given that "either their mucus or saliva must be extracted in order to test for the virus."[225] As this case illustrates, the precise measure (e.g., masks, non-intrusive temperature screening, mandatory testing on site, proof of prior testing) will be pivotal in any analysis of the permissibility of the measure under Fourth Amendment scrutiny.

As discussed above, the Fourth Amendment only bars *unreasonable* searches.[226] Considering a challenge by Los Angeles Police Department employees to a city vaccine policy that required unvaccinated city employees to submit to weekly testing, the U.S. District Court for the Central District of California explained that the Fourth Amendment searches that are "not related to law enforcement purposes" are evaluated under the "special-needs rubric."[227] Under that rubric, the court must balance four factors: (a) "the nature of the privacy interest affected," (b) "the character of the intrusion," (c) "the nature and immediacy of the government concern," and (d) "the efficacy of this means of addressing the concern."[228] Considering the saliva- and nasal-swab COVID-19 tests to which the plaintiffs were subject, the Central District determined, "This Court, like other courts that have considered the issue, finds both tests to be negligible intrusions."[229] By contrast, the Central District deemed the "nature and immediacy" of the government's concern to be great; the court cited "the continued need to contain the spread of COVID-19" and quoted from various other cases that emphasized the urgent need to combat the pandemic.[230] Likewise, the Central District found the city's testing requirement to be an effective means of addressing the concern, based on the plaintiffs' admission that the testing regime had been effective in containing the disease.[231] Thus, the court found the search—in this

[220] *Jacobson*, 197 U.S. at 25.

[221] Sylvia A. Law & Aviam Soifer, *Column: Hawaii Can Require Testing for All Coming In*, Honolulu Star-Advertiser (June 16, 2020), https://www.staradvertiser.com/2020/06/16/editorial/island-voices/hawaii-can-require-testing-for-all-coming-in.

[222] *See Jacobson*, 197 U.S. at 25.

[223] Andrew Tunnicliffe, *Trouble in Paradise: Does Hawaii Need a New Airport Authority?*, Airport Tech. (July 11, 2019), https://www.airport-technology.com/features/airport-authority-hawaii.

[224] *Skinner*, 489 U.S. at 616.

[225] Burcham v. City of L.A., No. 2:21-cv-07296-RGK-JPR, 2022 U.S. Dist. LEXIS 6486, at *9 (C.D. Cal. Jan. 7, 2022).

[226] *Skinner*, 486 U.S. at 619.

[227] *Burcham*, 2022 U.S. Dist. LEXIS 6486, at *1–2, *8.

[228] *Id.* at *9.

[229] *Id.* at *11–12 (citing several district court cases).

[230] *Id.* at *12–13 (citing several federal cases).

[231] *Id.* at *13–14.

case, the required testing—to be reasonable, and therefore not in violation of the Fourth Amendment.[232]

While there are obvious and important distinctions between a city employer's testing requirement for its own employees and an airport sponsor's testing program for travelers, the Central District's opinion offers guidance to airport sponsors in considering whether their own potential testing requirement might violate the Fourth Amendment. First, assuming that such a test would require insertion of any sort of object into a person's cavity or under their skin, it seems likely that such insertion would constitute a Fourth Amendment "search."[233] Nevertheless, assuming the test were a saliva or nasal swab, a court could well find such invasion negligible, a fact the Central District, quoting the Supreme Court, held to be "of central relevance to determining reasonableness" of such search.[234] Meanwhile, a sponsor would likely need to consider whether the nature of the public health emergency is, as in the COVID-19 pandemic, renders the sponsor's "concern" sufficiently substantial to justify the testing requirement.[235] And, finally, a sponsor would want to determine whether the test is sufficiently reliable and otherwise useful—an analysis that might depend on both the test's accuracy and ability to provide results timely—to effectively address the sponsor's "concern."[236]

On the regulatory front, the FAA has stated that it has "no authority to either grant permission or to prohibit a local or [s]tate unit of government" from requiring travelers to obtain a negative COVID-19 test prior to flying to Hawaii.[237] However, the FAA indicated support for passenger health "screening," including COVID-19 testing, subject to certain conditions.[238] In the May 2020 Guidance, the FAA advised sponsors that it "is likely to be acceptable" for "[s]tate, local, or territorial public health officials […] to screen or quarantine passengers," provided that passengers "are not being categorically refused access to air transportation," such as through "unapproved blanket closures."[239] The FAA reiterated this position, using similar language, in the December 2020 Guidance and the 2022 Guidance.[240] As previously discussed, the FAA specified several additional conditions on the use of airport revenues to conduct COVID-19 testing and other health-screening activities, including requiring that such screening be "approved by [f]ederal, [s]tate, or local public health departments," is conducted by "certified health professionals *and not airport staff*," is conducted in consultation with airlines and other airport tenants, and that the sponsor "regularly evaluates the program for effectiveness" and compliance with federal and state "health guidelines."[241] In turn, the guidance stated, "Public health officials must take care to coordinate with airport sponsors, airlines, TSA, airport law enforcement, and other entities on when, where, and how their government conducts this screening and isolating[.]"[242] In any event, the guidance advised sponsors that health screenings "should not interfere with airport access and should not impact security" for travelers or aircraft operations.[243]

The FAA's highly qualified endorsement of health-screening protocols, including disease testing, for travelers significantly limited sponsors' authority. First, the FAA stated that sponsors cannot use airport employees to conduct testing. Though the FAA did not say so explicitly, the FAA presumably based that position on the facts that airport employees are generally not health professionals and that the sponsor is not a public health agency. Second, the FAA was clear that any health measures could not interfere with airport access. This restriction raises the question of what, if anything, a sponsor could do if it discovers, though its testing or screening protocols, that a person is infectious. (It is noteworthy that the restriction on airport access was phrased in terms of passenger access, presumably because of restrictions imposed by the Deregulation Act, as discussed in the next section of this digest.) If there was a theme that emerged from the FAA's guidance, it is that airport sponsors should be circumspect in implementing any public health measures and should always be sensitive to the effect of any such measure on airport access and airport operations. The FAA did not specifically opine on whether that caution should apply with equal force to health measures imposed on non-passengers at the airport, such as contractors, the sponsor's own employees, or other government employees. However, since not all legal impediments to sponsors' regulation of travelers apply to non-travelers, it appears reasonable to conclude that sponsors have greater leeway in adopting health measures that do not limit the movement of travelers.

(2) Authority to deny airport access based on test outcome. Assuming that an airport sponsor's health testing of travelers during a public health emergency complies with federal and state law, a sponsor's ability to deny airport access to those who test positive or refuse to be tested likely implicates other legal considerations. In particular, both *Jacobson* and the Deregulation Act may come into play.

If the sponsor is a state or a governmental body that the state has imbued with public health authority, *Jacobson* would likely provide the sponsor the constitutional basis to enforce a negative test requirement for airport users by prohibiting those without one from entering or transiting the airport during a public health emergency.[244] (If the sponsor lacks such state-delegated

[232] *Id.* at *14.

[233] *Cf. Skinner*, 489 U.S. at 616; *Burcham*, 2022 U.S. Dist. LEXIS 6486, at *8.

[234] *Burcham*, 2022 U.S. Dist. LEXIS 6486, at *11, *quoting* Maryland v. King, 569 U.S. 435, 446 (2013).

[235] *Cf. id.* at *12–13.

[236] *Cf. id.* at *9.

[237] Law, *supra* note 222.

[238] *E.g.*, 2022 Guidance at 5; Dec. 2020 Guidance at 5.

[239] May 2020 Guidance at 3.

[240] 2022 Guidance at 5; Dec. 2020 Guidance at 5.

[241] 2022 Guidance at 6 (emphasis added); Dec. 2020 Guidance at 6 (emphasis added).

[242] 2022 Guidance at 5; Dec. 2020 Guidance at 5.

[243] 2022 Guidance at 7; Dec. 2020 Guidance at 7.

[244] *See Jacobson*, 197 U.S. at 25 (recognizing broad state authority to regulate public health).

health authority, *Jacobson* may well not apply, potentially leaving the sponsor without authority under federal or state law to enforce a testing requirement.[245])

The analysis is different, however, for airline passengers. Notwithstanding *Jacobson*, the Deregulation Act constrains an airport sponsor's ability to limit airline travelers without negative tests from reaching their flights. As previously discussed, the Deregulation Act limits an airport sponsor's authority to take actions that have the effect of regulating an air carrier's price, routes, or services.[246] Whether a sponsor's decision to bar travelers without a negative test from proceeding through the airport—and thus accessing a flight—has the effect of regulating an air carrier's "service" in violation of the Deregulation Act is not entirely clear. Nor is it obvious whether the Proprietors Exception would justify an airport sponsor's imposition of a testing requirement as a condition of access to its airport. However, the *Arapahoe* court's skepticism toward the airport sponsor's "safety" justification for restricting scheduled service,[247] and the *Seaplane* court's conclusion that the Deregulation Act lacked a public health exception,[248] both suggest that a sponsor could, at least, face a credible legal challenge to any effort to bar travelers without negative tests from boarding commercial flights en masse. (And, with respect to the Proprietors Exception, a sponsor may struggle to argue that a requirement that turns away many passengers is "nonburdensome" to interstate commerce, as *Arapahoe* requires.[249])

Jacobson and the Deregulation Act may be in tension with respect to the authority of a sponsor who is a state or local government to deny access to the airport on public health grounds. As previously discussed, the Deregulation Act generally preempts state and local control of air carriers and transactions related to them. However, the Supreme Court in *Jacobson* held, "The authority of the State to enact [its vaccination] statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution."[250] While it is well-established that the federal government may, in certain circumstances, supersede the police power of a state,[251] the Supreme Court, as discussed in the context of federalism above, has recently held that "Congress [must] enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power[.]"[252] Assuming that the application of the Deregulation Act to a public health measure is not "exceedingly clear," and given the Tenth Circuit's observation in *Arapahoe* that "[t]he precise scope of an airport owner's proprietary powers [under the Deregulation Act] has not been clearly articulated by any court[,]"[253] it is at least arguable that the Deregulation Act does not supersede the states' police power to regulate public health, even to the extent that such regulations have some effect on air carrier business. Thus, the degree to which the Deregulation Act restricts a sponsor's potential authority (depending on state law) to bar untested, or positive-testing, air carrier passengers from the sponsor's airport is not as clear as a cursory reading of the Deregulation Act would suggest. While sponsors should be especially cautious with respect to measures that directly affect the ability of airlines to serve passengers, they should also act with enormous caution even with regard to those health measures that have only an indirect effect on airline passengers.

While the Constitution and federal law may permit certain sponsors to bar a traveler with a positive (or no) test from proceeding through the airport, sponsors should be mindful of practical FAA guidance. As the FAA advised sponsors with respect to COVID-19, "It is critical" that sponsors have a plan for handling positive tests.[254] In preparing such a plan, the FAA stated, "Airport sponsors should work with their airlines, the testing provider, and local public health authorities"—a process that may include "coordination with the airlines on denial of boarding procedures, isolation and removal of the test-positive passenger and travel companions from the airport, referral to the appropriate local health authorities for further diagnosis and isolation requirements, and a communication plan for passengers prior to arrival at the airport."[255]

This guidance has several implications. Most importantly, the guidance accurately implies that airlines have considerable discretion over whom they may deny board. In addition, the guidance seems to imply that the sponsor may have some authority to "isolat[e] and remov[e]" positive-testing passengers from the airport, given that "referral to the appropriate local health authorities" seems to follow the isolation-and-removal step. Third, it appears to presume, understandably, that public health officials, not the sponsor, would have authority over longer-term isolation requirements.

While the Deregulation Act (and caselaw thereunder) provides the best framework for analyzing restrictions on airline passengers, that statute does not address other airport users, including, in particular, persons who are traveling other than by commercial airline. The Deregulation Act applies only to regulation of *air carriers*, not other forms of air travel. Therefore, in the absence of federal law that explicitly limits their authority, sponsors almost certainly enjoy broader latitude under *Jacobson* to impose health requirements on individuals coming onto the airport for purposes other than traveling via or otherwise doing business with an air carrier. Nevertheless, a sponsor's authority is not subject only to the *Jacobson* framework. As the FAA

[245] *See id.*

[246] 49 U.S.C. § 41713(b)(1).

[247] *See Arapahoe*, 242 F.3d at 1222–23.

[248] *Seaplane*, 2021 U.S. Dist. LEXIS 225101, at *11.

[249] *Arapahoe*, 242 F.3d at 1222.

[250] *Jacobson*, 197 U.S. at 24–25.

[251] *See* Kelly v. Washington, 302 U.S. 1, 10 (1937) ("The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together" (internal quotation marks omitted).).

[252] U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849 (2020).

[253] *Arapahoe*, 242 F.3d at 1222.

[254] 2022 Guidance at 7.

[255] *Id.*

reminded sponsors, if a sponsor wishes to limit recreational and other "non-essential" aeronautical activities, "[T]he activities limited by an airport sponsor should be limited to those falling within the scope of a COVID-19 public health measure by an authority whose jurisdiction covers the airport's geographic area[.]"[256] The FAA has not provided guidance on other non-airline forms of travel, such as non-recreational air travel by private aircraft, travel by charter or fractional aircraft, or the myriad other ways in which passengers travel. While any restriction must comply with the standards imposed by the policies of the appropriate public health authorities, it appears that sponsors have considerably greater authority to impose public health measures when such measures do not affect airline passengers. This is an especially important conclusion for the thousands of sponsors of general aviation airports (and for general aviation traffic at commercial service airports).

c. Authority to Quarantine

Much of the analysis of an airport sponsor's authority to mandate testing applies to the question of whether a sponsor may require certain travelers to quarantine during a public health emergency. Both during the COVID-19 pandemic and in decades prior, federal and state courts alike have upheld the authority of state officials to mandate quarantines to protect public health.[257] Therefore, in assessing whether an airport sponsor has the authority to quarantine travelers it suspects of carrying an illness during a public health emergency, perhaps the overarching legal question is whether the sponsor has the authority under state law, and therefore under *Jacobson*, to implement public health orders.[258]

As discussed earlier in this section, the U.S. District Court for the Southern District of New York recently elected to analyze a challenge to a New York State quarantine order under both *Jacobson* and the more-modern analytical framework of strict scrutiny.[259] Jeffrey Jones, an Oklahoma attorney appearing pro se, challenged an executive order from the New York governor that required individuals who had recently visited states suffering a certain level of COVID-19 transmission to quarantine upon arrival in New York.[260] Jones challenged the executive order on several grounds, including the assertion that it infringed about the right to interstate travel and the Equal Protection Clause of the Fourteenth Amendment.[261]

First, the Southern District evaluated Jones's claims under *Jacobson*. Applying *Jacobson*, the Southern District held that Jones could only sustain his claims if he demonstrated that the executive order's quarantine requirement "bore 'no real or substantial relation' to public health or was 'a plain, palpable invasion of rights secured by the fundamental law.'"[262] Holding that the quarantine order pertained to a public health emergency, was implemented to curb that emergency, and was reasonable in light of public health guidance, the Southern District concluded that Jones had failed to make his case under *Jacobson*.[263]

The Southern District also evaluated Jones's claims under the more-modern "tiers of scrutiny" standard, given the Supreme Court's recent hints that it disfavors *Jacobson*'s broad application, at least as to First Amendment claims.[264] Observing that the right to travel is "firmly embedded" in federal jurisprudence, the Southern District applied strict scrutiny to Jones's right to travel claim.[265] Observing that federal courts had split on whether the New York quarantine order and various other such orders did, in fact, burden the right to travel, the Southern District concluded that the order would survive strict scrutiny even if it did burden such right.[266] The Court recited the familiar strict scrutiny standard, explaining that, to survive strict scrutiny, the government must show that its policy is "narrowly tailored to promote a compelling Governmental interest" and "use[s] the lease restrictive means to achieve its ends."[267] The Southern District then found that the government "unquestionably [has] a compelling interest" in combating COVID-19, given the disease's high degree of contagion.[268] The court further found that that quarantine order was "narrowly tailored" to combat the disease, and that, at least when the order was enacted, "there was no indication that less restrictive means would have achieved New York State's stated interests."[269] Thus, the Southern District upheld the quarantine order on strict scrutiny grounds as well.

Jones adds to the large body of case law that affirms the ability of state officials to implement sweeping mandates to combat a public health emergency. And, perhaps most importantly for airport sponsors, *Jones* indicates that a quarantine order can survive strict scrutiny during a pandemic even for courts that do not apply *Jacobson*'s analytical framework. Nonetheless, sponsors must be mindful of the limits on their own authority under state law; merely because the *state* may have a constitutional right to quarantine a traveler does not mean the *sponsor*, even if a state agency, enjoys such power under state law. Therefore, sponsors should review their own state statutory authority and determine which entity within the state—the sponsor, a public health officer, or some other body—has the authority to quarantine and under what circumstances. Ideally, sponsors will

[256] *Id.* at 4–5.

[257] *See, e.g.*, *Jacobson*, 197 U.S. at 25 (recognizing states' rights "to enact quarantine laws and health laws of every description" (internal quotation marks omitted)); *Jones*, 542 F. Supp. 3d at 220, 222 (upholding state quarantine under both *Jacobson* and strict scrutiny analysis); *Carmichael*, 470 F. Supp. 3d at 1142; Hickox v. Christie, 205 F. Supp. 3d 579, 591 (D.N.J. 2016) (discussing history of case law in support of quarantine authority); *In re* Necessity for the Quarantine or Isolation of Danny G., No. S-17933, 2022 Alas. LEXIS 7, at *11 (Alaska Jan. 19, 2022); *In re* Halko, 246 Cal. App. 2d 553, 557 (Cal. App. 2d 1966).

[258] *See Jacobson*, 197 U.S. at 25.

[259] *Jones*, 542 F. Supp. 3d at 220, 222.

[260] *Id.* at 211, 212–13.

[261] *Id.* at 216.

[262] *Id.* at 219, *quoting Jacobson*, 197 U.S. at 31.

[263] *Id.* at 219–20.

[264] *Id.* at 217–18.

[265] *Id.* at 220.

[266] *Id.* at 221–22.

[267] *Id.* at 220.

[268] *Id.* at 222 (internal quotation marks omitted).

[269] *Id.*

make such determinations long before they face a future public health emergency.

Without repeating this section's prior legal analysis in detail, sponsors are further reminded that the Deregulation Act could constrain any quarantine authority they do possess by limiting their power to quarantine or otherwise detain passengers en route to or disembarking from a flight on an air carrier. Furthermore, sponsors should keep in mind the FAA's practical and procedural guidance and expectations regarding their authority to implement public health requirements.[270]

d. Vaccination Requirements

During the COVID-19 pandemic, few policies garnered more national controversy than proposals for federal, state, or local governments to mandate vaccination against COVID-19. While the Supreme Court separately adjudicated the legality of two attempted federal vaccine mandates, neither ruling offers much guidance on whether an airport *sponsor* could require travelers to be vaccinated before entering its airport. Instead, as discussed below, a sponsor's power to do so likely hinges, like various other potential sponsor health measures, on *Jacobson*, the Deregulation Act, Grant Assurance obligations, and FAA policies in effect at the time.

(1) Federal authority to mandate vaccines. The Supreme Court rendered a split decision regarding the validity of two Biden Administration vaccine requirements. The administration had attempted to require tens of millions of Americans to obtain vaccination against COVID-19 through various federal mandates, including through the previously discussed OSHA Standard[271] and the contractual and funding authority of the U.S. Department of HHS,[272] among other methods. Finding a distinction among the different mechanisms that the federal government had applied to compel vaccination, the Supreme Court stayed the OSHA Standard, holding that OSHA lacked the statutory authority to issue such a sweeping mandate,[273] but upheld the HHS requirement, holding that it fell within HHS's statutory authority.[274] Thus, in both such decisions, the focus of the Court's inquiry concerned whether the federal agency imposing the vaccine requirement had statutory authority to do so.

