



Mask Mandate: Does the Federal Aviation Administration Have Authority to Require Masks on Flights?

February 8, 2021

The Centers for Disease Control and Prevention (CDC) [cautions](#) that although air circulation and filtration systems in passenger aircraft help reduce the spread of most viruses, sitting within six feet of others on flights may still increase the risk of contracting Coronavirus Disease 2019 (COVID-19). Thus, in response to the COVID-19 pandemic, all major U.S. airlines voluntarily implemented [policies](#) requiring passengers and crew to wear face masks during flights. However, some [commentators](#) raised concerns that the lack of a federal mask mandate has hindered the airline industry’s voluntary enforcement of these requirements.

On January 21, 2021, President Biden issued an executive order titled [Promoting COVID-19 Safety in Domestic and International Travel](#). Among other things, the order instructs several federal agencies, including the Federal Aviation Administration (FAA), and “the heads of any other executive departments and agencies . . . that have relevant regulatory authority” to “immediately take action, to the extent appropriate and consistent with applicable law, to require masks to be worn in compliance with CDC guidelines” on certain modes of transportation. The CDC has, in turn, issued an [order imposing mask requirements](#) in a broad range of transportation contexts, including on commercial aircraft. The CDC says that it has authority to enforce its order through criminal penalties, and that the order “shall be enforced by the Transportation Security Administration under appropriate statutory and regulatory authorities.” But the CDC also stated that it expects other federal agencies will implement “additional civil measures” enforcing the mask requirements, consistent with President Biden’s executive order. While the executive order requires federal agencies with “relevant regulatory authority” to take action to require masks, it does not specify which agencies ultimately will issue mask requirements. It also does not identify the statutory authorities that will form the basis for agency actions imposing these requirements.

The FAA exercises authority over aviation safety, and some [industry groups](#) and [Members of Congress](#) had specifically called on the FAA to require masks on flights prior to the executive order. These developments have raised questions about the FAA’s authority to mandate masks on commercial aircraft.

This Legal Sidebar provides a brief overview of the FAA’s statutory authority to regulate safety in civil aviation. It then examines whether that FAA authority covers health issues on commercial flights and

Congressional Research Service

<https://crsreports.congress.gov>

LSB10572

whether that authority provides a basis for the FAA to mandate the use of masks. This Legal Sidebar focuses specifically on FAA authority over commercial aircraft safety, and does not address FAA authority to mandate masks on non-commercial aircraft or within airports, which may implicate different authorities and considerations.

FAA Authority over Safety in Civil Aviation

The FAA has broad statutory authority over safety in civil aviation and regulates “[virtually all areas of air safety](#).” While Congress has tasked the FAA with regulating specific aviation safety issues, such as aircraft manufacturing and pilot certification, Congress has more broadly empowered the FAA to promulgate regulations necessary for safety in flight. In particular, [49 U.S.C. § 44701\(a\)\(5\)](#) provides that the FAA Administrator “shall promote safe flight of civil aircraft in air commerce by prescribing . . . regulations and minimum standards for other practices, methods, and procedure[s] the Administrator finds necessary for safety in air commerce” The term “air commerce” is [statutorily defined](#) to encompass commercial flights between states or between the United States and a foreign country, as well as “the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce.” The FAA may bring enforcement actions and assess [civil penalties](#) against passengers and airlines for violating safety rules that it promulgates under section 44701.

Analyzing the scope of section 44701(a)(5), courts have [emphasized](#) “the broad language in which Congress couched its delegation of authority,” as well as legislative history suggesting Congress intended to vest the FAA with “plenary authority” to regulate safety in the design and operation of civil aircraft. Although section 44701(a)(5) is not a “general welfare clause” that would give the FAA authority over “virtually all aspects of life on board commercial aircraft,” [courts have held](#) that FAA regulations fall within the scope of section 44701(a)(5) so long as they are “reasonably related to safety in flight.”

