

United States to impose federal COVID-19 safety measures on international travel

January 25, 2021

Introduction

On January 12, 2021, the Centers for Disease Control and Prevention (CDC) issued an Order (the CDC Order), which will require all air passengers travelling to the United States from a foreign country to present either of the following to the airline or aircraft operator (i.e., an individual or organization causing or authorizing the operation of an aircraft) before boarding the flight: (a) a negative result for a COVID-19 test, or (b) sufficient documentation of having recovered from COVID-19. Air passengers will also be required to confirm that the information they present is true by means of an attestation. The CDC Order was formally published in the Federal Register on January 21, 2021, and will become effective as of 12:01am EST on January 26, 2021.

On January 21, 2021, President Joe Biden also issued the *Executive Order on Promoting COVID-19 Safety in Domestic and International Travel* (the Executive Order). It requires relevant Federal Government Agencies to assess the implementation of the CDC Order (within 14 days of the Executive Order) and take any appropriate regulatory action. Among other things, the Executive Order also requires relevant Federal Government Agencies to consider additional measures such as mandatory quarantine/isolation, the implementation of COVID-19 safety measures at land and sea ports of entry, and the possible use of International Certificates of Vaccination or Prophylaxis (ICVPs) for COVID-19. It also immediately imposes a federal mask requirement on airports, commercial aircraft, trains, public maritime vessels (including ferries), intercity bus services, and all forms of public transportation.

Further details regarding the CDC Order and the Executive Order appear below.

The Executive Order

The Executive Order requires relevant Federal Government agencies to assess the implementation of CDC Order within 14 days of the date of the Executive Order. Based on the above assessment, they will be required to take any regulatory action that they consider appropriate, which includes consideration of the following:

- a. The timing and types of COVID-19 tests that should satisfy the negative test requirement, including consideration of additional testing immediately prior to departure;
- b. The proof of test results that travelers should be required to provide;
- c. The feasibility of implementing alternative and sufficiently protective public health measures, such as testing, self-quarantine, and self-isolation on arrival, for travelers entering the United States from countries where COVID-19 tests are inaccessible, particularly where such inaccessibility of tests would affect the ability of United States citizens and lawful permanent residents to return to the United States; and
- d. Measures to prevent fraud.

The Executive Order also requires relevant Federal Government agencies to promptly provide the President with a plan on how the Federal Government could implement CDC-recommended periods of self-quarantine/self-isolation after a flight to the United States from a foreign country. This suggests that a mandatory federal self-quarantine requirement for international travellers may be implemented by the United States in the near future. Such a requirement would be similar to what the Government of Canada has already implemented.

In addition, the Executive Order requires relevant Federal Government agencies to consult with foreign governments, international organizations, and other stakeholders in order to establish guidelines for public health measures associated with safe international travel, including on aircraft and at ports of entry. The Executive Order specifically refers to quarantine, testing, COVID-19 vaccination, follow-up testing and symptom monitoring, air filtration requirements, environmental decontamination standards, and contact tracing.

The Executive Order requires relevant Federal Government agencies to immediately commence diplomatic outreach to the governments of Canada and Mexico regarding public health protocols for land ports of entry. Based on this diplomatic engagement, they must submit a plan to the President within 14 days of the Executive Order, addressing the implementation of appropriate public health measures at land ports of entry. The plan should implement CDC guidelines, consistent with applicable law, and take into account the operational considerations relevant to the different populations who enter the United States by land. This suggests that similar measures may be implemented at land ports of entry in the near future. Such measures would be consistent with what the Government of Canada has already implemented (with the exception of its pre-departure COVID-19 test requirement, which only applies to air travel for now).

The Executive Order requires relevant Federal Government agencies to submit a plan to the President, within 14 days of the Executive Order, to implement appropriate public health measures at sea ports. The plan should implement CDC guidelines, consistent with applicable law, and take into account operational considerations. This suggests that similar measures may be implemented at sea ports of entry in the near future. Such measures would be consistent with what the Government of Canada has already implemented (with the exception of its pre-departure COVID-19 test requirement, which only applies to air travel for now).

