



DISABILITY LAW CENTER

3330 Arctic Boulevard, Suite 103
Anchorage, AK 99503

www.dlcak.org

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Sent via certified mail, copied: newsroom@alaskaair.com
mediarelations@aa.com

Ben Minicucci
President
Alaska Airlines
19530 International Blvd. S, Ste. #108,
SeaTac, Washington, 98188

Doug Parker
Chairman and CEO
American Airlines
P.O. Box 619616
DFW Airport, TX 75261-9616

Max Tidwell
Vice President, Safety and Security
Alaska Airlines
19300 International Blvd,
Seattle, Washington, 98188

Elise Eberwein
Executive Vice President, People and Communications
American Airlines
P.O. Box 619616
DFW Airport, TX 75261-9616

Dear President Minicucci, CEO Parker, VP Tidwell, and Executive VP Eberwein;

We write to you out of concern that the recent mask policies implemented by Alaska Airlines and American Airlines do not allow a disability exception for individuals whose disabilities make it impossible for them to wear a mask for any length of time. For the purposes of the Air Carrier Access Act of 1986, please treat this letter as a complaint so that we may follow up with the United State Department of Transportation, as necessary. Responses can be directed to Chad Hansen, staff attorney with Disability Law Center, chansen@dlcak.org.

We represent a network of disability advocacy organizations within the State of Alaska. As you may know, many communities within the State of Alaska are dependent on air travel for access. Many of these communities can provide only limited medical services to their members before community members must travel by air to a larger community such as Anchorage or Fairbanks to have their medical needs met. In some cases, an individual's medical needs are greater than what the medical infrastructure in the State of Alaska can meet and these individuals must travel by air to Seattle, Washington or elsewhere in the continental United States to have their needs met. Unfortunately, many people experiencing advanced medical needs also experience disabilities that prevent them from complying with mask mandates during the COVID-19 pandemic. This may include but is not limited to: people experiencing a respiratory disability that may impede breathing;



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people experiencing PTSD, anxiety, or claustrophobia; people living with autism who may have a sensitivity to touch and texture; people whose disabilities prevent them from having the manual dexterity to put on and take off masks; and people who use mouth control devices.

While we applaud the efforts that both airlines have taken to combat the COVID-19 pandemic and ensure safe travel for your customers, we have concerns that such an across the board policy will have adverse impacts on Alaskans with disabilities, and does not comply with federal guidance available to help airlines mitigate the risks arising from the COVID-19 pandemic, nor does it comply with the Air Carrier Access Act of 1986.

Recently, the United States Departments of Transportation, Homeland Security, and Health and Human Services jointly issued guidance for airlines and airports titled “Runway to Recovery: The United States Framework for Airlines and Airports to Mitigate the Public Health Risks of Coronavirus.”¹ Promoting Public Health within the Air Transportation System is one of the principles this guidance is meant to promote and in so doing recognizes that evidence based measures meant to minimize disease transmission should:

Reflect the full range of passenger needs, including requirements under the Rehabilitation Act, the Americans with Disabilities Act, and the Air Carrier Access Act. Consistent with these laws, it may be necessary for airports and airlines to modify certain measures to accommodate passengers with a disability while maintaining public health.²

Specifically, while this guidance suggests that everyone over the age of 2 years should wear a mask at all times, it does provide the exception that “Reasonable accommodations should be made for persons with disabilities or ailments who cannot wear masks or cloth face coverings.”³

While the guidance available in “Runway to Recovery” does not carry the full weight of the Code of Federal Regulations, it is meant to promote best practices by the administrative agencies that issue regulations and it is not unlikely that further guidance or regulation related to this matter may issue as the pandemic progresses.

¹ U.S. Departments of Transportation, Homeland Security, and Health and Human Services: Runway to Recovery: The United States Framework for Airlines and Airports to Mitigate the Public Health Risks of Coronavirus (2020). Available at https://www.transportation.gov/sites/dot.gov/files/2020-07/Runway_to_Recovery_07022020.pdf.

² Id at 7.

³ Id. at 18-19.



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Additionally, an across the board mask policy that does not allow an exception for individuals with disabilities and does not make an individualized determination based on need likely does not comply with the Air Carrier Access Act of 1986 (ACAA).⁴

The ACAA states that “As a carrier, you must not... discriminate against any qualified individual with a disability, by reason of such disability, in the provision of air transportation.”⁵ This nondiscrimination requirement requires air carriers to modify “policies, practices, and facilities when needed to provide nondiscriminatory service to a particular individual with a disability, consistent with the standards of section 504 of the Rehabilitation Act, as amended.”⁶

Air carriers are not required to make modifications that would constitute an undue burden or would fundamentally alter their programs.⁷ However, using “Runway to Recovery” as a model that recognizes that reasonable accommodations should be made for persons with disabilities who are unable to wear masks, it is unlikely that the inability to wear a mask alone would constitute an undue burden or fundamental alteration unless the specific modification or alteration requested falls into either category. In such a case your airline should work with the individual to find a modification or accommodation that will work.

