

Hot Topics in Aviation

Q&A with Associate Marina Veljanovska O'Brien

Holland & Knight on the Rise (HKOTR) provides business development, networking and leadership opportunities for the rising stars in the firm. As part of this initiative, we have launched the Hot Topics Series. The in-depth interviews allow for our young policy and legal professionals to offer their viewpoints, reflect on their professional experiences and examine relevant issues across the policy and legal spectrums.

This month's Hot Topic features Associate [Marina Veljanovska O'Brien](#). Ms. O'Brien is a Washington, D.C., attorney and a member of Holland & Knight's Public Policy & Regulation Group. She focuses her practice in the areas of aviation law and international trade law.

In the following Q&A, Ms. O'Brien discusses the impact of the COVID-19 pandemic on the aviation sector, the resulting and ongoing government response, and the varied legal challenges facing aviation-related businesses.

Q. What led you to become an aviation attorney?

My entry into the aviation world was fortuitous. After clerking at the D.C. Superior Court, I joined a boutique aviation law firm primarily excited at the prospect of working with foreign clients on issues that cross borders. Since then, I've fallen in love with the aviation legal world and consider myself fortunate to practice in this area, as it presents professionals with a plethora of legal issues and an opportunity to practice in an area impacted daily by world events and politics. I am also an avid traveler and consider it a privilege to contribute toward the safety and development of air travel.

Q. How has COVID-19 affected the aviation industry?

The recent pandemic has been particularly harsh on the aviation industry. Due to travel restrictions, and in some cases outright bans, thousands of flights have been cancelled as carriers, both here and abroad, have grounded a significant portion of their fleet. Indeed, *Forbes* reports that 40 airlines around the world temporarily grounded their entire fleets, and many major carriers canceled more than 90 percent of scheduled flights. Equally grim are estimates published by the International Civil Aviation Organization (ICAO), which predicts an overall reduction of 41 to 51 percent of seats offered by airlines and approximately \$98 billion to \$124 billion in potential loss of gross operating revenues of airlines during the first half of 2020. Business aviation, airports and the aviation support industry (ground handling, catering, maintenance and repair, etc.) have likewise been impacted by diminished demand for their services due to COVID-19.

As a result, many aviation-related businesses have suffered, and in addition to seeking relief under the Coronavirus Aid, Relief and Economic Security Act (CARES Act), which is discussed below, they are exploring ways to cut costs so that they can continue to provide essential services. Only air cargo transportation has weathered the pandemic better, mostly due to a demand for air transport of medical devices and other COVID-19 related shipments, both domestically and around the globe. As a result, many grounded passenger airplanes are being reconfigured to carry cargo.

Q. What has been the government response?

U.S. Congress: On March 27, the 2020 CARES Act was signed into law. The CARES Act provides for over \$71 billion in economic relief to air carriers, airports and airline contractors during the COVID-19 crisis in the forms of loans, grants and tax relief. The U.S. Department of the Treasury (Treasury) and the U.S. Department of Transportation (DOT) were tasked with overseeing and allocating relief under this statute. Both government agencies have since issued guidance on this subject, including application procedures. It

is important to note that the government has already started to process applications under the CARES Act, and businesses that apply for assistance after April 30, 2020, may not be considered. Funds are available until expended.

Carriers: The CARES Act makes over \$29 billion available for government loans and loan guarantees to U.S. passenger and cargo air carriers, and allocates an additional \$29 billion for government grants to be used for paying employees' wages, salaries and benefits during the pandemic. In addition, the government has stopped imposing and collecting air carrier excise taxes for the remainder of 2020. Unlike provisions regarding loans and grants, which are limited to U.S. air carriers, the tax holiday applies to both U.S. and foreign air carriers.

These loans and grant assistance come with strings attached. For example, the CARES Act imposes restrictions on carriers receiving loans from the government, which must be included in a loan agreement. It also requires carriers to maintain the employment levels they had on March 24, 2020, until Sept. 30, 2020 (with few exceptions), and provides for caps on executive compensation. Furthermore, DOT has required carriers receiving financial assistance to maintain minimum air services on a nationwide basis. Carriers, however, may file a request for exemption from certain service points or levels of service. Many have already done so, and DOT is beginning to issue decisions, with mixed results. The CARES Act also includes a clawback provision if the conditions are not met.

Airports: The CARES Act also provides for \$10 billion to be distributed for airport grants-in-aid to help airports with prevention, preparedness and response to the new coronavirus. The funds are available for airport capital expenditures, airport operating expenses, including payroll and utilities, and airport debt payments. In order to receive financial assistance, airports must comply with the prevailing wage requirements and certain employee retention provisions. The DOT may waive the employment requirement if it is causing economic hardship or reducing aviation safety or security.

Aviation Contractors: Similar to the carrier grants, the CARES Act makes available \$3 billion for grants – for wage, payroll and benefits purposes – to airline contractors, which have been defined broadly to include baggage and cargo handling; catering; assisting passengers with disabilities; airport ticketing and check-in; aircraft cleaning, sanitizing and waste removal; ground handling; and subcontractors in the air transport industry. Businesses that have been approved for the grants are subject to similar conditions and restrictions as carriers, including executive compensation caps, employment levels, etc.

DOT: In addition to the DOT's role in overseeing certain aspects of the relief for carriers under the CARES Act, as detailed above, on April 3, 2020, the DOT issued a notice to all carriers with the aim of "clarifying" passengers' right to refunds of fares paid for flights that have been cancelled by carriers due to the pandemic, even if the tickets at issue were non-refundable. DOT stated that the carrier's refund obligation does not cease when flight disruptions are outside of the carrier's control (e.g., due to government restrictions).

FAA: In addition to its role in facilitating financial assistance for airport sponsors under the CARES Act, the Federal Aviation Administration (FAA) announced several measures to provide COVID-19 related relief to the aviation industry. For example, it temporarily waived airport slot usage rules at John F. Kennedy International Airport (JFK), LaGuardia Airport (LGA) and Reagan National Airport (DCA) applicable to both U.S. and foreign scheduled passenger carriers. As it relates to general aviation and Part 135 operators, the FAA issued several exemptions pertaining to multiple training requirement and medical certificates for Part 135 commercial flight crewmembers operating internationally. The FAA also announced that it will not take enforcement actions against flight crew members who fail to renew medical certificates expiring between March 31 and June 30. Separately, the FAA warned pilots not to experiment with the use of chloroquine or hydroxychloroquine to prevent coronavirus infection within 48 hours before reporting for flight or other safety-related duties.

Q. What legal issues are aviation clients currently facing?

The current pandemic has triggered an array of legal challenges. Carriers are seeking clearances to operate flights to accommodate stranded passengers, and they are seeking guidance about the carriage of critical medical equipment and supplies as well as guidance on restrictions that may apply to the importation or exportation of such items. Aircraft leasing and management companies need legal assistance reviewing their agreements with carriers and watching industry developments. Clients are especially interested in legal advice related to the financial aid or relief provided under the CARES Act.

Q. How do you assist your clients in navigating these issues?

As a regulatory attorney focusing on aviation and international trade, I am currently advising clients on statutory and regulatory compliance for government assistance programs in response to COVID-19. This includes legal advice on the eligibility requirements, conditions, and application and exemption procedures. I also provide assistance with enforcement actions, investigations and inquiries concerning DOT and FAA regulations related to both economic and safety-related issues. As it relates to international trade, I counsel aviation-related businesses on compliance with evolving rules concerning the export or import of personal protection equipment and medical devices, as well as embargo or sanction exemptions in the wake of this health pandemic.

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