With respect to OSHA, the Court held that the agency's enabling statute limited it to "set[ting] *workplace* safety standards, not broad public health measures."[275] The Court held that COVID-19, though "a risk that occurs in many workplaces," was "not an *occupational* hazard," but rather one of the "hazards of daily life" during the pandemic.[276] To allow OSHA "to regulate the hazards of daily life," the Court concluded, "would significantly expand OSHA's regulatory authority without clear congressional authorization."[277]

By contrast, the Court upheld the HHS vaccine requirement. That requirement was much narrower, and grounded in contract: The HHS requirement merely provided that, as a condition of eligibility for Medicare or Medicaid funding, recipients thereof must ensure that their employees receive COVID-19 vaccinations, with certain exemptions.[278] The Court observed that "Congress has authorized" the Secretary of HHS to "impose conditions on the receipt of Medicaid and Medicare funds" that the Secretary of Labor finds "necessary" for the health and safety of those "furnishing services" to the two health programs.[279] Observing that COVID-19 is a "highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease," the Court acknowledged that the Secretary of HHS had found a vaccine mandate necessary to protect such patients during the pandemic.[280] Thus, the Court held, the vaccine mandate "fits neatly within the language of the statute" authorizing HHS to impose conditions on receipt of its funds.[281]

Both decisions are arguably narrow. Rather than offering a sweeping assessment of the constitutionality of a vaccine mandate or a broad reappraisal of administrative power, the decisions focused on whether each agency complied with its respective statutory authority in light of the facts of the pandemic. Thus, while the decisions garnered headlines, their significance for airport sponsors, if any, may be to reaffirm the unsurprising principle that the Court expects administrative agencies to work within the bounds of their statutory authority.

As previously discussed, federal courts, though not the Supreme Court, have preliminarily blocked the Biden Administration from enforcing its third widespread vaccine mandate, the Contractor Mandate.[282] In doing so, a Kentucky federal district court held, and the Sixth Circuit suggested, that the Contractor Mandate likely infringes on powers that the U.S. Constitution reserves to the states.[283] However, both courts, as well as a federal district court in Georgia, also held that the statute on which the federal government relied to justify the Contractor Mandate did not, in fact, grant the executive branch the power to impose that mandate. As the Kentucky district court observed, that

[270] *See generally* 2022 Guidance.

[271] Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 662 (2022).

[272] *Missouri*, 142 S. Ct. at 650.

[273] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

[274] *Missouri*, 142 S. Ct. at 652.

[275] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (emphasis in original).

[276] *Id.* (emphasis in original).

[277] *Id.*

[278] *Missouri*, 142 S. Ct. at 650.

[279] *Id.* at 652.

[280] *Id.*

[281] *Id.*

[282] *Kentucky*, 23 F.4th at 612; *Kentucky*, 2021 U.S. Dist. LEXIS 228316, at *44.

[283] *Kentucky*, 23 F.4th at 599 (plaintiffs "plausibly alleged that the federal government has intruded upon an area traditionally left to the states—the regulation of the public health of state citizens in general and the decision whether to mandate vaccination in particular"); *id.* at 609 ("What the contractor mandate seeks to do, in effect, is to transfer this traditional prerogative" to regulate public health "from the states to the federal government[.]"); *Kentucky*, 2021 U.S. Dist. LEXIS 228316, at *31 ("[T]here is serious concern that Defendants have stepped into an area traditionally reserved for the states, and this provides an additional reason to temporarily enjoin the vaccine mandate.").

statute, the Federal Property and Administrative Services Act (Property Act), "delegate[s] the president the authority to manage federal procurement."[284] However, the court held, "While the [Property Act] grants to the president great discretion, it strains credulity that Congress intended the [act], a procurement statute, to be the basis for promulgating a public health measure such as mandatory vaccination."[285] Similarly, in granting a nationwide preliminary injunction against the Contractor Mandate, the Georgia district court concluded that the Property Act likely "did not clearly authorize the President to issue" the Contractor Mandate, and that such mandate likely "does not fall within the authority actually granted to the President in [the Property] Act."[286]

The Sixth Circuit reached the same conclusion as the Georgia and Kentucky district courts when it rejected the government's motion for a stay of the Kentucky court's injunction against the Contractor Mandate. As the Sixth Circuit explained, the Property Act permits the President "to employ an 'economical and efficient *system*' to '*procur*[*e*]'" contractor services, but not to "impose whatever medical procedure deemed 'necessary' on the relevant services personnel to make *them* more 'economical and efficient.'"[287] Thus, the Sixth Circuit held, "[T]he Property Act likely confers no authority upon the President to order the imposition of the contractor mandate."[288] As such, the Sixth Circuit declined to stay the Kentucky district court's injunction against the Contractor Mandate,[289] and the injunction remains in effect at the time of writing.[290] However, the Biden Administration continues to appeal the nationwide injunction of the mandate, and one appellate judge considering the matter has surmised, during oral argument, that the Supreme Court will likely settle the matter and that it is not clear which side would prevail.[291]

Regardless of the judiciary's ultimate verdict on the Contractor Mandate's legality, the case of that mandate, and the Biden Administration's effort to impose it, offers lessons both for sponsors and for regulators. For sponsors, the Contractor Mandate provides an example of how much power the federal government may attempt, and might be able, to wield through its contracting authority, rather than through lawmaking or true regulation. As the Sixth Circuit highlighted, the Contractor Mandate "sweeps in at least one-fifth of our nation's workforce, possibly more," reflecting the fact that about 20 percent of American workers work for federal contractors.[292] That court further observed that vendors located in Kentucky, including state agencies, held nearly $10 billion worth of federal contracts in 2020, while vendors in Tennessee and Ohio, the two other states subject to that court's Contractor Mandate injunction, respectively held $10.2 billion and $12.5 billion worth of federal contracts that year.[293] And, while several federal courts have so far denied the federal government's power to enforce the Contractor Mandate, even the Sixth Circuit has conceded that "[c]ourts have recognized that the Property Act gives the President necessary flexibility and broad-ranging authority."[294] And, as noted above, at least one federal appellate judge believes the Supreme Court may yet uphold the Contractor Mandate.[295] In short, regardless of the ultimate disposition of the challenges to the Contractor Mandate, the federal government has substantial legal and economic leverage to direct private parties and state and local governments through its contracting authority.

The federal government's de facto ability to regulate through contracting is relevant to airport sponsors because many, and nearly all that operate airports with airline service, are federal contractors, even without counting Grant Assurances as federal contracts. For example, many airports lease space to the TSA. The TSA currently provides security at nearly 440 airports,[296] where it both operates screening facilities and regularly leases additional space for administrative and support functions.[297] Sponsors also commonly lease space to other federal agencies, such as CBP, the Department of Agriculture, and the FAA itself (often through office and air traffic facility leases with the General Services Administration).[298] Furthermore, sponsors who are also state or local governments often constitute federal contractors by virtue of their myriad other funding agreements with the federal government.[299] Thus, sponsors may expect to be subject to health-related federal requirements imposed upon federal contractors.

And, as with the Contractor Mandate, the federal government's contracting powers may not only extend to the sponsor,

[284] *Kentucky*, 2021 U.S. Dist. LEXIS 228316, at *18.

[285] *Id.* at *20–21.

[286] Georgia v. Biden, 2021 U.S. Dist. LEXIS 234032 (S.D. Ga. Dec. 7, 2021), at *29–30.

[287] *Kentucky*, 23 F.4th at 604, *quoting* 40 U.S.C. § 101 (italics and brackets in opinion).

[288] *Id.* at 612.

[289] *Id.*

[290] Daniel Wiessner, *Court Probes Biden's Power to Impose COVID-19 Vaccine Mandate on Contractors*, Reuters (July 21, 2022), https://www.reuters.com/legal/government/court-probes-bidens-power-impose-covid-19-vaccine-mandate-contractors-2022-07-21.

[291] Jory Heckman, *Appeals Court Sees High Bar to Restoring Federal Contractor Vaccine Mandate*, Fed. News Network (Apr. 11, 2022), https://federalnewsnetwork.com/contracting/2022/04/appeals-court-sees-high-bar-to-restoring-federal-contractor-vaccine-mandate (quoting Judge William Pryor of the Eleventh Circuit as saying, "The Supreme Court may go with the government on down the road. I wouldn't be surprised[.] […] But I won't be surprised if, at the end of the day, the other side wins this case either.").

[292] *Kentucky*, 23 F.4th at 589; *Kentucky*, 2021 U.S. Dist. LEXIS 228316, *6 (citing share of U.S. workforce employed by federal contractors).

[293] *Kentucky*, 2021 U.S. Dist. LEXIS 228316, at *12–13.

[294] *Kentucky*, 28 F.4th at 614 (internal citation and quotation marks omitted).

[295] Heckman, *supra* note 292.

[296] *TSA by the Numbers*, Transp. Sec. Admin., https://www.tsa.gov/news/press/factsheets/tsa-numbers (last updated May 19, 2021).

[297] *See* U.S. Gen. Servs. Admin., PBS Leasing Desk Guide 20-1 (last updated 2010).

[298] *See id.* ("[S]ome airports must also have other agencies on-site, such as the Departments of Agriculture and Homeland Security.").

[299] *See* Diane Juffras, *Does the Federal Contractor Vaccine Mandate Apply to Local Governments?*, Coates' Canons NC Local Gov't L. (Nov. 30, 2021), https://canons.sog.unc.edu/2021/11/does-the-federal-contractor-vaccine-mandate-apply-to-local-governments.

but also to the sponsor's own tenants and other contractors. As the Kentucky district court observed, the Contractor Mandate applied both to federal contractors and to those contractors' subcontractors.[300] What, exactly, constitutes a "subcontractor" in the context of the Contractor Mandate or any similar future requirement is not entirely clear, in part because the federal government has been enjoined from enforcing, and thus interpreting, in practice, the Contractor Mandate. However, following the Contractor Mandate's announcement last year, early indications suggested that the federal government would apply that mandate broadly in an effort to get as many American workers vaccinated as possible. As the federal body in charge of recommending the Contractor Mandate stated in its own guidance, a "contract" subject to the Contractor Mandate

> includes all contracts and any subcontracts *of any tier thereunder*, […] including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term contract shall be interpreted broadly [… .][301]

Of course, sponsors maintain contractual relationships with their tenants, including concessionaires, airlines, and service providers. As such, under a broad reading of the federal government's definition of a "contract" subject to the Contractor Mandate, such tenants, any other party with whom the sponsor contracts, and even any other party with whom *those* tenants and parties contract, could be swept within the Contractor Mandate, at least with respect to employees who work at the airport.[302]

As previously discussed, it is far from clear that the Contractor Mandate will ever be enforced. Nonetheless, the experience of the Contractor Mandate, and the Biden Administration's efforts to enforce it broadly, should put sponsors on notice that the federal government (or even a state or local government) may in the future attempt to wield its contracting power to impose health requirements on sponsors and those who do business with them. More broadly, the episode highlights the fact that, especially during a public health emergency, sponsors may have to confront thorny legal issues and make quick judgment calls without the benefit of clear or extensive legal authority or precedent. In such circumstances, sponsors must accept that none of their options may be risk-free, and that even requirements imposed by the federal government may not provide a legal safe harbor.

It is noteworthy that, while the Contractor Mandate raised novel and complex legal issues for many federal contractors, airport sponsors are already familiar with, and subject to, exhaustive federal regulation by contract. The Grant Assurances, which are largely grounded in statute and federal regulation, are imposed and enforced by contract, in much the same way that the Contractor Mandate was to be applied. While the federal government elected not to use the AIP grant agreements as a vehicle to impose the Contractor Mandate, that was a policy choice, not a legal decision. This suggests that, depending upon the outcome of litigation over the Contractor Mandate and the scope of the power of the federal government to use its contracting authority to impose requirements on federal contractors, in a future public health emergency, the federal government, in its contracting role, could impose public health mandates on airport sponsors through contractual vehicles like the AIP grant agreements. The current requirements imposed through federal AIP (and similar) grant agreements are largely dictated by federal law and regulation but may provide the legal vehicle for future imposition of requirements should the courts provide the federal government broad authority to impose a Contractor Mandate. Unlike some of the entities that were to be covered by the Contractor Mandate, airport sponsors and the authority of the FAA to use contracts to impose oversight and supervisory authority has repeatedly been upheld by the courts.

The Contractor Mandate and its subsequent injunction also provide lessons for regulators. While the federal government's guidance emphasized that the government would interpret that mandate broadly—including it in federal contracts "and any subcontracts of any tier thereunder"—anecdotal evidence suggests that many federal officials intended only to apply the mandate to first-tier subcontractors. That is, at least some federal officials with contracting oversight did not seem prepared for the prospect that airport vendors, custodial service providers, or even taxi or rideshare providers with airport contracts might be subject to the Contractor Mandate. That lack of clarity resulted, at least in part, from the arguably unclear nature of the federal policy imposing the Contractor Mandate, a policy that the Biden Administration prepared quickly in response to the President's order to impose such a mandate.[303] The administration's experience with the Contractor Mandate thus reinforces the risk that a hurriedly imposed requirement—especially one with the extraordinary scope of that mandate—could yield unintended consequences and unanticipated, or underestimated, implementation challenges. Even in the midst of a public health emergency, regulators should work to coordinate across agencies and with other stakeholders when developing, implementing, and preparing guidance regarding regulations.

(2) Sponsors' authority to mandate vaccination. Whether a sponsor may require travelers to be vaccinated to enter the sponsor's airport premises likely implicates *Jacobson*, the Deregulation Act, and the sponsor's federal Grant Assurance obligations. As this section of the digest has discussed at length, *Jacobson* stands for the premise that a state, or government officials acting under state authority, enjoys broad latitude to impose public

[300] *Kentucky*, 2021 U.S. Dist. LEXIS 228316, at *5–6.

[301] Safer Fed. Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors 3 (2021) (emphasis added).

[302] *See id.* at 10 (explaining that the Contractor Mandate applies to facilities where any of the employees of a "covered contractor" will be present "during the period of performance of a covered contract").

[303] Alazar Moges, *Unanswered Vaccine Mandate Questions Remain for Contractors After FAR Council Rule*, Fed. News Network (Oct. 1, 2021), https://federalnewsnetwork.com/contracting/2021/10/contractors-still-scratching-their-heads-on-bidens-vaccine-mandate.

health mandates.[304] Nowhere is that clearer than with respect to vaccination. As the Supreme Court itself has held,

> *Jacobson* […] settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.[305]

Thus, under *Jacobson*, the key question for a sponsor that is considering requiring travelers at its airport to be vaccinated is whether the sponsor is a state or has received a delegation of state authority to regulate public health. *Jacobson* likely ascribes no public health power to a sponsor who lacks such state authority.

Conversely, among all of the various health measures a sponsor might consider, a vaccine mandate seems especially likely to conflict with the Deregulation Act. As previously discussed in this section, the Deregulation Act severely restricts a sponsor's authority to set policy "having the force and effect of law related to a price, route or service of an air carrier" that is subject to federal aviation law.[306] While the Proprietors Exception does provide some leeway to a sponsor's authority over its airport facilities, a sponsor nevertheless is advised to exercise caution to avoid implementing rules or mandates that are "burdensome" on air carrier service.[307]

Likewise, while FAA guidance indicates that at least certain public health measures "will likely be acceptable" during a pandemic, that guidance limits such statement to the condition that "passengers are not categorically refused access to air transportation."[308] Furthermore, the principle underlying the guidance that advises sponsors that they generally may not use airport employees to conduct public health screening appears to apply to vaccine checks as well.[309]

As a practical matter, a vaccine mandate may have the greatest potential, of any public health measure available to an airport sponsor, to substantially "burden" the commercial service of an air carrier or to "categorically refuse[] access to air transportation."[310] Well over a year after the public rollout of the COVID-19 vaccine, about two-thirds of the U.S. population is considered "fully vaccinated," but several states report full-vaccination rates below 55 percent.[311] Therefore, were a sponsor to condition access to its airport on full vaccination for COVID-19 at the time of this writing, one-third of the U.S. public would be prohibited from transiting the airport. Short of a prohibition on certain air carrier operations entirely, it seems hard to consider a policy that could have a more disruptive, burdensome effect on air carrier service. The FAA did not define what it meant when it refers in its guidance to an impermissible "categorical" prohibition on travel. However, the FAA would likely deem impermissible a sponsor's requirement that travelers be vaccinated to access airport facilities because such a requirement would exclude a large category of travelers from access to air service. Thus, while a sponsor might have strong authority under *Jacobson* to mandate traveler vaccination, the nature of vaccination rates in the United States could bring any sponsor-imposed, rather than federally imposed, vaccine requirement into conflict with the Deregulation Act and FAA policy.

e. Mask Requirements

As with vaccine mandates, the federal government's mask mandate during the COVID-19 pandemic generated legal (and political) controversy, but the case law regarding it has limited application to state and local airport sponsors. Recently, the U.S. District Court for the Middle District of Florida struck down the federal mask mandate for public transit, including for airline travel and in airports.[312] In that case, plaintiffs challenged the mask mandate, which the CDC had imposed. Ruling for the plaintiffs, the court held that the CDC had violated the Administrative Procedure Act by issuing the mask mandate without notice or comment, exceeded its statutory authority by issuing the mandate, and did not adequately explain the basis for the mandate.[313] While that ruling, which led to the sudden, national rescission of the mask mandate in transportation facilities,[314] garnered considerable national attention, it did not clearly indicate whether a state or local airport sponsor could, constitutionally or under federal statute, enforce a mask mandate of its own. The decision turned on procedural grounds;[315] it did *not* clarify whether there are any constitutional impediments to Congress giving the CDC authority to issue a mask mandate if the CDC were to follow the procedural requirements set forth in the Administrative Procedure Act.[316]

As such, sponsors considering imposing mask mandates will likely find *Jacobson* a more useful guide. As discussed above, several airport sponsors imposed or continued to enforce their own mask mandates for some time following the Middle District's vacatur of the mask mandate,[317] while other states expressly forbade airport sponsors within their jurisdictions from

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[304] *Jacobson*, 197 U.S. at 25.

[305] Zucht v. King, 260 U.S. 174, 176 (1922); *see also* Phillips v. City of N.Y., 775 F.3d 538, 542 (2d Cir. 2015) (In *Jacobson*, "The Supreme Court held that mandatory vaccination was within the State's police power.").

[306] 49 U.S.C. § 41713(b)(1).

[307] *Cf. Arapahoe*, 242 F.3d at 1222 (observing that Proprietors Exemption applies to "exercise of proprietary powers" that is, among other things, "nonburdensome to interstate commerce").

[308] 2022 Guidance at 5.

[309] *See id.*

[310] *Cf. Arapahoe*, 242 F.3d at 1222; 2022 Guidance at 5.

[311] *See How Vaccinations Are Going in Your County and State*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html (last updated Sept. 15, 2022).

[312] Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-cv-1693-KKM-AEP, 2022 U.S. Dist. LEXIS 71206, at *64 (M.D. Fla. Apr. 18, 2022).

[313] *Id.* at *63–64.

[314] Aria Bendix et al., *CDC Mask Mandate for Planes, Trains No Longer in Effect After Judge Rules It 'Unlawful,'* NBC News (Apr. 18, 2022), https://www.nbcnews.com/news/us-news/florida-court-overturns-cdc-travel-mask-mandate-unlawful-rcna24853.

[315] *Health Freedom Def. Fund*, 2002 U.S. Dist. LEXIS 71206, at *63–64.

[316] *See id.* at *35 (declining to consider plaintiffs' constitutional non-delegation claim).

