

TSA Has Legal Authority to Conduct Air Passenger Temperature Screenings

As airlines seek to restore consumer confidence in air travel, they are urging the Transportation Security Administration (TSA) to administer temperature screenings of all passengers at TSA airport security checkpoints. Several airlines, including Frontier Airlines and Air Canada as well as airports in Washington state and Hawaii announced plans to conduct screenings. Such action by individual airlines and airports, while laudable in its intent, may result in an inconsistent approach that confuses passengers, thereby potentially undermining the confidence of the traveling public. Protection of public health is a purely governmental function that, in the context of air travel, requires action by the federal government.

Some have questioned whether TSA has statutory authority to do so. For its part, TSA appears to have answered that question in the affirmative because TSA reportedly is preparing to administer temperature checks at more than a dozen U.S. airports. TSA's apparent legal conclusion is correct.

The Aviation and Transportation Security Act (49 U.S.C. § 114) affords TSA broad, overarching authority over transportation security, but two of the Act's specific provisions are relevant to TSA's plan to conduct passenger temperature checks: (1) 49 U.S.C. § 114(g)(1), which grants TSA authority to act in response to a "national emergency," and (2) 49 U.S.C. § 114(f)(4) and (16), which afford TSA discretion to carry out unspecified measures "related to transportation security."

"National Emergency" Authority

TSA's strongest legal basis for conducting temperature screenings may be found in 49 U.S.C. § 114(g)(1), which governs TSA responsibilities "during a national emergency." Specifically, TSA's "national emergency responsibilities" include: (1) "coordinat[ing] domestic transportation, including aviation..." and (2) "carry[ing] out such other duties, and exercise such other powers, *relating to transportation during a national emergency* as the Secretary of [the Department of] Homeland Security [DHS] shall prescribe." 49 U.S.C. § 114(g)(1)(A),(D) (emphasis added).

The Act does not define "national emergency," but rather authorizes the Secretary of DHS to "prescribe the circumstances constituting a national emergency" and to direct TSA's responsibilities in response to such an emergency. 49 U.S.C. § 114(g)(1),(3). Because President Donald Trump declared a national emergency on March 13, 2020, the Secretary of DHS could assert that a national emergency exists and prescribe duties to TSA, including passenger temperature screenings, in response to that emergency.

Specifically, TSA could argue that temperature screenings "relate to transportation during a national emergency," pursuant to direction from the Secretary of DHS, because they are an essential part of enabling the public to travel safely by air in the midst of a global pandemic. Alternatively, TSA could assert that temperature checks are necessary to "coordinate domestic [aviation] transportation." While "coordinate" is not defined in the statute, TSA could argue that to enable domestic aviation to return to pre-COVID levels, the public must be confident that there are common, standardized measures in place to mitigate COVID-related health risks in air transportation that are not dependent on the particular airline that the passenger flies or the airport from which the passenger departs. It can and should be the federal government's role to conduct such checks on a standardized, consistent basis, and TSA's statutory authority likely allows it to do so pursuant to direction from DHS.

Authority to Conduct Measures "Related to Transportation Security"



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TSA arguably has authority to conduct passenger temperature checks pursuant to two provisions in 49 U.S.C. § 114(f). Under 49 U.S.C. § 114(f)(4), TSA must “make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government.” Similarly, under 49 U.S.C. § 114(f)(16), TSA is responsible for “carry[ing] out such other duties, and exercise such other powers, relating to transportation security as the Administrator considers appropriate, to the extent authorized by law.”

Both of these provisions broadly authorize TSA actions in furtherance of “transportation security.” However, TSA’s statutory authority does not define the term “security.” TSA could assert that Congress intended this term to be broad by leaving it undefined, that it encompasses more than what is traditionally thought of as “security,” and that it involves efforts to ensure that passengers are free from threats or danger of any kind in transportation. Because COVID-19 poses a threat to passenger health in air transportation, temperature screenings are therefore necessary to “secure” air travel and potentially mitigate that danger.