“Health” as a Component of “Safety”

Notwithstanding the FAA’s broad authority to regulate “safety” in flight under section 44701(a)(5), “safety” is not statutorily defined, leaving unclear whether “safety” includes protecting physical health. For instance, a district court has [noted](#) that Congress’s primary concern with “safety” in section 44701(a)(5) and other aviation laws was “the operational and functional integrity of an aircraft,” and that “the independent health and medical needs of individual passengers . . . do not necessarily relate to the integrity of the aircraft.” While few courts have specifically analyzed the FAA’s authority to regulate health issues under section 44701(a)(5), the D.C. Circuit has held that “safety” includes protecting physical health on flights.

In *Bargmann v. Helms*, the plaintiffs challenged the FAA’s decision not to require commercial aircraft to carry medical equipment for treating certain serious health problems like heart attacks that can occur in flight. The FAA argued that under its statutory authority to regulate aviation “safety,” it lacked the power to require equipment for treating “health problems that ‘occur’ in flight but are not ‘caused by’ flight.” Rejecting that argument, the D.C. Circuit [characterized](#) the FAA’s interpretation as an “unreasonable” attempt to “limit artificially its regulatory authority.” Focusing on the text and legislative history of section 601(a)(6) of the Federal Aviation Act—a prior and substantively similar version of 49 U.S.C. § 44701(a)(5)—the court [held](#) that the statute broadly empowers the FAA Administrator to promulgate regulations “reasonably related to safety in flight,” and that the medical equipment satisfied this “minimum nexus.” The court noted that inflight medical emergencies are of “immediate concern to the personal safety” of the passenger, and may affect the safety of others insofar as the pilot might address the medical emergency by making an unscheduled landing.

More recently, in *Flyers Rights Education Fund, Inc. v. FAA*, the D.C. Circuit construed the FAA's authority to address health issues more broadly. The plaintiff challenged the FAA's decision not to promulgate rules on aircraft passenger seat size, which the plaintiff argued were necessary, in part, to protect passengers from developing [deep vein thrombosis](#) during flights. Referencing section 44701, the court [observed](#) that the FAA's statutory authority "'embod[ies] a comprehensive scheme for the regulation of the safety aspect[s] of aviation,'" and that "'health' is a component of 'safety.'" The court therefore [concluded](#) that the FAA has authority to "protect[] passengers' physical health in flight, even from harms that are not occasioned by the flight." Unlike the *Bargmann* case thirty years earlier, the FAA acknowledged its authority to protect passenger health in *Flyers Rights*. The court [explained](#) that the agency had declined to issue the requested regulations not because it believed it lacked authority to do so, but because the agency determined the health risk was low and the proposed regulations were unnecessary.

In another recent case, *Wallaesa v. FAA*, the D.C. Circuit rejected the argument that "safety" under section 44701(a)(5) should be interpreted narrowly to encompass only safety regulations involving the physical aircraft or air carrier personnel. Although *Wallaesa* involved regulations addressing disruptive passenger conduct, and not health issues, the decision emphasized the broad scope of the FAA's safety authority. Invoking the *ejusdem generis* doctrine, the plaintiff argued that section 44701(a)(5)'s general phrase "other regulations . . . necessary for safety" should be limited to safety issues similar to those specifically enumerated in the preceding subparts, [49 U.S.C. §§ 44701\(a\)\(1\) through \(4\)](#). The *ejusdem generis* doctrine instructs that a general term following a more specific list of enumerated terms should be interpreted to cover only matters similar to the specific terms. But the court [explained](#) that this doctrine "'does not control . . . when the whole context dictates a different conclusion,'" and that "section 44701's broad language conveys broad authority." The court thus reaffirmed that section 44701(a)(5) "provides authority to make rules reasonably related to flight safety."

Occupational Safety and Health

While the [Occupational Safety and Health Administration](#) (OSHA) generally regulates workplace health and safety conditions for employers, the FAA asserts nearly exclusive authority over occupational health and safety standards on civil aircraft. The Occupational Safety and Health Act [provides](#) that OSHA standards do not apply where another federal agency "exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Under a [2014 Memorandum of Understanding](#) between the FAA and OSHA, the FAA asserts exclusive authority—with limited exceptions not relevant in the COVID-19 context—over regulating the safety and health aspects of working conditions for flight deck personnel and cabin crew.