[317] Money, *supra* note 180.

imposing such requirements.[318] Thus, unless Congress grants the CDC more explicit authority to impose broad mask mandates, sponsors' authority to mandate masks in their airports during a future public health emergency will probably depend, at least in large part, on their respective power under state law to regulate public health.

Sponsors should note that litigants have had mixed success litigating to prohibit airlines and sponsors from requiring the litigant to wear a mask.[319] During the COVID-19 pandemic, DOT reminded air carriers that the CDC's mask mandate included an exemption for passengers who could not wear a mask because of a disability.[320] That DOT guidance further advised, "The Department also requires reasonable accommodations for persons with disabilities who are unable to wear masks or are unable to wear them safely."[321] Nonetheless, the guidance noted that airlines could require passengers claiming such a disability-related exemption to provide evidence to substantiate their claim and to comply with carrier-imposed "protective measures," including provision of a negative COVID-19 test.[322] Similarly, with respect to its own mask mandate at airports, TSA provided exemptions for those with certain disabilities.[323] Presumably, in the event of a future respiratory disease outbreak that causes the sponsor to impose a mask mandate, the sponsor would have to be similarly mindful about the need to reasonably accommodate those travelers who cannot wear masks for reasons of a disability.

However, a "reasonable accommodation" does not necessarily mean waiving a mask requirement, especially if the health threat is especially great: As the DOT guidance provided, federal policy "allows an airline to refuse to provide air transportation to an individual whom the airline determines presents a disability-related safety risk, provided that the airline can demonstrate that the individual would pose a 'direct threat' to the health or safety of others onboard the aircraft, and that a less restrictive option is not feasible."[324] At least assuming the federal government offers similar guidance to airport sponsors during a future public health emergency, a sponsor would presumably have authority to assess a traveler's disability claim and determine whether a mask exemption for that person is warranted in light of the traveler's and the public's respective interests.

f. Prohibiting Arrival of Certain Aircraft

Federal law and grant assurances limit a sponsor's ability to prohibit certain aircraft from using an airport or to require aircraft to land at certain airports, and not others, for health screening. Early in the COVID-19 pandemic, the federal government required international flights arriving into the United States to land at one of thirteen designated U.S. airports where federal agents would conduct "enhanced" health screening of the arriving passengers.[325] Such screening included questioning passengers, obtaining information to facilitate contact-tracing, and checking passengers' body temperatures.[326] While this was a federal requirement, the FAA has made clear that airport sponsors generally lack the authority to similarly restrict access to certain commercial flights based on the flights' origins. With respect to requests that flights land at only certain airports for screening, the FAA's 2022 Guidance advised sponsors that "[a]ll such requests would ordinarily require prior FAA approval under Grant Assurances 19 and 22 and related statutes."[327] "Usually," the 2022 Guidance cautioned, such flight restrictions "would likely constitute an unreasonable restriction on access," but the guidance noted that the FAA retains "discretion to consider such requests" and might deem them reasonable in the "exceptional" context of the COVID-19 pandemic.[328] By contrast, the FAA stated bluntly, "Prohibiting flights from 'hotspots' or areas of high levels of contagion generally is not acceptable."[329] There is no record of any sponsor seeking such approval and no record of the FAA making the kind of specific determination contemplated by the guidance.

The Deregulation Act and the Grant Assurances justify the requirement that a sponsor obtain federal approval before directing flights to certain airports for health screening. Limiting airport access to an air carrier clearly affects an air carrier's "service" and "routes" under the Deregulation Act,[330] such that federal law very likely preempts any state or local regulation of air carriers' access to certain airports. And, as the *Arapahoe* and *Seaplane* decisions indicate, a general concern for safety will likely not validate an air carrier access restriction under the Proprietors Exception.[331] Thus, a sponsor would likely be obligated, both through the Deregulation Act and its grant assurances, to obtain federal consent to require an international

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[318] *E.g.*, Aguayo, *supra* note 177.

[319] *See, e.g.*, Andreadakis v. CDC, No. 3:22cv52 (DJN), 2022 U.S. Dist. LEXIS 122236, at *5 (E.D. Va. July 11, 2022); Nick Mordowanec, *4-Year-Old Autistic Boy Can Fly Maskless After Judge's Ruling*, Newsweek (Feb. 17, 2022), https://www.newsweek.com/4-year-old-autistic-boy-can-fly-maskless-after-judges-ruling-1680354.

[320] U.S. Dep't of Transp., Notice of Enforcement Policy 1 (Feb. 5, 2021), https://www.transportation.gov/sites/dot.gov/files/2021-02/Mask%20Notice%20Issued%20on%20Feb%205.pdf.

[321] *Id.* at 6.

[322] *Id.*

[323] *TSA Extends Face Mask Requirement at Airports and Throughout the Transportation Network*, TSA (Apr. 30, 2021), https://www.tsa.gov/news/press/releases/2021/04/30/tsa-extends-face-mask-requirement-airports-and-throughout.

[324] U.S. Dep't of Transp., *supra* note 321, at 4–5.

[325] Michelle Baran, *U.S. Airports Will No Longer Screen International Arrivals for COVID-19*, AFAR (Sept. 9, 2020), https://www.afar.com/magazine/us-airports-to-no-longer-screen-international-arrivals-for-covid-19.

[326] *Id.*

[327] 2022 Guidance at 2.

[328] *Id.*

[329] *Id.* at 5.

[330] *Air Transp. Ass'n of Am.*, 266 F.3d at 1071 ("service … refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided […] 'routes' generally refer[s] to the point-to-point transport of passengers" (internal citation and quotation marks omitted); *Arapahoe*, 242 F.3d at 1222.

[331] *See Arapahoe*, 242 F.3d at 1222; *Seaplane*, 2021 U.S. Dist. LEXIS 225101, at *11–12.

flight to land at a certain U.S. airport, rather than another, for passenger health screening. Under the Grant Assurances, and indirectly under the Airport Noise and Capacity Act of 1990 (ANCA), a sponsor is generally prohibited from restricting access to its facility except for FAA-approved safety reasons.[332] Neither the FAA nor any court has recognized an exception to this broad prohibition for reasons of public health. Thus, sponsors should at least be mindful that the FAA could find that an access restriction for reasons of a public health emergency violates both ANCA and the sponsor's obligations under Grant Assurance 22 to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport."[333]

g. Enforcement of Public Health Measures

At least as important as the issue of an airport sponsor's legal authority to impose various health measures at its airport is the practical question of how a sponsor might enforce such requirements, particularly if a passenger refuses to comply with a health requirement. This digest does not assess law- and policy-enforcement authority in detail, largely because such powers are typically matters of state law. Sponsors do, however, need to understand the scope of their enforcement authority. Sponsors therefore should consult with state and local law enforcement to understand the sponsor's own authority, as well as the respective jurisdiction of local or state law enforcement agencies, to enforce airport protocols and control passengers who refuse to follow them. The sponsor's authority to enforce such requirements may well depend on whether the sponsor operates its own police department, as some sponsors do,[334] or looks to a host municipal, county, or state law enforcement agency to provide policing at the airport. Many sponsors already have agreements in place that set forth the respective powers of the sponsor and local law enforcement with regard to enforcement of state or local criminal matters, and obligations to maintain the peace, at the airport. Such agreements may provide sufficient clarity, but, if not, sponsors should examine those agreements to ensure that enforcing compliance with health mandates falls within the scope of law enforcement obligations.

[332] 49 U.S.C. §§ 47521; *see also* Grant Assurances at 10–11 (Grant Assurances 22 and 23).

[333] Grant Assurances at 10. This discussion does not address the question of a sponsor's obligation to provide services and staff to airlines under all circumstances. A sponsor's obligations in that regard, beyond the clear obligation to allow access to the airport, are beyond the scope of this digest.

[334] For example, the Port Authority of New York and New Jersey and the Metropolitan Washington Airports Authority each operates its own police department. *Port Authority Police Department*, Port Auth. of N.Y. & N.J. (accessed June 1, 2022), https://www.panynj.gov/police/en/index.html; *MWAA Police Department*, Metro. Wash. Airports Auth. (accessed June 1, 2022), https://www.mwaa.com/policefireems/mwaa-police-department.

D. Labor Management and Staffing Considerations

In addition to their role as transportation hubs, airports are among the largest sources of employment in many regions of the United States.[335] A 2014 study estimated that nearly 1.2 million people worked among 485 commercial U.S. airports during the year prior, including employees of airport tenants, sponsors, and various government agencies.[336] As such, many sponsors have direct or indirect authority, as employers or landlords of employers, over thousands of workers. This section of the digest addresses labor and employment-related legal considerations that a sponsor may face as the result of a public health emergency. Such considerations concern staffing reductions and the health requirements that a sponsor might seek to impose on its own employees and on others who work at the airport.

1. Sponsor Staffing Reductions

At the outset of the COVID-19 pandemic, U.S. airports experienced an unprecedented decline in passenger traffic:[337] On April 13, 2020, one month after the President declared the pandemic a national emergency, the number of individuals passing through TSA airport checkpoints was down more than 96 percent relative to the year prior.[338] As commercial air travel dried up, many airport sponsors suffered financial stress,[339] leading several to suspend most hiring, threaten layoffs, or furlough or layoff their own employees.[340]

[335] *See, e.g.*, Harriet Baskas, *How Many People Does It Take to Run an Airport?*, USA Today (updated Apr. 2, 2016), https://www.usatoday.com/story/travel/flights/2016/03/30/airport-workers-employees/82385558 (reporting that Atlanta's Hartsfield-Jackson airport has the largest workforce in the state of Georgia); Orlando Econ. P'ship, Top 75 Employers: Orlando MSA (updated July 2021), https://business.orlando.org/wp-content/uploads/sites/3/2020/02/Top-75-Employers.pdf (listing Orlando International Airport as Orlando region's fifth-largest employer).

[336] CDM Smith., The Economic Impact of Commercial Airports in 2013 at 5, 34 (Sept. 2014), http://airportsforthefuture.org/files/2014/09/Economic-Impact-of-Commercial-Aviation-2013.pdf.

[337] *See* Andrew Freedman et al., *How Coronavirus Grounded the Airline Industry*, Wash. Post (Apr. 1, 2020), https://www.washingtonpost.com/graphics/2020/business/coronavirus-airline-industry-collapse.

[338] *TSA Checkpoint Travel Numbers*, Transp. Sec. Admin., https://www.tsa.gov/coronavirus/passenger-throughput (last visited June 1, 2022).

[339] Alison Sider & Krystal Hur, *U.S. Airports to Receive $8 Billion to Help Pay Bills as Travel Recovers*, Wall St. J. (June 22, 2021), https://www.wsj.com/articles/u-s-airports-to-receive-8-billion-to-help-pay-bills-as-travel-recovers-11624373180.

[340] *See, e.g.*, Kayla Clarke, *Layoffs, Separations Coming to Detroit Metro Airport Due to Financial Hit from COVID-19 Pandemic*, ClickOnDetroit (July 8, 2020), https://www.clickondetroit.com/news/local/2020/07/09/wayne-county-airport-authority-announces-layoffs-separations-at-detroit-metro-airport-after-financial-hit-from-covid-19-pandemic (announcing layoff plans); Catherine Dunn, *Philadelphia International Airport Says Hundreds of Layoffs Are Possible Without More Federal Aid*, Phila. Inquirer (July 24, 2020), https://www.inquirer.com/business/philadelphia-international-airport-phl-budget-layoffs-coronavirus-cares-act-20200724.html (warning of layoffs without federal assistance); Larry Higgs, *After Massive Losses, Port*

In the case of the COVID-19 pandemic, some of the most potentially onerous employment impacts were ameliorated by provisions in federal funding statutes that required many airport sponsors who received federal relief funds to retain nearly all of their employees.[341] As expected, those requirements helped avoid massive layoffs of sponsor employees until the worst economic impacts of the pandemic had lessened. Whether similar requirements and relief programs will be available in a future public health emergency is, of course, completely unknown.

During a potential future public health emergency, passenger traffic and aircraft operations could similarly plummet at many airports, imposing strains airport finances and forcing sponsors to consider furloughing or laying off their own employees, as some did during the COVID-19 pandemic. While the federal government does not generally prohibit sponsors from reducing their own staffing, sponsors should be careful to review applicable federal, state, and local laws and regulations to ensure that any such layoffs or furloughs comply with those requirements.

Among other concerns, sponsors need to consider whether their staffing-reduction plans comply with antidiscrimination laws. For example, a sponsor's headcount-reduction proposal that prioritizes furloughing or laying off certain higher-paid employees could disproportionally affect older employees. Such a proposal could, therefore, lead to claims that the sponsor has engaged in age discrimination in violation of the federal Age Discrimination in Employment Act.[342] Even if a sponsor has no intention of discriminating against older workers (or those who fall within any other legally protected class), practices with discriminatory effects may violate such laws if they yield what is known as a "disparate impact" on any such class of workers.[343]

In addition, sponsors need to be alert to Grant Assurance requirements with regard to several federal antidiscrimination policies. For example, Grant Assurance 1 requires sponsors to comply with Title VI of the Civil Rights Act of 1964, which, among other things, prohibits discrimination against individuals on the basis of various characteristics under federally funded programs.[344] Grant Assurance 1 further requires compliance with other antidiscrimination provisions, including, for example, the Age Discrimination Act of 1975 and Executive Order 11246, which respectively prohibit age discrimination in federally funded programs and various forms of discrimination by federal contractors.[345] Therefore, even an unintentional violation of any such policy might jeopardize a sponsor's AIP grant eligibility, in addition to the various other penalties a sponsor could face for a discriminatory employment practice.

Finally, some sponsors may be subject to collective-bargaining agreements that further restrict the sponsor's ability to reduce staff or may dictate the tools which the sponsor uses to does so. Sponsors need to review any such agreements closely with counsel prior to planning or implementing any staff reductions.

Given the potential legal pitfalls a sponsor could face when laying off or furloughing staff in response to a public health emergency, sponsors may want to include a staff-reduction plan in connection with their planning for a public health emergency in which headcount reduction is necessary. In preparing such a plan, sponsors will want to consider several variations of the plan to address distinct emergency situations that could implicate different staffing needs. In any event, sponsors need to work closely with labor counsel when preparing such a plan to ensure compliance with applicable laws, regulations, and grant assurances.

2. Health Requirements for a Sponsor's Own Employees

Just as a sponsor may wish to impose health measures on air travelers using its airport, the sponsor may consider imposing health-related requirements, such as testing and vaccination mandates, on its own employees. Sponsors need to be mindful that any such policy could implicate federal, state, and local laws and regulations, as well as the terms of applicable collective-bargaining agreements.

Figure 3 provides an overview of the legal questions a sponsor should consider when deciding whether to impose a health requirement on the sponsor's own airport employees. The following section of the digest discusses those considerations in greater detail.

a. Relevant Case Law

Federal courts have repeatedly upheld an employer's authority to require its workers to be vaccinated, including against COVID-19. Applying both federal and California law, a federal district court in California held that United Airlines was entitled to place on extended leave an employee who refused to wear a face mask on the basis of a disability.[346] After United required all of its employees to wear face masks due to the COVID-19 pandemic, the plaintiff, a United ramp worker at LAX, requested to wear a face shield in lieu of a mask, asserting that his post-traumatic stress disorder and anxiety prevented him from wearing a face mask.[347] United refused plaintiff's face

Authority Cuts $1.3B Through Attrition, Stalled Projects, NJ.COM (Nov. 19, 2020), https://www.nj.com/news/2020/11/after-massive-losses-port-authority-cuts-13b-through-attrition-stalled-projects.html (reporting Port Authority plans to reduce 626 positions through attrition and buyouts).

[341] AIRPORT CORONAVIRUS RESPONSE GRANT PROGRAM FREQUENTLY ASKED QUESTIONS, *supra* note 86, at 28. (sponsors of hubs were required to keep at least 90 percent of their employees through February 15, 2021 in order to receive relief grant funds).

[342] *See The Age Discrimination in Employment Act*, EEOC, https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967 (last visited June 1, 2022) (full text of ADEA).

[343] *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (observing that both ADEA and Title VII of the Civil Rights Act of 1964 "authorize recovery" for discriminatory employment practices "on a disparate-impact theory").

[344] Grant Assurances at 2, *citing* 42 U.S.C. §§ 2000d.

[345] *Id.* at 2–3; 42 U.S.C. §§ 6101,; *Executive Order 11246*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ofccp/executive-order-11246 (last visited June 1, 2022).

[346] Bezzina v. United Airlines, Inc., No. CV 21-05102-JFW(JPRx), 2022 U.S. Dist. LEXIS 36243, at *9, *28 (C.D. Cal. Feb. 24, 2022).

[347] *Id.* at *5, *7, *9.

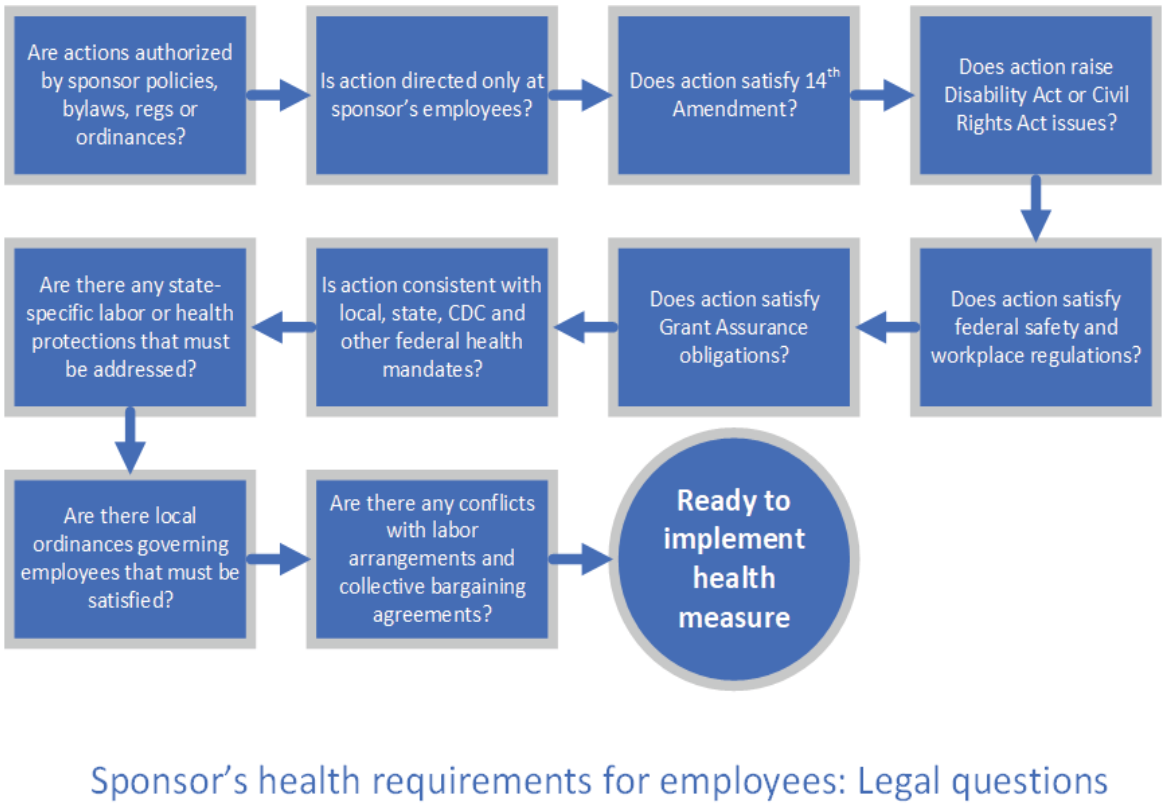

Figure 3. Legal questions a sponsor should consider.

shield request, advising him that United "currently requires all employees to use a face mask even when using a face shield," and instead placed him on leave.[348] The plaintiff sued, alleging various causes of action under California law, including employment discrimination on the basis of a disability in violation of California's Fair Employment and Housing Act.[349]

The federal district court dismissed the complaint with prejudice.[350] As the court held, "Plaintiff is unable to establish a prima facie case of disability discrimination because he cannot demonstrate that he is able to perform the essential duties of his position without endangering himself or others."[351] Observing that the parties did not dispute that the plaintiff's job "requires that he wear a mask in order to protect his own health and safety of those around him," the court found no evidence of discrimination.[352] Furthermore, the court concluded that United had a "legitimate and nondiscriminatory basis for its mask policy—the protection of its employees and customers from the highly contagious, air-borne virus, COVID-19."[353] The court further held that United's mask requirement "was grounded in a reasonable judgment based on current medical knowledge and public health guidance."[354] And, while the court acknowledged that certain "federal, state, and local regulations and orders […] generally suggest that face shields may be an acceptable substitute when a person is unable to wear a face mask," the court held that "[p]laintiff's employer, United, is the entity responsible for making that decision, and in this case, United made the reasonable business decision to require every employee wear a face mask without exception."[355] Thus, the court recognized that United, as an employer, enjoys broad latitude to implement the "reasonable" employee health requirement of wearing a face mask, despite its effect on an assertedly disabled employee.

