

U.S. Airline Passenger Consumer Protection – Recent Developments (July 2020)

The U.S. Department of Transportation (DOT) is empowered to prohibit any “unfair or deceptive practice” in the sale of air transportation by airlines or agents.¹ DOT also prohibits discrimination against airline passengers with disabilities.² Based on those statutes – and despite the “deregulation” of the airline industry in the 1980s – DOT exercises significant control over the practices of airlines and their agents. Moreover, that authority is exclusive to DOT, because another federal statute (typically interpreted expansively) prohibits state and local jurisdictions from imposing their own requirements “related to a price, route, or service of an air carrier.”³

This article provides an overview of DOT consumer protection decisions and guidance in 2019, as well as issues likely to arise in 2020 and beyond in the wake of the COVID-19 pandemic. In recent years, the number of public consent orders issued by DOT has decreased significantly – although in 2019, eight such agreements assessed more than \$2.4 million in civil penalties. Moreover, DOT continues to provide guidance, including through informal channels, and thus it remains important for travel-related business to be aware of applicable requirements.

Passengers with Disabilities. In 2019, DOT issued a policy statement regarding service animals, indicating that as a matter of policy it would not enforce certain requirements, pending formal changes to the rules;⁴ subsequently, DOT issued a notice of proposed rulemaking (NPRM) proposing revisions, which most notably no longer require airlines to accommodate emotional support animals.⁵



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the DOT's rules on airline passenger consumer protection.

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Additionally, the independent Architectural and Transportation Barriers Compliance Board solicited comments on new standards for in-flight wheelchairs;⁶ subsequently, DOT issued an NPRM also soliciting comments on that issue, as well as revisions to the requirements for certain aircraft lavatories.⁷ DOT also announced the formation of an advisory committee on disabilities issues, and reminded airlines that they must provide passengers with allergies an opportunity to preboard if those passengers need extra time to wipe down their seats.

Fare Advertising. DOT's "full fare rule" requires that advertising state "the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component."⁸ In 2019, an airline was fined because it improperly displayed and collected taxes applicable to frequent flyer tickets. Additionally, DOT denied a petition which requested that the agency regulate the marketing of a "free" checked bag allowance by certain airline-branded credit cards because the marketing allegedly was inconsistent with actual airline practices.

Tarmac Delay Plans. DOT requires airlines to implement tarmac delay plans that, among other mandates, prohibit aircraft from remaining on the ground for more than four hours (for international flights) or three hours (for domestic flights) without providing passengers an opportunity to deplane.⁹ In 2019, four airlines were fined for violations of these requirements. In addition, DOT issued an NPRM which proposed relatively minor revisions to the rules.¹⁰

Air Carrier Authority. Both U.S. and foreign airlines must obtain appropriate authority from DOT before holding out or actually operating services.¹¹ In 2019, DOT fined a carrier for engaging in unauthorized flights between various international gateways and the United States, and fined another carrier for operating services which required commuter air carrier authority when it only held air taxi authority. DOT also prohibited both U.S. and foreign airlines from holding out services between the United States and Venezuela, and restricted the scheduled Cuba services of U.S. airlines to Havana's Jose Marti International Airport.

Additional 2019 Developments. DOT also fined a carrier because it failed to submit required traffic and financial reports to the agency. In cooperation with DOJ, DOT announced that the former CEO of a bankrupt public charter operator had been sentenced to nearly eight years in prison because she conspired to steal passenger funds from an escrow account. The Government Accountability Office (GAO) also issued a report which described selected airlines' programs for training employees on racial, ethnic, and religious non-discrimination.

Other DOT Committees. At the direction of Congress, DOT re-established a consumer advisory committee; at its first meeting, its agenda included airline ancillary service fees and involuntary changes to passenger itineraries. The committee also formed a task force on in-flight sexual misconduct, which issued a report summarizing best practices for handling complaints. DOT additionally established a committee to advise on the disclosure to consumers of the fees for air ambulance services.

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Other Rulemaking Proceedings. DOT denied three petitions which requested that the agency adopt new customer service requirements – (1) to require airlines to rebook delayed passengers on the next available flight (even if operated by another airline), (2) to regulate how airlines inform international passengers of their treaty-based liability rights under the Montreal Convention, and (3) to regulate change fees for international flights, generally capping them at \$100.

DOT itself initiated a rulemaking to update its denied boarding compensation rules, to allow electronic payments,¹² and DOT also adjusted for inflation the civil penalty for violations of its consumer protection rules – the new maximum in most cases now being \$34,174.¹³ DOT subsequently issued an NPRM to narrow its definition of what constitutes an “unfair or deceptive practice” subject to agency regulation.¹⁴

2020 and Beyond. The COVID-19 pandemic has generated two new sets of guidance: (1) a reminder of DOT’s long-standing position that airlines must offer refunds for carrier-initiated cancellations or significant schedule changes, and (2) clarification regarding how airlines may require passengers to undergo health screening consistent with DOT’s disabilities rules. Challenges and uncertainties remain; numerous formal and informal complaints about denied or delayed refunds have been submitted to DOT, along with litigation in federal courts, and certain airlines have announced that passengers who do not wear masks will be denied transportation, irrespective of whether they may have a qualifying disability.

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As seen above, DOT’s consumer-related rules and policies are extensive and complex. Those who provide, sell, or otherwise arrange air transportation should take care to familiarize themselves with DOT’s regulations and interpretations; to review their practices in light of DOT’s guidance; and to keep abreast of new developments, such as those summarized here.

¹ 49 U.S.C. § 41712.

² 49 U.S.C. § 41705.

³ 49 U.S.C. § 41713.

⁴ Guidance on Nondiscrimination on the Basis of Disability in Air Travel, 84 Fed. Reg. 43480 (August 21, 2019).

⁵ Traveling by Air With Service Animals, 85 Fed. Reg. 6448 (February 5, 2020).

⁶ Advisory Guidelines for Aircraft Onboard Wheelchairs, 84 Fed. Reg. 43100 (August 20, 2019).

⁷ Accessible Lavatories on Single-Aisle Aircraft: Part 1, 85 Fed. Reg. 1 (January 2, 2020).

⁸ 14 C.F.R. § 399.84.

⁹ 14 C.F.R. § 259.4.

¹⁰ Tarmac Delay Rule, 84 Fed. Reg. 57370 (October 25, 2019).

¹¹ 49 U.S.C. § 41101 and § 41301.

¹² Modernizing Payment of Denied Boarding Compensation, 84 Fed. Reg. 11658 (March 28, 2019).

¹³ Revisions to Civil Penalty Amounts, 84 Fed. Reg. 37058 (July 31, 2019).

¹⁴ Defining Unfair or Deceptive Practices, 85 Fed. Reg. 11881 (February 28, 2020).