



## **Ebola, Airlines, and Denying Boarding on the Basis of Safety (August 2014)**

By David M. Endersbee and Alexander T. Simpson

World health authorities, both national and multinational, are presently in the midst of major efforts to suppress the spread of the deadly Ebola hemorrhagic fever virus ("Ebola").<sup>1</sup> It is widely feared that air travelers will spread Ebola to countries where it does not presently exist.<sup>2</sup> However, airlines operating flights to and from the U.S. are vested with clear authority to deny boarding to passengers they suspect of being infected with Ebola (or other serious infectious diseases).

The U.S. Department of Transportation ("DOT") has adopted regulations concerning Nondiscrimination on the Basis of Disability in Air Travel, codified at 14 CFR Part 382. As here relevant, Part 382 applies to most major U.S. and foreign air carriers; for foreign carriers, it applies to flights that originate or terminate in the U.S. Part 382 broadly prohibits discrimination on the basis of disability<sup>3</sup> and forbids carriers from denying boarding on the basis of disability, except in narrow circumstances.<sup>4</sup>

### **When May a Carrier Deny Boarding?**

A passenger who exhibits symptoms of Ebola may represent a threat to the safety of passengers, crew, and untold others in airports, to say nothing of persons at the flight's destination. DOT regulations<sup>5</sup> permit a carrier to deny boarding to a passenger with a communicable disease who poses a "direct threat."<sup>6</sup> Ebola would appear to meet the definition of a "direct threat" because, at this time, there is nothing an airline can do to mitigate its threat in a cabin environment.<sup>7</sup>



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 nondiscrimination on the basis of disability in air travel and passenger protections.

For further information regarding the matters discussed in this article, please contact:

David M. Endersbee  
(202) 973-7935  
dmendersbee@zsrlaw.com

Alexander T. Simpson  
(202) 973-7912  
atsimpson@zsrlaw.com

Zuckert, Scoutt & Rasenberger, L.L.P.  
888 17th Street, N.W.,  
Washington, D.C. 20006.  
Telephone: (202) 298-8660  
www.zsrlaw.com

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<sup>1</sup> On August 6, 2014, the U.S. Centers for Disease Control announced a rare "level 1 activation" for its Emergency Operations Center in response to the expanding Ebola outbreak. See <https://twitter.com/DrFriedenCDC/status/497081608068149248> (accessed August 7, 2014).

<sup>2</sup> On August 8, 2014, the World Health Organization announced that an Emergency Committee had declared the West African Ebola outbreak to be a "‘extraordinary event’ and a public health risk to other States." The Emergency Committee also recommended, among other things, that "States should be prepared to detect, investigate, and manage Ebola cases; this should include . . . where appropriate, the capacity to manage travelers originating from known Ebola-infected areas who arrive at international airports or major land crossing points with unexplained febrile illness." <http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/> (accessed August 12, 2014).

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## How May a Carrier Deny Boarding?

A carrier employee denying boarding on the basis of a passenger's potentially severe infectious disease should consult with a carrier Complaint Resolution Official (CRO) to ensure that the denial is consistent with DOT regulations. DOT requires that carriers have a CRO available at all times the carrier is operating to serve as the carrier's "expert" on DOT's nondiscrimination regulations.<sup>8</sup> A CRO has authority to overrule any airline personnel, with the sole exception of an aircraft captain who is making a decision on the basis of safety.<sup>9</sup>

A passenger who is denied boarding must be provided with a written statement, at the passenger's request, explaining the carrier's actions.<sup>10</sup> A passenger denied boarding on the grounds that his or her health condition poses a "direct threat" must also be permitted to travel for up to 90 days from the date of postponed travel, at the original fare, or be refunded the cost of unused flights.<sup>11</sup>

## What Public Health Information May Carriers Rely On?

In crafting its rules, DOT understood that airlines would not necessarily be the best judges of health conditions presented by passengers. DOT's rules provide that carriers "may rely on directives issued by public health authorities (e.g., the U.S. Centers for Disease Control or Public Health Service; comparable agencies in other countries; the World Health Organization)."<sup>12</sup> In the preamble to its Final Rule adopting changes to Part 382, DOT stated that

For example, if CDC [Centers for Disease Control] or WHO [World Health Organization] issues an alert or directive telling airlines not to carry a particular individual who poses a serious health risk (e.g., an individual with multiple drug-resistant tuberculosis), or persons exhibiting symptoms of a serious health condition (e.g., SARS), we would expect carriers to follow the public health agency's instructions. Carriers could do so without contradicting the requirements of this Part.<sup>13</sup>

## What Public Health Information Has Been Issued?

The CDC has issued guidance<sup>14</sup> stating that

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<sup>3</sup> 14 CFR 382.11.