Other federal courts have similarly ruled in favor of an employer's authority to impose health-related mandates on its employees in response to the COVID-19 pandemic. Following President Biden's executive order that federal contractors require their employees to be vaccinated against COVID-19, a federal contractor in South Carolina required its own employees to receive such a vaccine.[356] Several of the contractor's employees sued to enjoin the contractor's vaccination requirement, arguing, among other things, that the requirement was, in effect, a

[348] *Id.* at *9 (internal quotation marks omitted).

[349] *Id.* at *10, *12.

[350] *Id.* at *29.

[351] *Id.* at *16.

[352] *Id.* at *16–17.

[353] *Id.* at *18.

[354] *Id.* at *19.

[355] *Id.* at *20–21.

[356] Rhoades v. Savannah River Nuclear Sols., *LLC*, Civil Action No. 1:21-cv-03391-JMC, 2021 U.S. Dist. LEXIS 246597, at *3–4 (D.S.C. Dec. 28, 2021).

government mandate masquerading as a private employer requirement.[357] The court rejected that argument, instead holding that the contractor was acting as a private employer in issuing its "private employer mandate."[358] As such, the court concluded, regardless of the federal vaccine mandate, the contractor, "as a private employer in South Carolina, retains its prerogative to terminate at-will employment relationships at any time, for any reason, or for no reason at all."[359] Both in light of that conclusion and on other grounds, the court declined to enjoin the contractor's employee vaccine mandate.[360] Thus, in ruling for the contractor, the court implied that whether a governmental order is the reason that a private employer in a state with "at-will" employment laws imposes its own vaccine mandate is immaterial to whether that employer may terminate an employee for refusing to be vaccinated.

Other federal and state courts have reached similar conclusions. A federal district court in Kentucky considered a challenge by employees to their employer hospital's COVID-19 vaccination mandate.[361] First, the court dispensed with the plaintiff employees' federal constitutional claims against their employer, holding that such claims only applied to state actors, and the hospital was a private employer.[362] Next, the court rejected the plaintiffs' claims under the Disabilities Act and Title VII of the Civil Rights Act of 1964 (Title VII).[363] The court did state that, "under the [Disabilities Act] and Title VII, private employers […] are required to offer medical and religious accommodations to its mandatory vaccination policy."[364] Nevertheless, the court held that the plaintiffs failed to demonstrate that their employer had not complied with its obligations under the Disabilities Act to sufficiently accommodate the employees' purported disabilities.[365] Nor, as a factual matter, the court held, had the plaintiffs demonstrated that their employer had discriminated against them on the basis of religion in violation of Title VII.[366]

Perhaps most significantly, the Kentucky federal court held that, under *Jacobson*, public interest considerations cut against enjoining the employer's vaccination mandate. As the court held,

> The case before this Court deals with a private actor, and with no actual coercion. Being substantially less restrictive than the *Jacobson* mandate, and being enacted by a private actor, Defendants' policy is well within the confines of the law, and it appropriately balances the public interests with individual liberties.[367]

Thus, the court declined to enjoin the employer hospital's vaccination mandate.[368]

As previously noted, state courts have ruled similarly. For example, the Louisiana Supreme Court has concluded that applicable at-will employment law precludes an employee from stating a claim against a private employer who mandates vaccination against COVID-19. As the court summarized its ruling, the state's "employment-at-will doctrine […] means an employer is at liberty to dismiss an at-will employee and, reciprocally, the employee is at liberty to leave the employment to seek other opportunities."[369] While federal and state laws "temper[]" that policy, the court held, "no such exceptions appl[ied]" to the case before it because, among other things, "the employer is a private actor," and the state constitutional provision that the employees cited only limits governmental actors."[370]

These holdings indicate that courts will tend to uphold the right of an employer to require an employee to be vaccinated, wear a mask, or submit to a similar health requirement, at least in the face of a public health emergency and absent some law or regulation to the contrary. However, at least one federal appellate decision suggests that certain courts may disfavor strict employee vaccination requirements or similar health mandates, even when issued by a private employer. After a U.S. district court declined to preliminarily enjoin United Airlines' employee vaccination requirement, a divided panel of the Fifth Circuit reversed, holding in an unpublished, *per curiam* opinion that United's alleged efforts to pressure employees to receive a COVID-19 vaccination despite their purported religious beliefs likely irreparably harmed the plaintiff employees.[371]

The court purported to issue a "narrow" decision, and neither "decide whether United or any other entity may impose a vaccine mandate" nor "decide whether plaintiffs are ultimately entitled to a preliminary injunction."[372] However, the decision makes clear that the majority sympathized with the plaintiffs' claims of religious discrimination and viewed United's efforts to compel those plaintiffs to get vaccinated as abusive. As the court held,

> United has presented plaintiffs with two options: violate their religious convictions or lose all pay and benefits indefinitely. That is an impossible choice for plaintiffs who want to remain faithful but must put food on the table. In other words, United is actively coercing employees to abandon their convictions.[373]

Furthermore, the panel's description of the parties' positions and actions hints at sympathy for, if not agreement with, the plaintiffs' religious objections: While the court characterized United's efforts to ascertain the sincerity of accommodation-seeking

[357] *Id.* at *7, *9.

[358] *Id.* at *9.

[359] *Id.*

[360] *Id.* at *14.

[361] Beckerich v. St. Elizabeth Med. Ctr., 523 F. Supp. 3d 633, 637 (E.D. Ky. 2021).

[362] *Id.* at 639–40.

[363] *Id.* at 640–43.

[364] *Id.* at 640.

[365] *Id.* at 641.

[366] *Id.* at 643.

[367] *Id.* at 646, *citing Jacobson*, 197 U.S. 11, 26.

[368] *Id.* at 647.

[369] Hayes v. Univ. Health Shreveport, LLC, 332 So. 3d 1163, 1165–66 (La. 2022).

[370] *Id.* at 1166.

[371] Sambrano v. United Airlines, Inc., No. 21-11159, 2022 U.S. App. LEXIS 4347, at *2, *14–15 (5th Cir. Feb. 17, 2022).

[372] *Id.* at *2.

[373] *Id.* at *22.

employees' religious objections as a "bizarre inquisition,"[374] the court observed that the plaintiffs' bases for refusing vaccination—the "concern that aborted fetal tissue was used to develop or test the COVID-19 vaccines"[375]—is "a common basis for religious objections to the COVID-19 vaccine,"[376] and the court suggested no similar skepticism toward that claim. Thus, while the panel purported to decide a narrow question, its ruling suggests that the court would be receptive to a future challenge to an employer vaccine mandate on the basis that it discriminates against an employee's religious beliefs. Furthermore, the decision suggests that the court would be reluctant to second-guess a plaintiff's religious sincerity, and might, therefore, require an employer to waive a vaccination requirement for almost any employees requesting a religious exception.

Notably, many airport sponsors are state or local governmental entities. Whether they constitute "private employers" may often turn on their legal status and on the application of state law. State and local legal considerations are discussed below.

b. Applicable State and Local Law

Sponsors should be mindful that state and local laws may restrict the sponsor's ability, as an employer, to require its own employees to wear masks, receive vaccinations, or comply with other health requirements during a public health emergency. Several states have limited or prohibited the authority of private employers to require their employees to be vaccinated.[377] Certain states, including Florida and South Carolina, have enacted laws prohibiting state or local governmental agencies from requiring their own employees to be vaccinated against COVID-19.[378] While several of these laws are limited to COVID-19 vaccinations, sponsors considering requiring their own employees to be vaccinated against another disease would be well-advised to review the scope and extent of applicable laws in their states and localities to determine whether they continue to impose a limit on a sponsor's ability to require that its employees be vaccinated or to comply with certain other health measures.

c. Leases and Labor Agreements

Regardless of whether a sponsor may require its own employees to be vaccinated or otherwise comply with certain health measures under applicable law, the sponsor should review its own labor agreements prior to mandating any such employee health measures. It is possible that such agreement—whether an employment contract, a collective-bargaining agreement, or some other labor agreement—could constrain the sponsor's ability to issue such a health requirement, at least without completing various procedural or consultative steps. This is another example of an issue that should be identified in early planning for a public health emergency. As an example, when COVID-19 first hit the economy, lawyers worldwide took a new look at *force majeure* clauses.[379] While such clauses are common in commercial contracts, few lawyers take the time to examine the events and circumstances that would trigger *force majeure*, and most lawyers certainly did not read these boiler-plate clauses with a pandemic in mind. Since this pandemic, there has been a growth in professional literature about such clauses and the importance of considering whether a public health emergency should trigger *force majeure* provisions.[380]

3. Health Requirements Imposed on Tenants' Employees

a. Requirements Applicable to Tenants Generally

A sponsor that wishes to impose health requirements on its own airport-based employees may also find it desirable to impose similar mandates on the employees and contractors who work for airport concessionaires and other airport tenants. The sponsor's legal authority to do so will likely depend on a combination of the law in the sponsor's jurisdiction and the terms of the sponsor's agreements with its tenants.

There appears to be no federal case law specifically addressing the authority of an airport sponsor to require the employees of its tenants to be vaccinated or submit to other health requirements distinct from those imposed on travelers and other airport users. That may be due, in part, to the lack of controversial health requirements that sponsors have imposed on their airport tenants. At the time of this digest's completion, only one airport sponsor had imposed a COVID-19 vaccination requirement on employees of its airport tenants. That sponsor, the City and County of San Francisco, which operates San Francisco International Airport (SFO), ordered all "airport workers," including employees of "every SFO tenant or contractor," to either become fully vaccinated against the disease or, if exempt for medical or religious reasons, undergo weekly COVID-19

[374] *Id.* at *4 n.2.

[375] *Id.* at *5.

[376] *Id.* at *5 n.3.

[377] *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, Nat'l Acad. for State Health Pol'y, https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates (last updated July 11, 2022).

[378] *Id.*; *Governor Ron DeSantis Signs Legislation to Protect Florida Jobs*, Ron DeSantis (Nov. 18, 2021), https://www.flgov.com/2021/11/18/governor-ron-desantis-signs-legislation-to-protect-florida-jobs; S. Michael Nail, *South Carolina Governor Signs Bill Curtailing Employer Vaccine Mandates*, Nat'l L. Rev. (Apr. 27, 2022), https://www.natlawreview.com/article/south-carolina-governor-signs-bill-curtailing-employer-vaccine-mandates.

[379] A force majeure clause "is a provision in a contract that frees both parties from obligation if an extraordinary event directly prevents one or both parties from performing. A non-performing party may use a force majeure clause as excuse for non-performance for circumstances beyond the party's control and not due to any fault or negligence by the non-performing party." *Force Majeure*, Cornell L. Sch.: Legal Info. Inst., https://www.law.cornell.edu/wex/force_majeure (last updated Dec. 2021).

[380] *E.g.*, Cosmos Nike Nwedu, *The Rise of Force Majeure Amid the Coronavirus Pandemic*, 61 Nat. Res. J. 1 (2021); King Fung Tsang, *From Coronation to Coronavirus: COVID-19,* Force Majeure *and Private International Law*, 44 Fordham Int'l L.J. 187 (2020–2021); John R. Clark, *Can I Get Force Majeure From a Novel Coronavirus?*, 39 Air Med. J. 235 (2020).

testing.[381] There does not appear to be any pending litigation regarding that order.

Despite a lack of case law directly adjudicating a sponsor's power to impose health requirements on a tenant's employees, case law addressing public entities' authority over their contractors generally may shed light on how courts would decide a challenge to a sponsor's health mandates on tenants' workers. In response to the COVID-19 pandemic, New York City's health commissioner ordered that those working in the city's public school system be vaccinated against the virus.[382] The order explicitly applied to "[a]ll staff of contractors" who physically worked in city's public schools, among others.[383] Various teachers and administrators challenged the order on First Amendment grounds, alleging that the city had improperly denied their requests for religious exceptions to the order.[384]

On appeal, the Second Circuit held that the city had likely used "constitutionally infirm" procedures for assessing the plaintiffs' exemption claims, but the court nonetheless held that the order itself did not violate the First Amendment "on its face."[385] In evaluating the plaintiffs' facial challenge to the order's constitutionality, the court applied the rational-basis standard, under which the court considered merely whether the city "chose[] a means for addressing a legitimate goal that is rationally related to achieving that goal."[386] As the court held,

> The [order] plainly satisfies this standard. Attempting to safely reopen schools amid a pandemic that has hit New York City particularly hard, the City decided, in accordance with CDC guidance, to require vaccination for all [Department of Education] staff as an emergency measure. This was a reasonable exercise of the State's power to act to protect the public health.[387]

Notably, the court did not separately assess the order's constitutionality as it applied to the city's *contractors* or to those contractors' employees, even though the court noted that the order applied to such contractor employees.[388] Rather, the court seemed content to uphold the order, including its application to a city contractor's employees, as a "reasonable exercise" of state authority over public health.[389]

A federal district court in Washington State upheld a similar employee vaccination mandate, but this time against a challenge grounded in the U.S. Constitution's Contracts Clause. Washington Governor Jay Inslee ordered that state employees and many state contractors, as well as a range of educators and healthcare workers, be vaccinated against the disease.[390] Various employees of state and local agencies moved to preliminarily enjoin the order, in part on the ground that the order substantial[ly] modifi[ed]" their employment contracts, in violation of the Contracts Clause, by "impos[ing] a new qualification for employment[.]"[391] (In relevant part, the Contracts Clause provides, "No State shall […] pass any […] Law impairing the Obligation of Contracts[.]"[392])

The court denied the plaintiffs' motion and suggested that their Contracts Clause claim would ultimately fail.[393] As the court explained, courts considering a Contracts Clause claim must first determine whether a challenged law "operated as a substantial impairment of a contractual relationship."[394] If so, the court then assesses whether such law "is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose."[395] Thus, the court indicated that it could only find a Contracts Clause violation if the governor's order both substantially impaired the plaintiffs' employment agreements and did not appropriately and reasonably advance a significant and legitimate public purpose.[396] Without even deciding whether the governor's order substantially impaired the employment contracts, the court held that the plaintiffs could not establish their entitlement to an injunction because "there is no doubt that [the order] is an appropriate and reasonable way to advance a significant and legitimate public purpose, which is curbing the spread of COVID-19."[397] "Even applying a heightened scrutiny," the court continued, "the [order] serves the State's compelling interest in reducing COVID-19 infections."[398] Noting that the order "is well-supported by extensive medical evidence, recommendations by professional organizations, and aligns with other measures already in place in other governmental settings[,]" the court held that the plaintiffs had "failed to demonstrate […] that there are serious questions going to the merits of the [Contracts Clause] claim."[399]

The Second Circuit and Washington district court's rulings suggest that federal courts would be inclined to uphold the power of a state or local government to order contractors to be vaccinated or otherwise take health precautions in response to

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[381] *Mayor London Breed and San Francisco International Airport Announce Vaccination Requirement for All Airport Workers*, City & Cty. of S.F. (Sept. 21, 2021), https://sfmayor.org/article/mayor-london-breed-and-san-francisco-international-airport-announce-vaccination-requirement.

[382] Kane v. De Blasio, 19 F.4th 152, 158 (2d Cir. 2021).

[383] *Id.* at 159 n.1.

[384] *Id.* at 158.

[385] *Id.* at 158–59.

[386] *Id.* at 166.

[387] *Id.*

[388] *Id.* at 159 n.1.

[389] *Id.* at 166.

[390] Wise v. Inslee, No. 2:21-CV-0288-TOR, 2021 U.S. Dist. LEXIS 205380, at *3 (E.D. Wash. Oct. 25, 2021).

[391] *Id.* at *3, *13, *quoting* plaintiffs' motion *and citing* U.S. Const. art. I, § 10, cl. 1.

[392] U.S. Const. art. I, § 10, cl. 1.

[393] *Wise*, 2021 U.S. Dist. LEXIS 205380, at *13 ("Plaintiffs have failed to demonstrate they will succeed on the merits of their Contracts Clause claim and that there are serious questions going to the merits of the claim."); *20 (denying motion for temporary restraining order and preliminary injunction).

[394] *Id.* at *13, *quoting* Sveen v. Melin, 138 S. Ct. 1815, 1821–22 (2018).

[395] *Id.* at *14, *quoting* Apartment Ass'n of L.A. Cty., Inc. v. City of L.A., 10 F.4th 905, 913 (9th Cir. 2021).

[396] *See id.* at *13–14.

[397] *Id.* at *14.

[398] *Id.* at *14–15.

[399] *Id.* at *15.

a public health emergency. The Second Circuit seemed to have little trouble upholding the New York City mandate against a First Amendment challenge, and its decision implies a broader endorsement of the order's constitutionality.[400] Meanwhile, the Washington court considered curbing COVID-19 not only a "legitimate public purpose" but also a "compelling government interest."[401] (Of course, it is speculative whether a future public health emergency would satisfy either standard; likewise, whether a particular health measure would constitute an "appropriate and reasonable way" to combat it would be highly fact-specific.) Thus, the Washington court's decision suggests that, at least under the Contracts Clause, a state's contractor vaccination requirement in response to a deadly pandemic could pass muster. (Notably, the Contracts Clause applies to both state and local laws,[402] so one might expect a court to analyze a Contracts Clause challenge to a local health ordinance under a framework similar to the Washington court's.)

Even assuming a sponsor's effort to impose a health-related requirement on a tenant's employees during a public health emergency would accord with the U.S. Constitution and federal statute, the sponsor's authority to enforce such a requirement may still hinge on state and local law and general contract principles. As discussed in the section of this digest concerning a sponsor's authority to impose health requirements on travelers, that authority may hinge on whether the sponsor is a state government, a local government with health-policy authority delegated by the state, or neither. Therefore, an independent public airport authority with no state statutory power over health regulation may be much more limited than a state or local government in its ability to impose health-related requirements on airport tenants. Likewise, because courts have interpreted a state or local government's authority to "impair" a contract to depend, in part, on that government's lawmaking power, a sponsor without such lawmaking authority may not be able to impose a health requirement on the employees of an existing airport tenant unless the tenant's contract with the authority so allows.[403]

Standard contract principles may also be key to a sponsor's authority to impose health requirements on a tenant's employees, especially if the tenant does not have independent legislative authority to impose health requirements generally. Courts, and the FAA, routinely look to the terms of a sponsor's contract when considering the sponsor's authority over an airport tenant.[404] Thus, a sponsor's power to require a tenant's employees to follow certain health orders may come down to whether the sponsor's contract with that tenant permits the sponsor to issue health orders, make other demands in the public interest or the interest of health or safety, or otherwise allows for unilateral contract modification for reasons including the addition of a health requirement.