The Executive Order requires relevant Federal Government agencies to assess, in coordination with any relevant international organizations, the feasibility of linking COVID-19 vaccinations to ICVPs and producing electronic versions of ICVPs. An ICVP is an official documentation used as proof of vaccination against a disease when a country entry requirement exists, as designated under the *International Health Regulations* (IHR). It is most commonly used as proof of vaccination for the yellow fever virus, which several countries require for entry. This suggests that the United States may be considering the possible use of ICVPs as proof of evidence of COVID-19 vaccination.

The Executive Order also immediately requires masks to be worn in compliance with CDC guidelines in or on: (a) airports, (b) commercial aircraft, (c) trains, (d) public maritime vessels (including ferries), (e) intercity bus services, and (f) all forms of public transportation (as defined in 49 USC § 5302(14)). This requirement applies to both domestic and international travel. All eleven major US airlines already have a mask requirement in place but enforcing it has been a challenge. In addition to expanding the mask requirement to other forms of public transportation, the Executive Order should also make it easier for airlines to enforce.

The CDC Order

Overview

As mentioned above, the CDC Order becomes effective on January 26, 2021. As of that date, all international travellers two years of age or older (including US citizens and lawful permanent residents) will be prohibited from

boarding a flight to the United States unless they comply with the requirements of the CDC Order.

In order to comply with the CDC Order, international passengers will be required to provide evidence of one of the following:

- a. A negative pre-departure test result for SARS-CoV-2, the virus that causes COVID-19, conducted on a specimen collected within the three calendar days preceding the flight's departure from a foreign country (Qualifying Test); or
- b. Written or electronic documentation of recovery from COVID-19 after previous SARS-CoV-2 infection in the form of a positive viral test result and a letter from a licensed health care provider or public health official stating that the passenger has been cleared for travel (Documentation of Recovery).

Passengers must retain written or electronic documentation reflecting the negative Qualifying Test result or Documentation of Recovery presented to the airline or other aircraft operator. They must also produce their Qualifying Test result or Documentation of Recovery upon request by any US government official or cooperating state or local public health authority.

International travellers must also provide an attestation to the CDC, through the airline or other aircraft operator, of having received a negative Qualifying Test result or of recovery from COVID-19 after previous SARS-CoV-2 infection and clearance to travel. Unless otherwise permitted by law, a parent or other authorized individual should attest on behalf of a passenger aged two to 17 years. An authorized individual may also attest on behalf to any passenger who is unable to attest on his or her own behalf (e.g., by reason of physical or mental impairment). Airlines and other aircraft operators must retain a copy of each passenger's attestation for two years.

Presentation of a Qualifying Test

In the case of a Qualifying Test, if the passenger is arriving on a direct flight to the United States, the specimen must have been collected within the 3 calendar days preceding the flight's departure. However, if the passenger is arriving via one or more connecting flights, the specimen must have been collected within the 3 calendar days preceding the departure of the initial flight but only if:

- a. The connecting flights were booked as a single passenger record with a destination in the United States, and
- b. Each connection is no longer than 24 hours.

According to the CDC Order, a Qualifying Test is defined as a viral detection test for current infection (i.e., a nucleic acid amplification (NAT) test or a viral antigen test) approved or authorized by the relevant national authority for the detection of SARS-CoV-2. In addition, the results must state "NEGATIVE," "SARS-CoV-2 RNA NOT DETECTED," "SARS-CoV-2 ANTIGEN NOT DETECTED," or "COVID-19 NOT DETECTED." A test marked "invalid" is not acceptable.

NAT tests, which include a polymerase chain reaction (PCR) or reverse transcription loop-mediated isothermal amplification (RT-LAMP) test, are extremely accurate. However, the definition also appears to include the less accurate antigen test (also known as a "rapid test."); Canada's pre-departure COVID-19 test requirement does not recognize an antigen test. In addition, a serology test, which tests for antibodies and primarily determines whether an individual previously had COVID-19, is clearly not acceptable.