<sup>4</sup> 14 CFR 382.19.

<sup>5</sup> 14 CFR 382.21.

<sup>6</sup> Defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." 14 CFR 382.3.

<sup>7</sup> Carriers are required to undertake a three-step determination before denying boarding for a disability-related safety basis. In undertaking this determination, carriers should ascertain: "(i) The nature, duration, and severity of the risk; (ii) the probability that the potential harm to the health and safety of others will actually occur; and (iii) whether reasonable modifications of policies, practices, or procedures will mitigate the risk." 14 CFR 382.19(c)(1).

<sup>8</sup> 14 CFR 382.151.

<sup>9</sup> 14 CFR 382.151(e).

<sup>10</sup> 14 CFR 382.21(e).

<sup>11</sup> 14 CFR 382.21(d).

<sup>12</sup> 14 CFR 382.21(b)(1).

<sup>13</sup> Final Rule, Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27614, 27624 (May 13, 2008).

<sup>14</sup> Interim Guidance about Ebola Virus Infection for Airline Flight Crews, Cleaning Personnel, and Cargo Personnel, available at <http://www.cdc.gov/quarantine/air/managing-sick-travelers/ebola-guidance-airlines.html> (accessed August 12, 2014).

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People who have been exposed to Ebola should not travel on commercial airplanes until there is a period of monitoring for symptoms of illness lasting 21 days after exposure. Sick travelers should delay travel until cleared to travel by a doctor or public health authority.

CDC's guidance explicitly recommends that airlines use the authority granted to them in Part 382 to deny such passengers boarding.<sup>15</sup> CDC's guidance also helpfully provides links to other important information for airlines and airline personnel.

At this writing, the International Air Transport Association (IATA) and the International Civil Aviation Organization (ICAO) have released statements, in coordination with WHO, which do not recommend any travel restrictions or border closures at ports of entry.<sup>16</sup>

## Conclusion

Although Ebola cannot be transmitted through the air<sup>17</sup>, it can be transmitted through "direct contact with the blood or bodily fluids of an infected symptomatic person or through exposure to objects (such as needles) that have been contaminated with infected secretions."<sup>18</sup> Thus, while the risk of transmission in a cabin environment may be low, close passenger proximity combined with serious public health consequences means that carriers should continue to exercise vigilance and carefully monitor advice and directives from public health authorities. In addition, carriers should ensure that their personnel are appropriately trained and familiar with relevant DOT standards for assessing passenger health and making denied boarding decisions on the basis of safety.

**Zuckert, Scouff & Rasenberger, L.L.P.**  
888 17th Street, N.W.  
Washington, D.C. 20006.  
Telephone: (202) 298-8660  
Fax: (202) 342-0683  
[www.zsrlaw.com](http://www.zsrlaw.com)

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<sup>15</sup> "Airlines should consider using their own authority (for U.S. airlines, and foreign airlines serving the United States, Department of Transportation 14 CFR Part 382) to deny boarding of sick travelers if Ebola is suspected." Id.

<sup>16</sup> Statement on Ebola Outbreak, July 31, 2014, available at <http://www.iata.org/pressroom/pr/Pages/2014-07-31-01.aspx> (accessed August 12, 2014); ICAO and World Health Organization Collaboration on Ebola Outbreak, available at <http://www.icao.int/Newsroom/Pages/ICAO-and-World-Health-Organization-collaboration-on-Ebola-outbreak.aspx> (accessed August 12, 2014).

<sup>17</sup> Questions and Answers on Ebola, <http://www.cdc.gov/vhf/ebola/outbreaks/guinea/qa.html> (accessed August 12, 2014).

<sup>18</sup> Id.