Finally, regardless of whether a sponsor is a state, local government, or independent body, and irrespective of the terms of a sponsor's tenant contracts, state or local law may further constrain its ability to impose public health requirements upon airport tenants. As previously discussed, several states have passed legislation prohibiting state agencies and local governments from imposing mask or vaccine mandates generally.[405] In these states, a public sponsor may be statutorily prohibited from imposing any or all health requirements on the employees of an airport tenant. Given the range of applicable state laws and the fact that many are new, sponsors need to consult with counsel when assessing whether any such law applies to them and, if so, how.

b. Potential Preemption of Requirements for Air Carrier Employees

While a sponsor may be entitled under the U.S. Constitution to impose health requirements on many airport tenants, the Deregulation Act directly affects a sponsor's efforts to require employees of an air carrier, including those based at the sponsor's airport, to comply with health requirements. As discussed in this digest's section on public health measures, the Deregulation Act generally prohibits a sponsor from "enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier."[406] As explained in that section, while the Deregulation Act carves out an exception to allow a sponsor to "carry[] out its proprietary powers and rights,"[407] that exception is, in the words of the Tenth Circuit, "extremely limited;"[408] federal courts have struck down efforts to restrict air carrier operations on broad health- and safety-related grounds, at least when the sponsor fails to demonstrate that the restriction supports safety or other public interests.[409]

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[400] *Kane*, 19 F.4th at 166 ("This [order] was a reasonable exercise of the State's power to act to protect the public health.").

[401] *Id.* at *14–15.

[402] N.P.R. Co. v. Minnesota, 208 U.S. 583, 590 (1908) ("It is no longer open to question that municipal legislation passed under supposed legislative authority from the State is within the prohibition of the Federal Constitution and void if it impairs the obligation of contracts.").

[403] *See N.P.R. Co.*, 208 U.S. at 590 (Commerce Clause analysis applies to local legislative acts); *Wise*, 2021 U.S. Dist. LEXIS 205380, at *13–15 (applying the Contracts Clause to evaluate a state's authority to impair a contract).

[404] *See, e.g.*, Cap. Leasing v. Columbus Mun. Airport Auth., 13 F. Supp. 2d 640, 655 (S.D. Ohio 1998) (airport sponsor, "like any other property owner, is free to insist upon the terms and conditions it imposes upon persons or entities desiring to have access to or use its property"); Avis Rent a Car Sys. v. Monroe Cty., 660 So. 2d 413, 414–15 (Fla. Dist. Ct. App. 1995) (analyzing airport-concessionaire contract according to its terms); Desert Wings Jet Ctr., LLC v. City of Redmond, FAA Dkt. No. 16-09-07, Director's Determination, 2010 FAA LEXIS 298 (Nov. 10, 2010), at *58 ("Complainant agreed to the negotiated terms of the new agreement, which included the accepted lease rate. The Director will not interfere with the negotiated settlement between the Complainant and Respondent when federal issues are not involved.").

[405] Pickett, *supra* note 178; Mckay, *supra* note 179.

[406] 49 U.S.C. § 41713(b)(1).

[407] 49 U.S.C. § 41713(b)(3).

[408] *Arapahoe*, 242 F.3d at 1222–23.

[409] *Id.* at 1223–24; *Seaplane*, 2021 U.S. Dist. LEXIS 225101, at *5.

However, a recent Ninth Circuit decision indicates that, despite the Deregulation Act, state and local governments may have substantial authority to impose labor regulations on airlines operating within their respective jurisdictions. In *Bernstein v. Virgin Atlantic*, the Ninth Circuit considered whether Virgin America (Virgin), now merged with Alaska Airlines, violated various California labor laws by failing to comply with statutory wage requirements, to provide adequate meal and rest breaks, and to perform other actions.[410] The district court had largely granted summary judgment to the class plaintiffs, various California-based Virgin flight attendants, holding that the airline had violated the California Labor Code (Labor Code) and, in relevant part, that the Deregulation Act did not preempt subjecting Virgin to the Labor Code's meal or rest-break requirements.[411] (Virgin appears to have argued that the Deregulation Act only preempted the Labor Code's meal- and rest-break requirements.[412])

On appeal, the Ninth Circuit affirmed the district court's holdings with respect to meal and rest breaks, while reversing on other questions.[413] With respect to Virgin's preemption claim, the Ninth Circuit observed, "Where a law bears a reference to rates, routes, or services, the Supreme Court has held that the law 'relates to' those items and is therefore preempted."[414] However, the Ninth Circuit held, "Where a law bears no such reference, the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route, or service and thereby interferes with the competitive market forces within the industry."[415] The court noted that it had previously evaluated the preemptive effect of "virtually identical" language in the Federal Aviation Administration Authorization Act (FAA Act) on California meal and rest requirements for interstate truckers.[416] In that prior case, the court had held that, under the FAA Act, "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services."[417] Concluding that such reasoning "applies with equal force" to the flight attendants' claims, the Ninth Circuit concluded, "Just as the [FAA Act] did not preempt California's meal and rest-break requirements as applied to the trucking industry, the [Deregulation Act] does not preempt those requirements as applied to the airline industry."[418]

Importantly, the Ninth Circuit's decision in *Bernstein* is an outlier, at odds with other federal case law.[419] Nonetheless, the Supreme Court recently declined to review the Ninth Circuit's *Bernstein* decision, allowing it to stand.[420] (The Supreme Court's decision not to review *Bernstein* does not indicate an endorsement of the Ninth Circuit's ruling; the Court denies the vast majority of petitions for review,[421] and the Court has repeatedly emphasized that such a denial "imports no expression of opinion upon the merits of the case."[422]) However, the federal court for New York's Eastern District recently reached the conclusion opposite *Bernstein* in a case that the Eastern District said "appears to be directly on point" with *Bernstein*.[423] In that case, *Delta Air Lines v. New York City Department of Consumer Affairs*, the Eastern District considered Delta's claim that, with respect to flight attendants, the Deregulation Act preempted a New York City ordinance (the Sick Time Act) that required many private employers to provide paid sick leave to their employees.[424]

Contrary to the Ninth Circuit, the Eastern District held that "it is clear that [the Deregulation Act] expressly preempts the [Sick Time Act] as applied to Delta's flight attendants."[425] As the court held, the "services" an airline offers include "the operation of the scheduled flight itself."[426] Under federal law, the court continued, an airline cannot operate a flight without a minimum number of flight attendants.[427] Absent that number, the court reasoned, "the flight cannot operate, and the airline cannot provide any of its services."[428] Thus, the court concluded, "Because the [Sick Time] Act relates to flight attendants and their availability at the time they are scheduled to work, the Court finds that the [Sick Time] Act relates to a covered service

[410] Bernstein v. Virgin Am., Inc., 3 F.4th 1127, 1133 (9th Cir. 2021).

[411] *Id.* at 1134.

[412] Bernstein v. Virgin Am., Inc., 227 F. Supp. 3d 1049, 1070 (N.D. Cal. 2017) ("Virgin argues that Plaintiffs' meal and rest-break claims are preempted by the Federal Aviation Act […] and/or the Airline Deregulation Act[.]").

[413] *Bernstein*, 3 F.4th at 1145.

[414] *Id.* at 1141, *citing* Morales, 504 U.S. at 388–89 (1992).

[415] *Id.*, *quoting* Dilts v. Penske Logistics, LLC, 769 F.3d 637, 645 (9th Cir. 2014) (internal quotation marks omitted) (emphasis in original).

[416] *Id.*

[417] *Id.*, *quoting Dilts*, 769 F.3d at 646.

[418] *Id.*

[419] Ryan McCoy, *California's (Improper) Regulation of Pilot and Flight Attendant Rest*, 34 Air & Space Law. 15, 16 (2022) ("[T]he Ninth Circuit's decision in *Bernstein* demonstrates that the court has disregarded the Supreme Court's decisions in *Morales v. Trans World Airlines, Inc.*, [504 U.S. 374 (1992),] *American Airlines, Inc. v. Wolens*, [513 U.S. 219 (1995),] and *Northwest, Inc. v. Ginsberg*[, 572 U.S. 273 (2014)]. In all three of these cases, the Supreme Court held that the [Deregulation Act] preempted laws of general applicability because each law had a "significant impact" on prices, routes, and services.").

[420] Daniel Wiessner, *U.S. Supreme Court Rejects Alaska Airlines Appeal in Labor Law Dispute*, Reuters (June 30, 2022), https://www.reuters.com/world/us/us-supreme-court-rejects-alaska-airlines-appeal-labor-law-dispute-2022-06-30.

[421] *See The Supreme Court–The Statistics*, 133 Harv. L. Rev. 412, 421 (2019) (noting that, during 2018 Term, Court decided only 129 of 6538, or 1.85 percent of, cases submitted on petition for writ of certiorari; statistic excludes cases within Court's original jurisdiction).

[422] Missouri v. Jenkins, 515 U.S. 70, 85 (1995), *quoting* United States v. Carver, 260 U.S. 482, 490 (1923).

[423] Delta Air Lines, Inc. v. N.Y.C. Dep't of Consumer Affairs, No. 17-CV-1343 (ILG) (RML), 2021 U.S. Dist. LEXIS 193022, at *19 (E.D.N.Y. Sep. 30, 2021).

[424] *Id.* at *1.

[425] *Id.* at *2.

[426] *Id.* at *24.

[427] *Id.*

[428] *Id.*

under the [Deregulation Act]."[429] Alternatively, the court held, if the "service" were instead deemed to be the provision of a flight that "reliably departs on schedule," the Sick Time Act would still "relate to" a covered service because it would "bear[] on Delta's ability to reliably provide on-time flights to its passengers[.]"[430] And "because[,]" the court determined as a matter of law, "the [Sick Time] Act threatens to subject Delta to a patchwork of state laws that will undermine its ability to compete in a deregulated marketplace, the purpose for which the [Deregulation Act] was enacted to achieve[,]" the Deregulation Act preempted the Sick Time Act.[431]

The Eastern District explicitly criticized the Ninth Circuit's reasoning in *Bernstein*. Referring to the Ninth Circuit's holding that "the proper inquiry is whether the [state or local] provision, directly or indirectly, *binds* the carrier to a particular price, route, or service[,]"[432] the Eastern District stated, "No other circuit, including the Second Circuit, has adopted such a narrow standard."[433] "The Court disagrees with the Ninth Circuit," the Eastern District stated; "Rather," the court concluded, "the proper test is whether the state or local rule frustrates the [Deregulation Act's] deregulatory purpose."[434] The Eastern District also deemed *Bernstein* inconsistent with the Supreme Court's holding in *Morales v. Trans World Airlines*, in which the Court "rejected the argument that only state laws specifically addressed to the airline industry," and not "laws of generally applicability," "are preempted" by the Deregulation Act.[435]

In sum, *Bernstein* suggests that a sponsor may have significant latitude to impose health-related requirements upon airline employees on the job at the sponsor's airport, at least if the sponsor is a state or local government with lawmaking or regulatory authority. However, the Eastern District's *Delta* decision, as well as past Supreme Court case law, suggest that the Supreme Court could overrule *Bernstein* by deciding a future case to the contrary. Until or unless the Court so rules, *Bernstein* stands at odds with other federal courts' interpretation of the Deregulation Act. Thus, the Deregulation Act may preclude a sponsor from imposing health-related requirements on airline employees using the sponsor's airport during a public health emergency, even if the sponsor is entitled to pose such a requirement on the employees of other airport tenants.

E. Surveillance and Data Privacy

Faced with a public health emergency, airport sponsors may consider turning to various forms of mobile and monitoring technology to identify potentially infected airport users, facilitate social distancing, and otherwise reduce the potential for disease transmission. However, several of these technologies—particularly those that collect data on airport users—raise potential data privacy concerns and could create liability for a sponsor. This section of the digest discusses several general data privacy concerns that sponsors are encouraged to consider when exploring the use of monitoring and other technologies to respond to a public health emergency. As with other sections of this digest, this section focuses on federal law, not state or local law, regarding data use, privacy, and protection. However, this section does recommend sources of further information regarding state data laws.

1. Forms of Data Collection

Airport sponsors may look to several types of data-collecting systems to help them respond to a public health emergency. One broad category of such technology is passenger pathway analytics. Pathway analytics involves the use of sensors, often but not necessarily cameras, to track how passengers occupy and move through terminal spaces.[436] Using any combination of cameras, radio-frequency identification (RFID), Bluetooth technology, Wi-Fi, cellular signals, or other systems or data sources, airport sponsors can track passengers' and workers' movements through the lobby, concessions, security-screening, and gate areas of a terminal.[437]

Pathway analytics does not necessarily require the retention of personally identifiable information—data that, alone or in tandem with other information, permits the identification of an individual.[438] Many pathway-analytics systems, such as those based on Wi-Fi, Bluetooth, or video tracking, can anonymize personally identifiable information prior to processing such data, and pathway-analytics systems are often designed to aggregate sensitive data at the point of collection and discard any personally identifiable information immediately.[439]

Pathway analytics may prove useful to sponsors during a public health emergency. By understanding live wait times for check-in and security-screening, a sponsor may be more equipped to promote physical distancing by directing passengers to less-crowded security lines. The sponsor can also provide travelers with data on live or average check-in or security-screening delays so that such travelers can make their own decisions about when to arrive at the airport or whether to check-in or check a bag in person. Additionally, by identifying where in the airport passengers are crowding, a sponsor's operational managers can redirect custodians to more frequently clean and restock high-traffic restrooms, hand-sanitizer stations, and protective-equipment dispensers. Such crowding and foot-traffic data can also help sponsors determine whether

[429] *Id.*

[430] *Id.* at *25.

[431] *Id.* at *26.

[432] *Bernstein*, 3 F.4th at 1145.

[433] *Delta*, 2021 U.S. Dist. LEXIS 193022, at *19.

[434] *Id.*

[435] *Id.* at *20, *quoting Morales*, 504 U.S. at 386 (internal quotation marks omitted).

[436] David R. Zoufal et al., *ACRP LRD 42: Legal Implications of Data Collection at Airports,* Transportation Research Board of the National Academies of Sciences, Engineering and Medicine, Washington, D.C., 2021.

[437] *Id.*

[438] *Guidance on the Protection of Personally Identifiable Information*, U.S. Dep't of Labor, https://www.dol.gov/general/ppii (last visited Apr. 28, 2022).

[439] Zoufal, *supra* note 437, at 12–13.

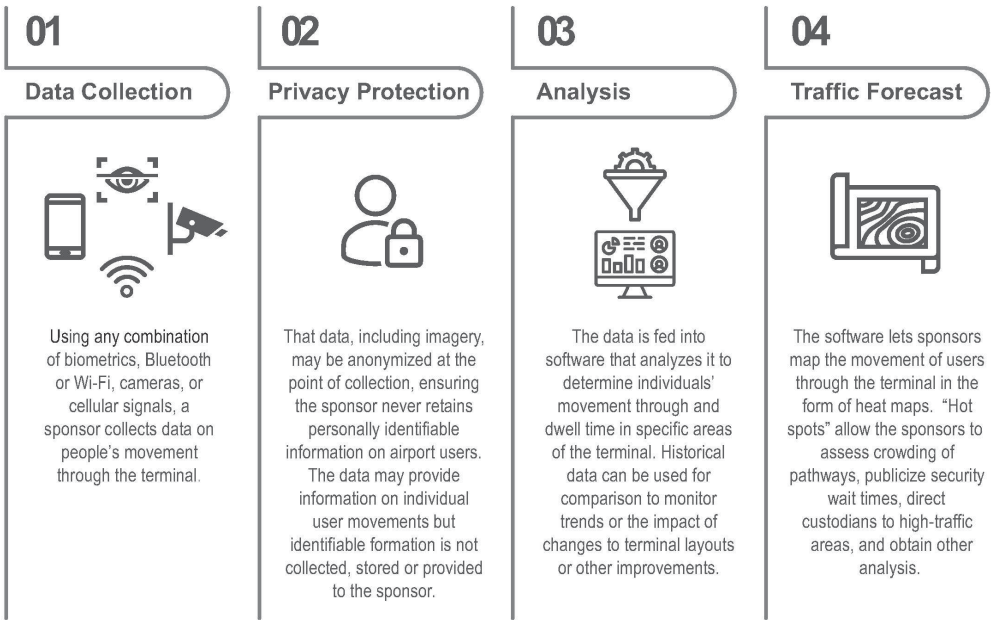

Figure 4. Summary of the pathway-analytics process.

to open closed-off areas of the terminal to promote physical distancing in busy areas.

Figure 4 provides a summary of the pathway-analytics process, reflecting how data from a variety of potential sources can provide sponsors with actionable information to promote public health at their airports and improve the passenger experience.

Sponsors may also use biometrics to better manage their facilities during a public health emergency. By and large, the use of biometrics at U.S. airports, at least for purposes other than clearing customs and immigration, is a relatively new phenomenon. In 2018, Delta Air Lines launched its first "biometric terminal" at its Atlanta hub.[440] That program enabled travelers to check in, check luggage, clear a TSA checkpoint, board a flight and, upon entering the United States from abroad, clear immigration, all almost entirely through the use of facial-recognition software.[441] The effects of the COVID-19 pandemic may have increased passengers' acceptance of biometric travel protocols: A 2021 survey found that 73 percent of travelers were willing to share their biometrics to improve their airport travel experience, up from 46 percent in 2019.[442] The International Air Transport Association, which sponsored the survey, attributed that dramatic increase in public acceptance of biometrics to travelers' desire to overcome the "balloon[ing]" airport processing times resulting from the pandemic.[443] Regardless of a future public health emergency, a continued shift toward biometrics as a passenger-processing tool seems likely.[444]

A future public health emergency could inspire more airport sponsors to roll out various forms of biometric technology to process travelers and workers. In the midst of a public health emergency, sponsors may conclude that investing in or expanding the use of biometrics—to identify, check in, screen, and board passengers—is worthwhile in order to minimize close physical interaction between travelers, security or immigration officers, and airline agents. Biometrics could also reduce the need for travelers to touch surfaces: CBP touts its increasing reliance on biometric scanning at U.S. ports of entry, particularly its Biometric Facial Comparison program, as a "hands-free process" that "helps to prevent the spread of germs[.]"[445]

In an effort to stem the spread of disease, some sponsors may turn to contact tracing, which involves identifying those who have been in close contact with an infected individual and alerting them of the potential exposure.[446] While contact tracing is a longstanding public health practice that need not involve digital

[440] *Delta to Launch First Biometric Terminal in the U.S.*, Delta (Sept. 20, 2018), https://news.delta.com/delta-launch-first-biometric-terminal-us.

[441] *Id.*

[442] *Passengers Want to Use Biometrics Says Survey*, IATA (Nov. 16, 2021), https://airlines.iata.org/news/passengers-want-to-use-biometrics-says-survey (citing results of 2019 survey).

[443] *Id.*

[444] Elaine Glusac, *Your Face Is, or Will Be, Your Boarding Pass*, N.Y. Times,https://www.nytimes.com/2021/12/07/travel/biometrics-airports-security.html (last updated Jan. 11, 2022) ("In short, tech-driven changes are coming fast and furiously to airports, including the following advancements in biometrics.").

[445] *Say Hello to the New Face of Speed, Security, and Safety*, CBP, https://biometrics.cbp.gov (last visited Apr. 29, 2022).