Presentation of a Documentation of Recovery

In the case of Documentation of Recovery, the passenger must present documentation of a positive test result and a signed letter on official letterhead that contains the name, address, and phone number of a licensed healthcare provider or public health official stating that the passenger has been cleared for travel. The positive test result must have occurred within the 90 days preceding the passenger's flight to the United States, or at such other intervals as specified in CDC guidance.

The test performed must have been a viral detection test for current infection (i.e., a NAT test or antigen test) approved or authorized by the relevant national authority for the detection of SARS-CoV-2. The test must state “POSITIVE,” “SARS-CoV-2 RNA DETECTED,” “SARS-CoV-2 ANTIGEN DETECTED,” or “COVID-19 DETECTED.” A test marked “invalid” is not acceptable.

The CDC’s willingness to accept Documentation of Recovery makes the CDC Order more lenient than Canada’s pre-departure COVID-19 test requirement, which only accepts evidence of a negative PCR or RT-LAMP test.

Available exemptions

In addition to children under two years of age, the following categories of individuals and organizations are specifically exempt from the requirements of the CDC Order:

- a. Crew members of airlines or other aircraft operators provided that they follow industry standard protocols for the prevention of COVID-19 as set forth in relevant Safety Alerts for Operators (SAFOs) issued by the Federal Aviation Administration (FAA).
- b. Airlines or other aircraft operators transporting passengers with COVID-19 pursuant to CDC authorization and in accordance with CDC guidance.
- c. Federal law enforcement personnel while on official duty and carrying out a law enforcement function and members of the US military (including aircraft operators), when traveling under competent orders - provided that the authority ordering the travel requires precautions to prevent the possible transmission of infection to others during the travel period in accordance with CDC guidance.
- d. Airlines or other aircraft operators granted specific waivers from the application of the CDC Order based on CDC’s determination that a foreign country lacks available SARS-CoV-2 testing capacity. Such waivers may be granted based on a specific request made by an airline or aircraft operator to the CDC and will be limited to 14 days unless renewed by CDC.

The number of exemptions currently available under the CDC Order are quite limited. By comparison, Canada’s pre-departure COVID-19 test requirement recognizes a larger number of exemptions. However, additional exemptions may be added later, either by the CDC or possibly through additional regulatory action mandated by the Executive Order.

Penalties for non-compliance

The CDC Order sets out specific requirements for both: (a) airlines and other aircraft operators; and (b) aircraft passengers. Failure to comply with these requirements may result in criminal penalties.

Requirements for airlines and other aircraft operators

Any airline or other aircraft operator with passengers arriving in the United States is required to do the following for each passenger onboard the aircraft:

- a. Verify that each passenger has provided an attestation and must retain a copy of each passenger attestation for two years;
- b. Confirm that each passenger aged two years of older has documentation of a negative Qualifying Test of Documentation of Recovery from COVID-19; and
- c. Not board any passenger without verifying the attestation and confirming the documentation described above.

Requirements for aircraft passengers

Any aircraft passenger departing from any foreign country with a destination in the United States is required to do the following:

- a. Provide an attestation to the CDC, through the airline or other aircraft operator; and
- b. Retain a copy of the negative Qualifying Test result or Documentation of Recovery from COVID-19 and present it for inspection to the airline and upon request by an agent of the US government or a cooperating state or local public health authority.

Any airline, aircraft operator, or aircraft passenger who fails to comply with the above requirements may be subject to criminal penalties under 42 U.S.C. §271 and 42 C.F.R. §71.2, in conjunction with 18 U.S.C. §3559 and 18 U.S.C. 3571. In the case of an aircraft passenger, willfully giving false or misleading information to the government may also result in criminal penalties under 18 U.S.C. §1001.

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