In coordination with the CDC, the FAA recently [issued](#) its own updated occupational safety and health guidance addressing COVID-19 for air carriers and crews. With respect to masks on flights, the guidance incorporates the CDC's recommendation to wear masks on all public transportation conveyances, including aircraft, and asks air carriers to "[c]onsider providing masks to crewmembers for routine use when on duty if wearing a mask does not interfere with required PPE or job tasks." The guidance also notes that wearing a mask for COVID-19 purposes may affect the donning of oxygen masks, and it advises air carriers and crewmembers to be mindful of FAA [regulations](#) requiring that crewmembers be able to rapidly don oxygen masks.

Mask Mandate Under Section 44701(a)(5)

The FAA's broad statutory authority to regulate "safety" in air commerce under section 44701(a)(5) suggests that courts would likely view a mask mandate on commercial aircraft to be within the FAA's authority. To the extent that "safety" includes protecting "physical health" in flight, as the D.C. Circuit held in *Flyers Rights*, requiring masks on flights to protect passengers and crew from contracting the

potentially deadly COVID-19 virus would seem to satisfy the “minimum nexus” to flight safety that [courts have required](#) under section 44701(a)(5). The FAA’s statutory safety authority therefore could possibly support additional executive action enforcing mask requirements on flights.

But even if a court were to hold that a mask mandate is within the scope of the authority that Congress granted to the FAA in section 44701(a)(5), a court also would have to determine that such a mandate is within Congress’s constitutional powers.

The FAA’s section 44701(a)(5) authority is a delegation of congressional power and cannot exceed Congress’s powers enumerated in the Constitution. Congress’s regulation of air commerce under section 44701(a)(5) is rooted in the Commerce Clause. While a general nationwide mask mandate could raise difficult constitutional issues concerning the limits of Congress’s Commerce Clause power, requiring masks on commercial flights appears to be squarely within the bounds of that power.

The [Commerce Clause](#) grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The Supreme Court [has held](#) that there are “three broad categories of activity that Congress may regulate under its commerce power”: (1) “the use of the channels of interstate commerce,” (2) “instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “activities that substantially affect interstate commerce.” The first two of these categories are most relevant to mandating masks on flights. First, [navigable airspace](#) constitutes a “channel of interstate commerce,” and it is a “[well-settled principle](#) that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the *means* of promoting or spreading evil, whether of a physical, moral or economic nature.” Second, [aircraft](#) are “instrumentalities of interstate commerce,” and Congress [may regulate](#) “the persons or things that the instrumentalities are moving,” including “people while they are on a . . . plane.”

An FAA mask mandate would also need to accord with constitutional protections of individual rights. However, as noted in a previous Sidebar, federal mask requirements appear to face few obstacles on that basis. For example, courts have [rejected](#) challenges to state mask mandates brought on First Amendment freedom of speech grounds.

Considerations for Congress

Congress has extensive power to regulate air travel. Courts have broadly construed the FAA’s current statutory authorities over aviation safety, but if Congress were to seek to eliminate uncertainty over FAA authority to protect airline passengers and crew from communicable diseases, Congress could consider enacting legislation expressly authorizing the FAA to regulate this area.

Several bills in the 116th Congress contained provisions related to mask requirements in air travel. For example, the [Healthy Flights Act of 2020](#) (H.R.7867) would have included mask requirements for airline passengers and employees, as well as for public-use airports. The bill also would have given the FAA Administrator express authority during infectious-disease epidemics to impose requirements “necessary to protect the health and safety of air carrier crewmembers and passengers and to reduce the spread of such infectious disease through the aviation system.” The [Heroes Act](#) (H.R.8406) would have required the Secretary of Transportation to impose mask requirements in a range of transportation contexts, including for air carriers.

Author Information

Bryan L. Adkins
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.