[446] *See* Eric N. Holmes & Chris D. Linebaugh, Cong. Rsch. Serv., LSB10511, COVID-19: Digital Contact Tracing and Privacy Law 1, https://crsreports.congress.gov/product/pdf/LSB/LSB10511 (generally defining contact tracing).

surveillance,[447] the COVID-19 pandemic led various U.S. states, foreign governments, and major technology companies to develop phone-based contact-tracing applications.[448] Such apps typically employ one of two forms of tracking to identify cellphone users who have been in close proximity to an individual who later reports infection.[449] While state governments and the private sector have rolled out many of the highest-profile contact-tracing apps in the United States, airport consultants have explored best practices for sponsor-led digital contact-tracing efforts in the United States.[450] For example, sponsors may also be able to conduct contact tracing among airport workers by tracking the use of airport access cards: If the sponsor finds that a worker who later tests positive has presented his or her access card at an airport card reader, the sponsor can identify other workers who used the same card reader around the same time and then alert them to their potential exposure.[451]

Finally, as discussed previously in this digest, sponsors may consider conducting body-temperature screening of passengers and staff in response to an outbreak of a fever-inducing disease. While there are multiple means of conducting such screenings, including such low-tech approaches using an analog thermometer, airport sponsors would likely prefer less-invasive, more-modern systems, such as the use of thermal imaging cameras to identify the body heat of passing travelers and alert a screener to those whose temperatures indicate fever.[452]

Each of these systems requires some degree of data collection, even if no such data is stored or retained by the system. As such, in addition to various other legal considerations the use of such systems might implicate, each gives rise to data privacy concerns with potential legal risks for airport sponsors.

2. Legal Implications of Data Collection

An airport sponsor's collection of data on travelers and staff could have legal implications ranging from those concerning the Constitution to those concerning individual vendor contracts. For example, digital surveillance and data-collection efforts could face scrutiny under the Fourth Amendment, which protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"[453] As previously discussed in this digest, whether an action by a public official constitutes a "search," for Fourth Amendment purposes, depends on whether the action intrudes physically on a "constitutionally protected area" or, regardless of whether the action is physical, violates one's "reasonable expectation of privacy."[454] What constitutes a reasonable expectation of privacy is socially relative: It turns, in part, on what expectation of privacy "society is prepared to recognize as reasonable."[455]

For decades, Supreme Court precedent appeared to preclude an individual from asserting a Fourth Amendment violation when the government obtained information on that person, such as financial records or call history, from a third party, such as a bank or a phone company.[456] Under that "third-party doctrine," the Court held that a person lacked a reasonable expectation of privacy in such information because he or she had already voluntarily turned it over to the third party.[457] However, in 2018, the Court meaningfully narrowed that doctrine when it decided *Carpenter v. United States*.[458] In *Carpenter*, the Court held that a cellphone customer has a reasonable expectation of privacy in his or her cell-site location information (referred to herein as "cell location data")—the record of a cell phone's geographic location, relative to cell towers, over a potentially long period of time.[459] As the *Carpenter* majority explained, when the Court established the third-party doctrine in the 1970s, "few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements."[460] Because the government "achieves near perfect surveillance" when it tracks a cell phone over time, giving the government access to "the privacies of life," the Court held that it would contravene a reasonable expectation of privacy to allow the government access to cell location data.[461]

Carpenter may have implications for efforts by airport sponsors to monitor travelers' movements by tracking their mobile devices. While *Carpenter* concerned law enforcement surveillance, the Court's view that the Fourth Amendment limits officials' authority to track cell location data without a warrant suggests that sponsors—typically governmental entities—may wish to ensure that their pathway analytics or other data-collection systems do not capture extensive location data that

[447] *Id.* (noting that contact tracing historically involved working with potentially infected persons to identify contacts).

[448] *Id.* at 2–3.

[449] *Id.* at 3. Such apps typically track an infected user's close physical contacts in one of two ways: Location tracking and proximity tracking. Location tracking uses GPS or cell-site location data to identify where various cellphone users are on Earth, allowing the system to identify individuals who have crossed paths with a reportedly infected person. Proximity tracking uses Bluetooth technology to identify when a cellphone (or other Bluetooth-enabled device) has been within a certain close range of another Bluetooth-enabled device, the latter held by an infected person, for at least a certain period of time. Unlike location tracking, proximity tracking does not require determining where the Bluetooth devices are geographically, but only whether they have been within a certain distance from one another. *Id.*

[450] Zach Varwig, *Contact Tracing and COVID-19 Technology Best Practices*, Aviation Pros (Dec. 17, 2020), https://www.aviationpros.com/airports/airport-technology/article/21163514/contact-tracing-and-covid19-technology-best-practices.

[451] *See id.*

[452] *See* Zoufal, *supra* note 437, at 21.

[453] U.S. Const. amend. IV.

[454] Carpenter v. United States, 138 S. Ct. 2206, 2213, 2219 (2018); Michael A. Foster, Cong. Rsch. Serv., LSB10449, COVID-19, Digital Surveillance, and Privacy: Fourth Amendment Considerations 2 (Apr. 16, 2020).

[455] *Carpenter*, 138 S. Ct. at 2213 (internal citation omitted).

[456] Foster, *supra* note 455, at 2.

[457] *Id.*

[458] *Carpenter*, 138 S. Ct. 2206.

[459] *Id.* at 2217.

[460] *Id.*

[461] *Id.* at 2217–18.

can be tied to a particular individual. Furthermore, given the principles articulated in *Carpenter* and the evolving nature of data law and regulation, sponsors are encouraged to be careful when collecting and retaining extensive location or similar data that could constitute personally identifiable information, including with respect to both pathway analytics and contact-tracing efforts. Sponsors that intend to use such technology should consider anonymizing such data at the front end and avoiding retention of any unnecessary data in their systems. Sponsors also could reduce their legal exposure by tracking only those devices whose users clearly, affirmatively opt-in to such tracking. Given the sensitive nature of much personal data and the evolving jurisprudence regarding it, sponsors considering a mobile-device tracking program are advised to consult with knowledgeable legal counsel, and perhaps technology consultants, to ensure that any data-collection programs they operate do not run afoul of *Carpenter* or applicable state law, and that such programs do not needlessly collect sensitive data.

Importantly, *Carpenter* does not prohibit all surveillance technology. The *Carpenter* Court characterized its holding as "narrow" and explicitly stated that the ruling did not "call into question conventional surveillance techniques and tools, such as security cameras[.]"[462] The Court also recognized that exigent circumstances may justify a warrantless search.[463] At least one congressional legal analyst has suggested that the need to combat a deadly disease could constitute the sort of "special need" that would justify warrantless data collection.[464] Furthermore, the *Carpenter* Court notably based its decision in large part on the fact that, in reality, most cellphone users do not choose to deliver their cell location data to their cellular providers.[465] Thus, a truly voluntary, opt-in contact-tracing program would be less likely to implicate *Carpenter*.[466]

The Constitution is not the only source of law that could limit airport sponsors' flexibility with respect to data collection and handling. Sponsors that obtain personal data face legal risk not only with respect to such data's collection but also in the event of such data's improper disclosure. At least one airport sponsor and one airport parking concessionaire have each faced a class action lawsuit[467] regarding the allegedly wrongful disclosure of information protected under the federal Fair and Accurate Credit Transactions Act (FACTA).[468] In each case, the putative class plaintiffs accused the defendant of issuing parking receipts that displayed more than five digits of the customer's credit-card number, in violation of FACTA.[469] In one case, the defendant, an airport sponsor, settled the matter at a cost of nearly $1.3 million, between attorneys' fees and a settlement fund.[470] While these cases do not address data collection in the context of a public health emergency, they reflect the risk that a sponsor may face by failing to protect data in accordance with various statutory and regulatory requirements.

Sponsors are also encouraged to consider the liability they may incur if an employee or third-party vendor misuses sensitive personal data. (For an in-depth discussion of such risks and potentially applicable federal statutes, as well as legal considerations relevant to sponsors' collection and use of data generally, readers should consult *ACRP LRD 42: Legal Implications of Data Collection at Airports* (*ACRP LRD 42*).[471])

Beyond federal statutes, a growing body of federal privacy regulation has implications for sponsors' collection, use, and retention of data. The Federal Trade Commission (FTC) has exercised jurisdiction over various data privacy matters.[472] Under that authority, the FTC has brought enforcement actions against corporations for practices that the agency has deemed "deceptive" or "unfair."[473] Such actions include charges that a company failed to adequately disclose the nature of its user-activity tracking, failed to disclose the inclusion of third-party software on a consumer device when such software could potentially access the consumer's sensitive data, or failed to sufficiently secure data, among other complaints.[474] For example, the FTC brought (and ultimately settled) an action against Uber in response to a data breach, alleging that the transportation network company misrepresented its data-security practices.[475] Likewise, the FTC brought, and a federal appeals court upheld, an enforcement action against the Wyndham hotel chain for "unfair cybersecurity practices."[476] In that matter, the FTC essentially asserted that Wyndham had taken a lackadaisical approach to cybersecurity, such as by failing to use firewalls, encrypt payment-card data, adequately limit vendors' access to sensitive data, identify and prevent data breaches, or respond adequately to such breaches.[477] Furthermore, at least one federal appellate court has upheld the FTC's authority to hold a company liable for alleged misrepresentations on the company's website, with the court reasoning that such misinformation could influence the consumer's use of that website.[478]

Those enforcement actions reaffirm the importance of following cybersecurity best practices in the use and protection

[462] *Id.* at 2220.

[463] *Id.* at 2222.

[464] Foster, *supra* note 455, at 4, *citing* United States v. Ward, 131 F.3d 335 (3d Cir. 1997); *see Ward*, 131 F.3d at 341 ("The Government also has an equally important interest in curbing the transmission of HIV which is furthered by the provision of crucial medical data to an individual whom the defendant may have exposed to an infectious disease by criminal means.") (internal quotation marks omitted).

[465] *Carpenter*, 138 S.Ct. at 2220.

[466] Holmes, *supra* note 447, at 3–4.

[467] Zoufal, *supra* note 437, at 28.

[468] Codified at 15 U.S.C. §§ 1681.

[469] Zoufal, *supra* note 437, at 28; 15 U.S.C. § 1681c(g)(1) (requiring truncation of debit- or credit-card numbers on receipts to five or fewer digits).

[470] Zoufal, *supra* note 437, at 28.

[471] Zoufal, *supra* note 437.

[472] *Id.* at 35–36.

[473] *Id.* at 35.

[474] *Id.* at 36.

[475] *Id.* at 37.

[476] *Id.* at 37–38.

[477] *Id.* at 38.

[478] *Id.*

of personally identifiable information and other sensitive data that a sponsor may collect during a public health emergency. Likewise, those cases counsel in favor of liberally disclosing a sponsor's data-collection practices on the sponsor's website and in other media, including on any apps that the sponsor may produce or distribute. And the FTC's case against Wyndham, along other FTC actions,[479] indicates that airport sponsors and others retaining sensitive data would be well-advised to implement, and adhere to, adequate and practicable cybersecurity plans, both to protect data and to mitigate the harm of a data breach.

Given the wide variation among state and local laws pertaining to data collection, data security, and consumer protection, this digest does not discuss state laws in detail. However, sponsors are advised to determine whether their states and localities have more-stringent laws and policies regarding data collection than those imposed by the federal government. At least a dozen states include explicit privacy protections in their state constitutions,[480] and certain states, including California and New York, have enacted extensive data privacy statutes.[481] Likewise, airport sponsors should consider that foreign data privacy regulations, including the European Union's General Data Privacy Regulation, may govern the data practices of airport stakeholders, including airlines, multinational private terminal operators, and other tenants, with whom a sponsor might wish to share data.[482] Paradoxically, state open-records or public-information laws could also require public-sector sponsors to *share*, not just protect, certain data they collect.[483]

Finally, sponsors will want to consider the contractual implications of data collection, both with respect to their own contractual obligations and with respect to the obligations they impose on their vendors. When preparing or entering into a contract with a vendor, concessionaire, or other third party, a sponsor would be well-advised to consider whether the agreement specifies which party will own data generated through the contractual relationship. That question may be particularly important if the contract is for software or data-collection services, whereby the vendor may have access to personally identifiable information or other sensitive data.[484] Likewise, sponsors are encouraged to review their contracts to confirm whether or how they limit each contracting party's use of sensitive data, define the data to be collected, require data-security practices, mandate and define data confidentiality, compel the destruction of sensitive data, and address handling of a data breach.[485] Especially for projects and relationships that involve the potential for extensive or sensitive data accumulation, sponsors might consider engaging counsel with expertise in data privacy or cybersecurity to review relevant agreements and mitigate potential liability.

In light of these various legal considerations, sponsors are further encouraged to consult *ACRP LRD 42*, which recommends various best practices for airport sponsors seeking to collect, use, or retain data. Such recommendations include the designation of a data privacy officer, development of a privacy policy, establishment of data-management and data-protection policies and practices, use of data anonymization, and provision of opt-out options to subjects of data collection, among many other recommendations.[486] *ACRP LRD 42* also refers readers to repositories of state data regulations, including several maintained by the National Conference of State Legislatures.[487] Sponsors are encouraged to consult counsel, and to consider *ACRP LRD 42* and other sources, for further information on data-security regulation.

F. Closure or Nonaeronautical Use of Airport Facilities

1. Using Airport Facilities for Medical or Community Accommodations

At the height of a public health emergency, a sponsor, or state or local officials, may consider it necessary to use part or even all of an airport for nonaeronautical purposes. Such purposes may include the use of airport facilities as a field hospital, testing, treatment, or vaccination facility, command post or logistics center, quarantine or isolation facility, or shelter for displaced or homeless individuals. Separately, the sponsor or state or local officials may fear that the public health emergency has rendered air travel or airport operations unsafe and may therefore wish to close the airport to protect airport workers, the traveling public, or the local community.

Prior to making any decision to close all or part of an airport, a sponsor needs to consider federal limitations on its authority to do so. FAA Grant Assurances, regulations, and property deeds limit an airport sponsor's authority to close all or part of an airport to aeronautical operations. Prior to making any such decision, a sponsor would be well-advised to coordinate with the FAA since the specific facts at the time could well be dispositive.

The FAA has cited two authorities, 49 U.S.C. § 47107(a)(8) and Grant Assurance 19, for the premise that a sponsor "must obtain FAA approval to allow airport closure for a nonaeronautical purpose."[488] Section 47107(a)(8) provides that, as a condition of receiving an AIP grant, a sponsor shall agree that "a proposal to close the airport temporarily for a nonaeronautical purpose must first be approved by the Secretary" of Transportation, acting through the FAA.[489] Grant Assurance 19 incorporates that provision by committing the sponsor to agree, in relevant part,

[479] *E.g.*, *id.* (discussing FTC case against LabMD for, in part, lacking an adequate data-security plan).

[480] *Id.* at 42.

[481] *Id.* at 43–44 (discussing New York's SHIELD Act); *id.* at 46–47 (summarizing the California Consumer Privacy Act).

[482] *Id.* at 60.

[483] *Id.* at 55.

[484] *See id.* at 67 (recommending consideration of data ownership in contracts).

[485] *Id.* at 67–69.

[486] *Id.* at 63–67.

[487] *Id.* at 43–44; *also id.* at 55 (citing repository of state records-retention schedules).

[488] 2022 Guidance at 2.

[489] 49 U.S.C. § 47107(a)(8).

> The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards […]. [The sponsor] will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for […] [o]perating the airport's aeronautical facilities whenever required[.][490]

The FAA has interpreted Grant Assurance 19 to apply to "all airport structures and operational areas."[491] With respect to a sponsor's obligation to obtain FAA approval to close a federally obligated airport, the FAA advised its staff at the outset of the COVID-19 pandemic, "In general, the FAA does not permit temporary closure or restriction of federally obligated airports for non-aeronautical purposes."[492] However, at least in the context of the COVID-19 pandemic, the 2022 Guidance (and prior versions of such guidance) advised that "closing gates or sections of terminals is likely to be acceptable if the closure is executed in response to reduced passenger volumes and operations, is not discriminatory, and does not provide an unfair competitive advantage to one operator," and provided that the sponsor coordinates such closure with its airlines, the TSA, and other, unspecified stakeholders.[493] The 2022 Guidance and December 2020 Guidance also advised that it would "likely be acceptable" to use terminals to shelter individuals, so long as such use "does not interfere with airport access," undermine airport security, or inhibit social distancing or other "protective measures."[494]

The lessons here are clear: Not all airport facilities are treated alike and the function that a particular facility at the airport plays is key to determining whether a sponsor has the authority to close that facility without FAA approval and what the implications of closing such facility, even with FAA approval, would be. Sponsors will note that Grant Assurance 19 requires operation of "the airport's *aeronautical* facilities whenever required."[495] As the FAA advised sponsors during the COVID-19 pandemic, "The closing of restaurants, retail stores, or other *non-aeronautical* functions in a terminal is not likely to violate FAA grant assurances if driven by COVID-19 public health measures or reduced clientele, and especially if restrictions are applicable to all business entities within the jurisdiction."[496] Nonetheless, the FAA reminded sponsors that such closures might implicate Airport Concession Disadvantaged Business Enterprise regulations and therefore advised sponsors to coordinate any such closures with the FAA's Office of Civil Rights.[497]

With respect to using certain airport facilities for pandemic mitigation efforts, the 2022 Guidance takes a subtly more permissive view than prior iterations of the FAA's COVID-19 guidance. Within its discussion of using airport revenue for public health efforts, the 2022 Guidance added a new observation that "[p]roviding physical space to accommodate vaccinations administered through a third-party provider" could constitute a legitimate airport operating cost.[498] The 2022 Guidance specifically cited "a location in the terminal or an outdoor drive-through location in a parking area" as potentially appropriate space for hosting such a vaccination effort, provided that the space "is not necessary for aeronautical activities."[499] By offering these locations as sites for a vaccination site, the 2022 Guidance implicitly *encourages* the use of certain airport facilities for pandemic mitigation measures, at least under limited circumstances, in a way prior iterations of FAA guidance had not.

Nonetheless, such guidance does not present absolute, bright-line direction regarding whether a sponsor may close or repurpose a specific airport facility to serve a specific public health purpose, especially outside the context of the COVID-19 pandemic. As a general matter, sponsors should never close runways, taxiways, or aprons for nonaeronautical use without explicit FAA approval; on the other hand, sponsors generally can, with no prior FAA approval, close nonaeronautical support facilities including automobile parking lots, gas stations, and passenger support functions such as outside-terminal concessions, bus stations and the like. Less clear-cut is a sponsor's authority to close in-terminal concessions, terminal gates, and passenger-processing facilities. A useful framework is for the sponsor to consider whether the particular closure directly affects aeronautical functions (e.g., the flying or landing of aircraft) or affects or impedes the ability of people to access such functions. The closer the particular facility is to serving or facilitating a basic aeronautical function, and the more likely it is that closure of such a facility could actually impede such functions, the more likely that advance FAA approval would be required.

Sponsors are reminded that FAA policy tends to cite *temporary* conditions when addressing the potentially permissible closure or nonaeronautical use of part of an airport. As discussed above, the FAA has considered it "likely […] acceptable" for a sponsor to close part of a terminal in light of emergency health measures or reduced passenger traffic and operations.[500] Thus, pursuant to the Grant Assurances, changed circumstances, including a resurgence of air traffic or the abatement of a public health emergency, could require the sponsor to reopen previ-

[490] Grant Assurances at 9.

[491] 2022 Guidance at 2.

[492] Kevin C. Willis, Compliance Guidance Letter 2020-01 (Mar. 16, 2020), https://www.faa.gov/airports/airport_compliance/media/CGL-2020-01-Temporarily-Close-Restrict-Non-Aeronautical-Purposes.pdf.

[493] 2022 Guidance at 3; Dec. 2020 Guidance at 3; May 2020 Guidance at 2.