Additionally, an air carrier can refuse to transport a passenger with a disability if there is a disability related safety basis because that individual poses a “direct threat.”⁸ A direct threat means “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.”⁹ The regulations instruct that:

In determining whether an individual poses a direct threat, you must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to 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

⁴ 49 U.S.C. § 41705, 14 C.F.R. § 382.1 et seq.

⁵ 14 C.F.R. § 382.11(a)(1).

⁶ 14 C.F.R. § 382.13(a).

⁷ 14 C.F.R. § 382.13(c).

⁸ 14 C.F.R. § 382.19(c)(1).

⁹ 14 C.F.R. § 382.3.



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(iii) Whether reasonable modifications of policies, practices, or procedures will mitigate the risk.¹⁰

Further, once an individual passenger is determined to be a direct threat, “you must select the least restrictive response from the point of view of the passenger, consistent with protecting the health and safety of others. For example, you must not refuse transportation to the passenger if you can protect the health and safety of others by means short of a refusal.”¹¹

The regulations provide further guidance that in assessing whether an individual is a direct threat, air carriers may rely on directives by public health authorities and must consider the significance of the consequences of a communicable disease and the degree to which it can be readily transmitted by casual contact in an aircraft cabin environment.¹² Examples provided by this regulation include the following:

Example 1: The common cold is readily transmissible in an aircraft cabin environment but does not have severe health consequences. Someone with a cold would not pose a direct threat.

Example 2: AIDS has very severe health consequences but is not readily transmissible in an aircraft cabin environment. Someone would not pose a direct threat because he or she is HIV–positive or has AIDS.

Example 3: SARS may be readily transmissible in an aircraft cabin environment and has severe health consequences. Someone with SARS probably poses a direct threat.¹³

An individual seeking an accommodation or modification to a universal mask policy due to a disability is unlikely to qualify as a direct threat for two reasons.

First, a determination that an individual constitutes a direct threat to the health and safety of others requires an individualized assessment of each individual requesting an accommodation or modification. The no exceptions mask policy currently in place is an across the board policy that does not conduct an individualized assessment to take into account the nature, duration, and severity of the risk; the probability that potential harm to the health and safety of others will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.¹⁴ This does not negate the fact that some individuals seeking an accommodation

¹⁰ 14 C.F.R. § 382.19(c)(1).

¹¹ 14 C.F.R. § 382.19(c)(2).

¹² 14 C.F.R. § 382.21(b).

¹³ Id.

¹⁴ 14 C.F.R. § 382.19(c)(1)



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might individually present a direct threat after an assessment meeting the criteria above, but a universal policy is not likely to find support in everyone seeking an accommodation being a direct threat.

Second, while a positive COVID-19 infection may be most closely related to the SARS example given above, it is important to note that this example covers someone with SARS and not someone who may have potentially been exposed to SARS. That is to say, an individual that is currently experiencing a COVID-19 infection likely does present a direct threat to the health and safety of others. However, the no exceptions mask policy is based on the idea that any passenger is potentially positive for COVID-19, and does not mean that all individuals wearing masks are currently infected by COVID-19.¹⁵ There are additional methods to mitigate the risk presented by COVID-19 besides the use of a mask. For example, as part of an accommodation, an airline may agree to let a person with a disability fly without the use of a mask if they are able to provide documentation that their disability needs prevent them from wearing a mask, provide proof of a recent negative COVID-19 test, and agree to sit at a greater distance from others in the plane who are wearing masks. Other examples of accommodations may exist, and we invite you to explore them as part of the collaborative process contemplated by the ACAA, as well as Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act.

We, as representatives of the disability community, encourage you to review your mask policies and create exceptions for individuals whose disabilities prevent them from wearing masks. We recognize the valued service that your airlines provide the State of Alaska and we look forward to hearing from you.

Sincerely,

Disability Law Center of Alaska
Northern Justice Project
Alaska Association on Developmental Disabilities
Stone Soup Group
Statewide Independent Living Council of Alaska (SILC)

¹⁵ For example, it is unlikely that an individual who is currently suffering from COVID-19 or a current asymptomatic carrier would be allowed to fly even if they agreed to wear a mask.