[494] 2022 Guidance at 3; Dec. 2020 Guidance at 3. The May 2020 Guidance similarly advised that a sponsor could likely use terminals to shelter people so long as doing so did not interfere with airport access or aviation security, but that version of the guidance did not cite "protective measures" as an additional factor to consider when evaluating whether terminals may be used for shelter.

[495] Grant Assurances at 9 (emphasis added).

[496] 2022 Guidance at 2–3.

[497] *Id.* at 3.

[498] *Id.* at 5.

[499] *Id.*

[500] 2022 Guidance at 3.

ously closed parts of an airport or discontinue nonaeronautical activities in such facilities. Therefore, sponsors would be well-advised to regularly evaluate whether travel and health conditions continue to justify the closure or nonaeronautical use of aeronautical facilities.

2. Use of Airfields for Aircraft Storage

In the event of a public health emergency, aircraft operators could choose to ground their fleets en masse, straining or exceeding airports' standard parking capacity. At the height of the COVID-19 pandemic, aircraft operators put nearly 17,000 commercial airliners—almost two-thirds of the world's fleet—into storage in response to the unprecedented collapse in passenger travel demand that the crisis wrought.[501] Airlines parked many of those aircraft at major "boneyard" airports, including several in the American Southwest,[502] where arid conditions pose less corrosion risk to airframes than do more humid climates. The surge in demand for aircraft parking strained capacity at aircraft storage airports, even as airlines and other aircraft operators parked thousands of planes at major passenger airports, including several airline hubs.[503]

As was the case during the COVID-19 pandemic, an airport sponsor's airline tenants may ask it to provide overflow parking capacity for aircraft, including by closing runways or taxiways and using them for aircraft parking. Because the use of an airfield as a temporary aircraft parking lot can pose direct safety and operational concerns, such use raises complex regulatory considerations. While sponsors considering providing overflow aircraft parking during a public health emergency should consult any relevant guidance that the FAA offers during that particular emergency, sponsors may also find instructive the guidance regarding overflow aircraft parking that the FAA issued during the COVID-19 pandemic.

The FAA responded to what it called that "extraordinarily unusual operational environment"[504] of the COVID-19 pandemic by issuing guidance to both aircraft and airport operators. In a "CertAlert,"[505] the FAA advised sponsors that were considering parking aircraft on aprons or "movement areas," such as runways or taxiways, to develop and coordinate any such plan through an "aircraft parking plan committee."[506] The CertAlert recommended that such a committee include representatives of the airport's sponsor, airlines, FBOs, air traffic control tower, other airport tenants (presumably including concessionaires), aircraft rescue and firefighting staff, law enforcement officials, and "local FAA technical operations personnel."[507]

That CertAlert also recommended several steps a sponsor should take to prepare and implement a plan for overflow aircraft parking. Those recommendations generally fell into at least one of three categories: guidance on where to park aircraft, coordination with regulators and stakeholders, and procedural and regulatory obligations. With respect to parking locations, the FAA advised sponsors to "[e]xhaust all space at gates, ramps and aprons first to the fullest extent possible" before parking aircraft on movement areas, and to do so in a manner "as to not impede" aircraft movement.[508] The FAA also advised sponsors to "maximize the use of intermediate taxiway(s)" for parking.[509] The CertAlert warned that "[p]arking on runways must be avoided to the extent practical" given the risk of inadvertent landings on such runways over the course of the pandemic.[510] In any event, the FAA admonished sponsors, no movement area closures could interfere with aircraft rescue and firefighting, law enforcement, or "other emergency response deployment."[511]

Regarding regulator and stakeholder coordination, the CertAlert recommended that sponsors conduct "extensive coordination" with aircraft rescue and firefighting staff, law enforcement officials, other emergency response personnel, and air traffic controllers in the sponsor's airport tower regarding any changes to emergency operations routes on the airport due to overflow aircraft parking.[512] The CertAlert also advised sponsors to update air traffic control agreements, including memoranda of understanding, memoranda of authorization, and letters of authorization "as appropriate," presumably to account for changes to airfield operations.[513] Likewise, the CertAlert advised sponsors to inform their assigned Airport Certification Safety Inspector and FAA Airports District Office or Regional Office before parking planes on a movement area.[514] And the CertAlert stated that, during the COVID-19 "situation," an aircraft parking plan committee should reevaluate and reapprove its parking plan at least every 90 days.[515]

Addressing regulatory obligations, the CertAlert advised sponsors to review all of the potential impacts that overflow

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[501] *Tracking the In-Storage Fleet and Utilization in a Time of Uncertainty*, Cirium (Apr. 21, 2020), https://www.cirium.com/thoughtcloud/tracking-the-in-storage-fleet-at-a-time-of-uncertainty.

[502] Andreas Spaeth, *Coronavirus Banishes Planes to the Desert*, Deutsche Welle (May 14, 2020), https://www.dw.com/en/coronavirus-banishes-planes-to-the-desert/a-53433298.

[503] Anurag Kotoky et al., *Two-Thirds of the World's Passengers Jets Are Grounded Amid COVID-19 Pandemic. Here's What That Means*, Time (Apr. 17, 2020), https://time.com/5823395/grounded-planes-coronavirus-storage; *Grounded Airliners in Storage During the COVID-19 Pandemic Outbreak*, Airplane Boneyards (accessed Mar. 30, 2022), https://www.airplaneboneyards.com/grounded-airliners-in-storage-due-to-covid19-2020.htm.

[504] FAA, SAFO 20005: Temporary Parking of Overflow Aircraft (2020) (hereinafter "SAFO 20005").

[505] CertAlerts give the FAA Airports Safety and Operations Division a quick way to provide additional guidance on Part 139 airport certification and related issues to FAA inspectors and staff. *See CertAlerts for Part 139 Airport Certification*, FAA (rev'd June 27, 2022), https://www.faa.gov/airports/airport_safety/certalerts/.

[506] FAA, Part 139 CertAlert 20-02: Temporary Parking of Overflow Aircraft 1 (2020).

[507] *Id.*

[508] *Id.* at 2.

[509] *Id.*

[510] *Id.*

[511] *Id.*

[512] *Id.*

[513] *Id.*

[514] *Id.*

[515] *Id.*

parking could have on their airport designs and facilities, "to include but not [be] limited to" "airport design standards including penetration to any surfaces," air traffic control tower "line of sight," and other communication, visual, and airport-surface impacts.[516] If aircraft parking caused an impact to "any of these surfaces," the FAA stated that sponsors "must" file an FAA Form 7460-1 (Notice of Proposed Construction or Alteration) to allow the FAA to conduct a safety analysis.[517] In addition, the guidance stated that, if a sponsor chose to utilize "nonstandard parking locations," it must close movement areas only in compliance with the procedures specified by 14 C.F.R. §§ 139.339, *Airport Condition Reporting*, and 139.341, *Identifying, Marking, and Lighting Construction and Other Unserviceable Areas*.[518]

Finally, the CertAlert warned sponsors that any overflow parking plan "must not adversely impact any user of the airport" and that, if it did, "appropriate accommodations must be made."[519]

The FAA also issued a Safety Alert for Operators (Safety Alert) to "air carriers, aircraft operators, and pilots" addressing overflow aircraft parking.[520] The Safety Alert summarized several recommendations that were also contained within the CertAlert but added additional guidance: It stated that a sponsor may use permanently closed or abandoned runways for overflow parking "as long as the aircraft parking meets the standards."[521] The Safety Alert also stated that, pursuant to 14 C.F.R. Part 139, if a sponsor elected to use "nonstandard parking locations," it must follow "normal notification procedures for closing taxiways long-term," which, the Safety Alert specified, included Notices to Airmen (NOTAMs), Automatic Terminal Information Service updates, and "barriers, night markings, de-energize lighting, operations notification, etc."[522]

The FAA subsequently issued a further CertAlert that provided guidance to sponsors on how they should issue NOTAMs regarding runway or taxiway closures that result from overflow aircraft parking.[523] In that notice, the FAA advised sponsors to add the text "FOR ACFT PRKG" to any NOTAM sentence indicating the closure of a runway or taxiway for overflow aircraft parking.[524]

Of course, the FAA may issue new or updated guidance, or one or more binding regulations, in the event that a future public health emergency or other widespread crisis compels aircraft operators to ground aircraft en masse. In such a circumstance, sponsors would be well-advised to carefully review such regulations or guidance. Nonetheless, the CertAlerts and Safety Alert that the FAA issued with respect to overflow parking during the COVID-19 pandemic offer both practical and regulatory guidance for sponsors considering whether to offer overflow aircraft parking. Therefore, except to the extent that the FAA issues superseding guidance, airport sponsors should consult the guidance documents discussed above when considering or planning overflow parking of aircraft.

While the regulatory requirements for parking aircraft on the airfield were thoroughly addressed in FAA regulatory and guidance documents during the COVID-19 pandemic, sponsors will also want to keep in mind other, non-regulatory factors when considering extraordinary aircraft parking. Many airport tenant agreements obligate the sponsor to maintain the airfield in a safe and serviceable condition, and the closure of a runway or taxiway for the convenience of parking mothballed aircraft could be construed as violating that obligation. Furthermore, even the temporary decommissioning of an active airfield surface could affect the operations of FBOs, specialized aviation service operations (SASOs), and other airfield enterprises. Sponsors not only need to review their contractual obligations to these tenants but should also consult closely with affected airport tenants to minimize both operational disruption and the possibility of litigation.

G. Financial Support for Airport Tenants

During the COVID-19 pandemic, airlines in the United States reduced capacity by thousands of flights each month,[525] resulting in the total suspension of commercial air service to certain smaller markets.[526] During a potential future public health emergency, air carriers might similarly reduce or eliminate air service, whether only to certain destinations or network-wide. Likewise, FBOs and SASOs may similarly reduce, suspend, or terminate operations, whether due to health reasons, financial pressures, or government mandates. Meanwhile, nonaeronautical tenants at an airport, such as restaurants, rental car agencies, and newsstands, may face financial pressure to suspend or shutter operations due to a lack of passenger traffic.

In response to airline and FBO/SASO service reductions, a sponsor may believe that it is prudent to provide financial incentives to retain a minimum level of service, reduce previously agreed-upon incentives, or both. Similarly, a sponsor may face pressure to offer financial support to nonaeronautical tenants. Regardless, the sponsor should be mindful of potentially relevant regulatory and contractual obligations.

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[516] *Id.*

[517] *Id.*

[518] *Id.*

[519] *Id.*

[520] SAFO 20005, *supra* note 505.

[521] *Id.* at 2. It is not entirely clear to which "standards" the document refers.

[522] *Id.*

[523] FAA, CertAlert No. 20-03, Notice to Airmen (NOTAM) Examples when Closing Runway(s) and/or Taxiway(s) to Temporarily Park Aircraft (2020).

[524] *Id.* at 1.

[525] Leslie Josephs, *JetBlue Slashes Flights by 80% from Its New York-Area Home as Coronavirus Spreads*, CNBC (Mar. 31, 2020), https://www.cnbc.com/2020/03/31/jetblue-slashes-flights-by-80percent-from-its-new-york-area-home-as-coronavirus-spreads.html.

[526] Michelle Gao, *'We're a Long Way from Anywhere Else': Small U.S. Cities Hit with Airline Service Cuts in Pandemic*, CNBC (Oct. 23, 2020), https://www.cnbc.com/2020/10/23/coronavirus-travel-airlines-cut-service-to-small-airports.html.

Table 3. Legal Considerations Regarding Tenant Financial Relief

Tenant	Federal considerations	State/local considerations	Sponsor business considerations
Airlines and similarly situated air service providers	• Airline Deregulation Act • Anti-Head Tax Act • Restrictions on unjust discrimination • Restrictions on granting exclusive rights • FAA airline incentive rules	• Authority to waive fees, rent • Bond covenants • Rules on gifts of public funds	• Consequences for residual airport finance structure • Effect on revenue
FBOs, SASOs and similar on-airport service providers	• Restrictions on unjust discrimination • Restrictions on granting exclusive rights	• Authority to waive fees, rent • Rules on gifts of public funds	• Need to maintain minimum services
Concessionaires (both in-terminal and outside)	• ACDBE rules • Antidiscrimination statutes	• Antidiscrimination statutes • Authority to waive fees, rent • Bond covenants • Labor requirements • Local Social/policy statutes	• Need for passenger conveniences
Other nonaeronautical tenants	• Antidiscrimination statutes	• Authority to waive fees, rent • Bond covenants • Rules on gifts of public funds • Labor requirements	• Revenue implications (especially for residual airport finance system)

1. Considerations Applicable to Aid for Any Tenant

There are a wide range of options for providing financial relief during a public health emergency. While each situation and each sponsor are unique, there are some overarching factors for sponsors who are considering a relief program to keep in mind. Table 3 summarizes legal factors that a sponsor should consider when assessing whether or how to provide financial relief for airport tenants.

Sponsors may be able to abate or defer rental charges and other fees that they impose on airport tenants. The FAA advised that sponsors would not run afoul of the Grant Assurances by abating tenants' rent in response to the COVID-19 pandemic, so long as such abatement "is reasonable under the circumstances and reflects the decline in fair market value, loss of services, and/or changes to volume of traffic and economy of collection."[527] The 2022 Guidance, for example, "encouraged" sponsors to tie any rent abatement they offer to "the changed circumstances" caused by the pandemic and consider the term of any such abatement, the availability of other forms of governmental or insurance support that such tenants may receive, and "possible subsequent conditions that, if triggered, would end the abatement," among other criteria.[528] In addition, the Sponsors Guidance cautioned sponsors to ensure that aeronautical rates "remain reasonable" and to consult with "all affected parties" if a rent abatement for *nonaeronautical* tenants could have the effect of increasing costs on aeronautical tenants.[529]

The FAA guidance also addressed rent or fee deferrals. The 2022 Guidance advised that sponsors whose bond or other obligations prevent the sponsor from abating rent may wish to consider a rent or fee deferral.[530] However, the 2022 Guidance stated that the "terms and interest rates applied" to such deferrals "should be reasonable and applied fairly to similarly situated businesses."[531] Furthermore, the 2022 Guidance directed sponsors offering deferrals to follow specific financial and accounting practices with respect to such deferrals.[532] (Earlier versions of the FAA's guidance provided substantially the same advice as that described in this paragraph.[533])

While the 2022 Guidance pertained only to the COVID-19 pandemic, sponsors may find it useful for ascertaining their financial and accounting obligations in the event a future public health emergency causes them to consider offering rent abatements. In particular, several themes emerge from the FAA guidance. First, the FAA will not prohibit financial relief to airport tenants if such relief is reasonable and closely tied to the circumstances of both the tenant and the sponsor. Second, the FAA favors deferral programs over waivers. Third, other financial entanglements, such as bond covenants or third-party agree-

[527] 2022 Guidance at 3.

[528] *Id.*

[529] *Id.*

[530] *Id.* at 4.

[531] *Id.*

[532] *Id.*

[533] Dec. 2020 Guidance at 4; May 2020 Guidance at 4.

ments (e.g., residual agreements with airlines) may impose independent constraints on a sponsor's authority to waive or defer airport fees. Fourth, nothing in FAA guidance suggests a softening of the FAA's bright-line position that sponsors cannot directly subsidize airlines. Finally, nothing in FAA guidance appears to countenance violation of the key principles of airport finance, including the prohibition on using aeronautical tenants to subsidize nonaeronautical tenants and the requirement that the sponsor operate as a closed fiscal system.

In addition to FAA policy guidance, sponsors need to review the terms of their agreements with air carriers and other tenants before offering, modifying, or rescinding any incentives programs, rent abatements, or other financial assistance to such carriers or tenants. Those terms may limit the sponsor's flexibility to provide such assistance irrespective of federal law or guidance. Furthermore, if an air carrier reduces or abandons its use of certain airport facilities, such as a gate or ticket counter, the sponsor should review its agreements with that carrier and other affected parties to determine whether the sponsor can reallocate such space to another aeronautical user. This is especially important at space-constrained airports or those where there is already intense competition for scarce terminal space. During the COVID-19 pandemic, some airlines were able to take advantage of newly vacated space to expand their own operations at airports such as Newark, Houston Bush International, and Chicago O'Hare, an opportunistic move that is both entirely lawful and encouraged by federal policy that promotes airline competition.[534]

2. Considerations Specific to Relief for Aeronautical Tenants

The FAA's Revenue Use Policy permits a sponsor to provide certain limited financial incentives to promote new service and competition at the sponsor's airport.[535] As the Compliance Manual explains, the FAA "allows a sponsor to attract new air service and competition at the airport by reducing or waiving fees, for a limited time period, to a carrier that agrees to provide certain new air service," provided that the sponsor implements such program "in a nondiscriminatory manner."[536] Permissible incentives include fee waivers or discounts, such as waivers of landing fees, during a "promotional period."[537] However, both the Revenue Use Policy and the Compliance Manual expressly prohibit sponsors from using airport revenues to provide "direct subsidy of air carrier operations."[538] Furthermore, the Compliance Manual emphasizes that a sponsor may not shift the cost of fee discounts or waivers to other air carriers.[539]

While a detailed analysis of permissible airline incentives is beyond the scope of this digest, those limitations suggest that sponsors need to exercise caution before either implementing or terminating an air service incentive program that is designed to respond to a public health emergency. While neither the Revenue Use Policy nor the Compliance Manual explicitly defines "competition" in the context of those policies' limitations on airport revenue use for incentives programs, it is far from apparent that sponsor incentives to *maintain* preexisting air service would satisfy the FAA's criteria for permissible incentives. Rather, the Compliance Manual's reference to "new service and competition" during a "promotional period" indicates an intention to *attract*, not maintain, air service. Furthermore, as the Compliance Manual provides, sponsors should ensure that any incentives programs they offer are open "to all similarly situated users of the airport willing to provide the same type and level of new service consistent with the promotional offering."[540] And, in seeking to attract new service, sponsors are advised to exercise caution not to factor the incentive discounts or waivers into their rate bases or otherwise shift the costs of any incentives onto other carriers not participating in the incentive program.[541]

By contrast, a sponsor may find that a public health emergency necessitates the termination or reduction of air service incentives. Before doing so, the sponsor will want to consult the terms of any applicable incentives agreements to ensure that any such incentive reduction or termination does not violate any of the agreements and therefore expose the sponsor to contractual liability. Likewise, the sponsor needs to ensure that it treats air carriers consistently with respect to air service incentives; if the sponsor elects to reduce or terminate incentives for one air carrier, it should take comparable action for similarly situated carriers, in part to avoid allegations of unjust discrimination in violation of Grant Assurance 22.

3. Considerations Specific to Aid for Nonaeronautical Tenants

While airport sponsors enjoy greater latitude in their treatment of nonaeronautical (rather than aeronautical) airport tenants, FAA policy limits that flexibility. As the Compliance Manual provides, "Rates charged for nonaeronautical use (e.g., concessions) of the airport must be based on fair market value[.]"[542] Just as it did with respect to aeronautical rents, the 2022 Guidance and prior FAA guidance recognized that a sponsor could lawfully renegotiate a nonaeronautical tenant's rent to a lower rate because of and during the COVID-19 pandemic.[543] The 2022 Guidance provided that "a reasonable basis" for such rent reduction "might be established" if the "underlying basis" for the rental rate had "temporarily declined or materially altered" due to the pandemic.[544] The 2022 Guidance cited "the decline in fair market value" as one of several reasonable bases

[534] *See* Alison Sider, *Southwest Airlines to Challenge Rivals at O'Hare and in Houston*, Wall St. J. (Oct. 12, 2020) (discussing Southwest and JetBlue service increases in Newark, Houston, and Chicago).

[535] Revenue Use Policy, 64 Fed. Reg. at 7718.

[536] Compliance Manual at 9-3.

[537] *Id.* at 15-10.

[538] Revenue Use Policy, 64 Fed. Reg. at 7720; Compliance Manual at 15-10.

[539] Compliance Manual at 15-10.

[540] *See id.*

[541] *See id.*

[542] *Id.* at 17-4.

[543] 2022 Guidance at 3; Dec. 2020 Guidance at 3.

[544] 2022 Guidance at 3; Dec. 2020 Guidance at 3.

for such a reduction, along with the "loss of services" "and/or changes to volume of traffic and economy of collection."[545] Thus, even as it allowed sponsors additional flexibility in light of the COVID-19 pandemic, the FAA remained focused on the need for fair market value of a leasehold as a primary basis for determining the nonaeronautical rent thereof. Given that the FAA guidance was limited to the context of the COVID-19 pandemic, sponsors cannot assume that the FAA would permit them to offer rent reductions, or financial assistance from airport revenues, to nonaeronautical tenants during a potential future public health emergency, at least without further guidance permitting such aid.

H. First Amendment Considerations

While it may seem that protecting and respecting First Amendment rights are far attenuated from the problems a sponsor will face in responding to a public health emergency, the COVID-19 pandemic taught otherwise, instead demonstrating that such issues can be paramount. That is especially true if, as happened during much of the COVID-19 pandemic, governmental responses to the public health emergency are controversial and trigger political, religious, moral or civil rights opposition. As "ground zero" in the practical effect of responses to a public health emergency, airports seemed during the COVID-19 pandemic to be especially ripe venues for First Amendment conflicts.

1. Sponsors' General Authority to Regulate Free Expression at an Airport

During a public health emergency, a sponsor might seek to reduce the risk of disease transmission by attempting to reduce unnecessary crowding in the airport. Under such circumstances, some sponsors may believe it prudent to limit protests, picketing, pamphleteering, or other expressive activities that promote crowds, could inhibit airport operations, and may inconvenience other airport users. Even during a public health emergency, a sponsor needs to understand that courts have recognized that, under the First Amendment, individuals retain certain rights to free expression on airport grounds.

It is well-established that an airport is not entirely exempt from the rights of free expression protected by the First Amendment. The U.S. Supreme Court first addressed the question of free speech rights at an airport over three decades ago, in *Board of Airport Commissioners v. Jews for Jesus*.[546] In that case, the Court considered whether the sponsor of LAX could constitutionally resolve that "the Central Terminal Area at [LAX] is not open for First Amendment activities by any individual and/or entity" and take action against those who attempted to "engage[] in First Amendment activity" therein.[547] The Court unanimously held the resolution unconstitutional. As the Court observed, "The resolution does not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX."[548] Rather, the Court stated, the resolution "purports to create a virtual 'First Amendment Free Zone' at LAX," prohibiting "even talking and reading, or the wearing of campaign buttons or symbolic clothing."[549] "We think it obvious," the Court concluded, "that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech."[550]

The Supreme Court has, however, upheld an airport sponsor's authority to impose "reasonable" restrictions on First Amendment activities at an airport. Several years after its decision in *Jews for Jesus*, the Court considered two questions: "whether an airport terminal operated by a public authority is a public forum" for First Amendment purposes and "whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment."[551] In that case, *International Society for Krishna Consciousness v. Lee,* the Court answered the first question in the negative.[552] As the Court explained, it is well-established that the government's ability to regulate speech in a particular space turns largely on whether that place is a "public forum."[553] If a court deems the site a public forum—property that, "by long tradition or by government fiat, […] has been devoted to assembly and debate[554]—government regulations of public expression in such space "survive only if they are narrowly drawn to achieve a compelling state interest."[555] (The Court noted that the same high standard applies to regulations of free expression covering a "designated public forum"—property that, while otherwise not a public forum, "the State has opened for expressive activity by part or all of the public."[556]) By contrast, the Court explained, when public property does not meet the criteria to be a "public forum" (designated or otherwise), the government may regulate speech thereon so long as such regulation is "reasonable" and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[557]

The *Krishna* Court held that airport terminals are not public forums.[558] As the Court observed, airport terminals were not historically used or designated for expressive activity, sponsors typically have not intentionally opened their terminals for such activity, and free expression is not an airport terminal's principal

[545] 2022 Guidance at 3.

[546] 482 U.S. 569 (1987).

[547] *Id.* at 570–71.

[548] *Id.* at 574.

[549] *Id.* at 574, 575.

[550] *Id.* at 575.

[551] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 674 (1992).

[552] *Id.* at 683.

[553] *Id.* at 678.

[554] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[555] *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678.

[556] *Id.*

[557] *Id.* at 679.

[558] *Id.* at 680.

purpose.[559] As such, the Court concluded, "neither by tradition nor purpose can the terminals be described as" public forums.[560]

Because airport terminals are not public forums, the *Krishna* Court then considered whether the anti-solicitation regulation at issue in the case was reasonable.[561] "We have no doubt," the Court held, "that under [the reasonableness] standard the prohibition on solicitation passes muster."[562] The Court noted both the inconvenience and the "duress" that solicitation can cause, especially in the context of an airport terminal, where, the Court observed, "a flight missed by only a few minutes can result in hours['] worth of subsequent inconvenience."[563] As such, the Court upheld the regulation as reasonable.[564]

However, in a companion decision to *Krishna*, a 5–4 majority of the Court held that the sponsor's ban on *leafletting* was not reasonable.[565] That majority appeared to reach its conclusion at least in part on the basis that, as Justice O'Connor wrote in a concurrence to *Krishna*, "leafletting does not entail the same kinds of problems presented by face-to-face solicitation," such as the need to stop and consider the speaker's message then and there.[566] However, at least one federal district court has indicated that the constitutionality of an airport sponsor's restrictions on expressive activities can hinge, in part, on the characteristics of the sponsor's particular airport.[567] In upholding a policy by the sponsor of the Fort Wayne Airport (FWA) that regulated "expressive activities, literature distribution, and solicitation" at FWA, the court distinguished that small commercial airport from the "shopping mall" and "huge complex open to travelers and nontravelers alike" that characterized the airport at issue in *Krishna* and Justice O'Connor's concurrence thereto.[568] As the district court observed, "FWA has not added any features and attractions to its facility that would make it a destination for those who do not otherwise have a reason to be at the Airport for its primary and dedicated purpose."[569] Rather, the court concluded, "most of the amenities existing at FWA can only be seen as complementing its primary purpose of serving air passengers."[570] Given those facts, the court held that FWA's sponsor "could reasonably conclude that limiting free speech activity that is not otherwise incidental to air travel to certain areas within and outside the terminal is related to the protection of its interests in" maintaining security, reducing congestion, easing foot-traffic flow, and preserving airport aesthetics.[571]

Other federal courts have upheld additional limitations on free expression at airports. At least two federal courts, including the Eleventh Circuit, have held that airport sidewalks are not public forums, despite courts typically considering sidewalks as such.[572] Federal appellate courts have also upheld a sponsor's right, as airport proprietor, to regulate the placement and licensure of news racks to protect concessions revenues, despite the expressive nature of the publications that the news racks sold.[573]

2. Regulation of Expression at an Airport During a Public Health Emergency

The relevance of First Amendment law for responding to a public health emergency became evident during the COVID-19 pandemic, as airports became potential sites of protests about health screening, masks, and vaccines.[574] While no federal or state court appears to have ruled on any airport sponsor's effort to restrict free expression because of a public health emergency, case law concerning sponsors' regulations of free expression generally provide some guidance for assessing how a court might react to such a regulation in the context of a public health emergency.

As *Krishna* held, an airport terminal is not a public forum, so an airport sponsor's regulation of activity within such terminal need only be reasonable and not discriminatory against certain viewpoints.[575] Lower federal courts have held that airport sidewalks and parking garages are also not public forums.[576] Thus, under those precedents, a sponsor needing to limit expressive activities during, and because of, a public health emergency would only need to demonstrate that such restrictions are reasonable and do not discriminate based on the speaker's views.

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[559] *Id.* at 680–82.

[560] *Id.* at 683.

[561] *Id.*

[562] *Id.*

[563] *Id.* at 684.

[564] *Id.* at 685.

[565] Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830, 831 (1992).

[566] *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 690 (1992) (O'Connor, J., concurring). In its one-sentence per curiam opinion, the majority in *Lee* did not explain its reasoning for striking down the leafletting ban. *Lee*, 505 U.S. at 831. Rather, the majority did so "for the reasons expressed" in three concurring and dissenting opinions to *Krishna*. *Id.* Justice O'Connor's concurrence in *Krishna* was one such concurring opinion. *Id.*

[567] Stanton v. Fort Wayne-Allen Cty., 834 F. Supp. 2d 865, 874–75 (N.D. Ind. 2011).

[568] *Id.* at 869, 875, *citing Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 688–89 (O'Connor, J., concurring) (terms in first quotation uncapitalized).

[569] *Id.* at 875.

[570] *Id.*

[571] *Id.* at 877.

[572] ISKCON Miami, Inc. v. Metro. Dade Cty., 147 F.3d 1282, 1289–90 (11th Cir. 1998); *Stanton*, 834 F. Supp. 2d at 873. The Eleventh Circuit further held that a parking lot adjacent to Miami airport terminals was not a public forum. *ISKCON Miami*, 147 F.3d at 1289.

[573] Atlanta J. & Const. v. City of Atlanta Dep't of Aviation, 322 F.3d 1298, 1302 (11th Cir. 2003) ("a government agency, statutorily mandated to be self-sufficient and acting pursuant to that charge, is permitted to assess a reasonable profit-conscious fee to newspaper publishers for the use of the airport's distribution facilities"); Jacobsen v. City of Rapid City, 128 F.3d 660, 664-65 (8th Cir. 1997) (airport sponsor's proprietary interest in retail concession revenues justified banning unlicensed news racks).

[574] *E.g.*, Danielle Wallace, *Pilots Protest Biden's Vaccine Mandate Outside North Carolina Airport: 'Enough Is Enough'*, FOXBusiness (Nov. 7, 2021), https://www.foxbusiness.com/lifestyle/north-carolina-airport-pilot-protest-biden-vaccine-mandate.

[575] *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 679–80.

[576] *ISKON Miami*, 147 F.3d at 1289–90; *Stanton*, 834 F. Supp 2d at 873.

As discussed elsewhere in this digest, the Supreme Court has accorded broad latitude to government officials to impose health-related regulations, especially during a public health emergency.[577] The Court upheld a California executive order limiting in-person attendance at worship services and various types of secular gatherings during the COVID-19 pandemic.[578] In a concurring opinion to the Court's one-line decision, Chief Justice Roberts emphasized that the executive order did not appear to discriminate against religious worship, given that "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[579] Roberts implied that the lack of such anti-religious discrimination brought the executive order within the "broad limits" of government officials' public health powers, which, Roberts stated, "should not be subject to second-guessing by an unelected federal judiciary."[580]

By contrast, the Court has enjoined a pandemic-related restriction that it held likely discriminated against religion. The Court considered a New York executive order that limited in-person attendance at religious services to 10 or 25 people within various geographic outbreak "zones," despite allowing "essential" businesses, including "acupuncture facilities, camp grounds, garages, […] and all transportation facilities" to operate without capacity restrictions.[581] Determining that the executive order "single[d] out houses of worship for especially harsh treatment,"[582] the Court held that New York had failed to show that such restrictions were "narrowly tailored" to serve a "compelling state interest"—the high standard the state had to meet to justify such a religiously discriminatory policy.[583] While the Court recognized that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," it found it "hard to see how the challenged regulations can be regarded as 'narrowly tailored'" in light of the religious institutions' apparently superior health protocols and the availability of less restrictive alternatives to the state's order.[584] Thus, the Court's decision—especially when coupled with the Court's holding regarding the California order—suggests that the Court would uphold pandemic-related restrictions on expression so long as they are reasonable and do not discriminate against religion or against certain viewpoints, ideologies, or classes of speaker.

Given the Court's reasoning in *Krishna* and the Court's openness in subsequent decisions to nondiscriminatory public health regulations, there is reason to expect that the Court would uphold at least some nondiscriminatory restrictions on expressive activities at an airport during, or attributable to, a public health emergency. Recall that, as the *Krishna* Court reasoned, the inconvenience and "duress" that soliciting donations could cause travelers constituted a reasonable basis for a sponsor's viewpoint-neutral restriction on such solicitation.[585] A sponsor may be able to argue persuasively that the risk to the public, not to mention inconvenience and duress, caused by a contagious pathogen or other public health emergency would similarly justify a range of restrictions on demonstrations, pamphleteering, or various other expressive activities during a public health emergency. Likewise, the danger such activities could pose to *workers* at the airport might cause a court to consider many such restrictions reasonable. And a court may well accept such restrictions as reasonable if a sponsor can show that those restrictions are necessary to reduce the logistical strain on law enforcement or airport staff, whether by reducing the risk of exposure to disease or by minimizing the diversion of resources from critical airport operations during staffing shortages.[586] Furthermore, as the Court's recent jurisprudence indicates,[587] a sponsor would likely increase the chance that a court would uphold its health-related restrictions on expression if the sponsor could provide persuasive evidence that such a restriction does, in fact, further public health interests and does not discriminate against religion or against the substance of any protected First Amendment activities.

IV. CONCLUSION

As experience teaches, a public health emergency may arise with little warning, quickly threatening the lives and welfare of people across a region or throughout the world and forcing governments, industries, and individuals to adapt urgently. As the crises caused by Zika, SARS and COVID-19 (and scores of pandemics for millennia before the modern day[588]) all demonstrate, both the pace and the extent of such crises are likely to be unpredictable. Even if public health authorities can predict certain characteristics of a future public health emergency, it is impossible to know in advance precisely when, where, and in what form such a future crisis might emerge, and even more difficult to predict how severe such a crisis will prove and when it will end. That unpredictability is multiplied when it comes

[577] *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring), *citing Jacobson*, 197 U.S. 11, 38 (1905), Marshall v. United States, 414 U.S. 417, 427 (1974), *and* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545 (1985).

[578] *Id.* at 1613.

[579] *Id.*

[580] *Id.* at 1613–14 (internal quotation marks omitted).

[581] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 65–66 (2020).

[582] *Id.* at 66.

[583] *Id.* at 66, 67 (internal quotation marks omitted).

[584] *Id.* at 67.

[585] *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 684.

[586] *Cf.* McDonnell v. City & Cty. of Denver, 878 F.3d 1247, 1255 (10th Cir. 2018) (upholding airport sponsor's restriction on spontaneous protests on the ground that airport police require several days to prepare for such protests).

[587] *See Cuomo*, 141 S. Ct. at 65–66; *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678; *id.* at 690 (O'Connor, J., concurring).

[588] A useful and simple infographic that places the recent public heath emergencies and the COVID-19 pandemic in a historical context is available from Visual Capitalist. Nicholas LePan, *Visualizing the Histories of Pandemics*, Visual Capitalist, https://www.visualcapitalist.com/history-of-pandemics-deadliest (last updated Sept. 13, 2022).

to a public health emergency's impact on air transportation. As the short history at the beginning of this digest illustrates, some public health emergencies have had only modest effects on air transportation, while others have been devastating. It is anyone's guess what the next emergency will be and its effect on air transportation. It is this uncertainty that makes it especially challenging for sponsors to predict, and prepare for, the next public health emergency.

Recognizing that inherent unpredictability, this digest sets out to help airport sponsors consider a range of legal issues that they might face when reacting to any of various possible public health crisis scenarios. This digest reviews many constitutional, statutory, and regulatory provisions, judicial precedents, and federal agency guidance documents that could help a sponsor and its counsel to assess the legal implications of a proposed response to a public health emergency. Understanding the legal constraints and considerations long in advance of a public health emergency could make the immediate response both more efficient and less likely to encounter serious legal impediments. But the response to a public health emergency—unlike responses to certain other airport emergencies—cannot be a cookbook exercise, and airport counsel need to appreciate the relevant legal variables, the probable objections and, perhaps most importantly, the scope of and limitations on the applicable authority of an airport sponsor. If there is a single lesson to be taken from this digest, it is that an airport sponsor's counsel should establish a relationship with his or her counterparts in local and state public health agencies so that each of those organizations can better understand its respective authority and coordinate effectively.

Ultimately, sponsor executive staff would be well-advised to consult with counsel when considering how to address a public health emergency and any of the myriad potential challenges—operational, financial, or otherwise—that such an emergency could cause. Ideally, this digest proves a useful tool in preparing for such an emergency—an emergency that hopefully remains hypothetical, but for which sponsors are ready nonetheless.

V. GLOSSARY

2022 Guidance	FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations (updated Apr. 2022)
ACDBE	Airport concession disadvantaged business enterprise
Access Act	The Air Carrier Access Act
AIP	Airport Improvement Program
Acquisition Regulation	The Federal Acquisition Regulation
Act	The Airline Deregulation Act
ANCA	Airport Noise and Capacity Act of 1990
Arapahoe	*Arapahoe Cty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001)
CBP	U.S. Customs and Border Protection
CDC	The U.S. Centers for Disease Control and Prevention
Compliance Manual	The FAA's Airport Compliance Manual (FAA Order 5190.6B), Change 1
COVID-19	Coronavirus disease 2019
Dec. 2020 Guidance	FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations (updated Dec. 2020)
Deregulation Act	The Airline Deregulation Act
Digest (without enumeration)	This ACRP Legal Research Digest
Digest 34	Leila Barraza & Elizabeth Hall-Lipsy, ACRP Legal Research Digest 34: Airport Public Health Preparedness and Response: Legal Rights, Powers and Duties (2018)
Digest 42	David R. Zoufal et al., ACRP Legal Research Digest 42: Legal Implications of Data Collection at Airports (2021)
Disabilities Act	The Americans with Disabilities Act
Disadvantaged Business	Airport concession disadvantaged business enterprise (see "ACDBE")
DOT	The U.S. Department of Transportation
Emergency Plan	An airport emergency plan
FAA	The U.S. Federal Aviation Administration
FAA Act	The Federal Aviation Administration Authorization Act
FACTA	The Fair and Accurate Credit Transactions Act
FTC	The U.S. Federal Trade Commission
FWA	Fort Wayne International Airport
H1N1	Influenza A virus subtype H1N1, also known as the H1N1 influenza virus
HHS	The U.S. Department of Health and Human Services
Jacobson	*Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
Labor Code	The California Labor Code
LAX	Los Angeles International Airport
Marin	Marin County, California
May 2020 Guidance	FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations (updated May 2020)
Medicare	The U.S. Centers for Medicare and Medicaid Services
NASA	The U.S. National Aeronautics and Space Administration
NOTAM	Notice to air missions (formerly "notice to airmen")
OSHA	The U.S. Occupational Safety and Health Administration
Part 139	Part 139 of Title 14 of the Code of Federal Regulations (14 C.F.R. Part 139)
Property Act	The Federal Property and Administrative Services Act

Proprietors Exception	A savings clause within the Deregulation Act that recognizes an airport sponsor's authority to carry out its powers and rights as sponsor
Revenue Use Policy	FAA, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696 (Feb. 16, 1999)
RFID	Radio-frequency identification
SARS	Severe acute respiratory syndrome
SASO	Specialized aviation service operation (typically, an on-airport business that serves aircraft operators but does not provide the full range of services offered by a fixed base operator)
Seaplane	*Seaplane Adventures, LLC v. Cty. of Marin*, No. C 20-06222 WHA, 2021 U.S. Dist. LEXIS 225101 (N.D. Cal. Nov. 22, 2021)
SFO	San Francisco International Airport
Standard	OSHA, *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021)
Task Force	A group of airport stakeholders assembled to review and refine an Emergency Plan
TSA	The U.S. Transportation Security Administration
Virgin	Virgin America (former U.S. airline; merged with Alaska Airlines)
WHO	The World Health Organization

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