

U.S. Government Requires COVID-19 Vaccination for Foreign Visitors Arriving by Air; Modifies Pre-Departure Testing and Data Collection Requirements

On October 25, 2021, President Biden issued a presidential proclamation titled *Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic* (the proclamation), and the U.S. Centers for Disease Control and Prevention (CDC) released a trio of orders that impose additional restrictions and documentary requirements on airlines and other air operators, passengers, and crew members to combat the spread of the virus that causes COVID-19. The presidential proclamation and orders apply to international flights into the United States and:

- require most noncitizens who are nonimmigrants to be fully vaccinated and prohibit airlines and other air operators from boarding individuals who fail to present required documentation (the Vaccination Order);
- modify pre-departure testing and documentation requirements that have been in effect since January 2021 and apply to nearly all passengers over two years of age (the Pre-Departure Testing Order); and
- expand the scope of contact information that airlines and other air operators engaging in passenger-carrying operations have been required to collect from passengers and crew members since February 2020 (the Contact Tracing Order).

These requirements, which take effect on November 8, 2021, cover *all* airlines and other air operators (regardless of whether the flight is commercial or private) and will require changes to airlines' and other air operators' passenger handling and data collection procedures and protocols. The proclamation and orders are summarized below:

The Proclamation

The proclamation bars entry into the United States of noncitizen nonimmigrant air travelers (other than crew members of airlines or other air operators when adhering to industry standard COVID-19 prevention protocols) who do not provide proof of full vaccination, with limited exceptions as identified in the proclamation for passengers who are either:

1. traveling for certain diplomatic or official foreign government activities;
2. deemed by the CDC to be exempted from a vaccination requirement due to their age (such as those under the age of 18 years as identified in the Vaccination Order described below);
3. participants in clinical trials;
4. persons for whom vaccination is medically contraindicated as determined by a physician;
5. granted an exception by the CDC for humanitarian or emergency reasons;
6. members of the U.S. Armed Forces or their immediate family members;
7. citizens of a foreign country (other than B-1 or B-2 visa holders) for which the availability of COVID-19 vaccinations, as determined by the U.S. government, is limited;¹
8. sea crew members traveling on a C-1 and D visa; or
9. persons whose entry into the United States is "in the national interest," as determined by the Departments of State, Transportation, or Homeland Security.

The proclamation directs the CDC to issue the necessary implementing procedures, including but not limited to defining and specifying documentation for proving full vaccination status as well as public health requirements applicable to noncitizen nonimmigrants who are excepted under the proclamation, i.e., not fully vaccinated but nevertheless admissible into the United States because they fall within one of the passenger categories identified in (i) through (ix), above (excepted passengers). Additionally, the Transportation Security Administration (TSA) has been directed to



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take steps to ensure airlines prevent individuals who are barred entry from boarding aircraft traveling to the United States.

Finally, the proclamation revokes several prior proclamations that had temporarily suspended entry into the United States of certain persons previously present in the People's Republic of China, Iran, Brazil, the United Kingdom, Ireland, and the 26 European countries comprising the Schengen Area, South Africa, and India.

Vaccination Order

Further to the proclamation, the Vaccination Order requires airlines and other air operators to confirm that all noncitizen nonimmigrant air passengers, other than crew (as noted above), those under the age of 18 and other excepted passengers (also defined above), have presented proof of full vaccination with an accepted COVID-19 vaccine (i.e., a vaccine (a) approved or authorized for emergency use by the U.S. Food And Drug Administration or (b) listed for emergency use by the World Health Organization)² before boarding the aircraft. This proof must be in the form of paper or digital documentation identified by the CDC as acceptable (such as a vaccination certificate with QR code, digital pass via smartphone with QR code or vaccination record/certificate issued at a national or subnational level by an authorized vaccine provider such as the CDC). Importantly, photographs of vaccination records/certificates are *not* acceptable.

With respect to all other noncitizen nonimmigrant passengers, airlines and other air operators must confirm that the individual, before boarding the aircraft, presents documentation proving that he or she is an excepted passenger and also provides an attestation (as prescribed by CDC) that, among other things, identifies the basis for being excepted under the presidential proclamation and attests that the individual will take the following steps:

1. arrange to be tested for COVID-19 three to five days after entry;
2. self-quarantine for seven days after entry (even if the test results are negative);
3. self-isolate in the event of a positive test result or if the individual develops COVID-19 symptoms; and
4. arrange to become fully vaccinated if the individual plans to remain in the United States for more than 60 days.

Excepted passengers who are members of the U.S. Armed Forces and their immediate family members are not required to comply with these steps. Additionally, individuals under the age of 18 years, or participating in a clinical trial, or persons for whom vaccination has been deemed by a physician to be medically contraindicated, are not required to become fully vaccinated while in the United States.

The required attestation may be integrated into a web, airport kiosk, or mobile application check-in process, provided there is a system in place to ensure that the person filling out the attestation is the passenger or an authorized representative (such as a parent acting on behalf of a minor). The CDC has published the required form of attestation that must be used, which includes the assurances required under the Vaccination Order as well as additional assurances required of nearly all passengers under the Pre-Departure Testing Order (summarized below). The Vaccination Order indicates that airlines and other air operators will be separately directed by TSA (including via a security directive in the case of airlines) to retain copies of the required attestation for two years.

Pre-Departure Testing Order

The Pre-Departure Testing Order amends a January 2021 CDC order that required airlines and other air operators, in the case of nearly all passengers over the age of two and arriving by air into the United States to confirm, based on passenger-provided documentation and regardless of the passenger's nationality, that the individual has either: (i) tested negative, through a NAAT or antigen test using a specimen collected within three days of departure, for the virus that causes COVID-19; or (ii) recently recovered from COVID-19.³

The Pre-Departure Testing Order establishes two different testing and documentation requirements depending on whether the passenger has been fully vaccinated for COVID-19. For fully vaccinated passengers, the testing timeframe remains the same (a specimen collected within three days of

departure), however, such passengers must also provide proof of being fully vaccinated. For all other passengers, the testing timeframe is modified to require that the specimen be collected within one day of departure.

Documentation of recovery from COVID-19 must include a positive test result based on a specimen issued within 90 days of departure and a health care provider's or public health official's letter stating the passenger is cleared for travel. Test result documentation (whether for a negative or positive test) and letters (for proof of recovery) should include personal identifying information that matches such information in the passenger's passport or other travel documentation as well as the name and contact information for the entity or individual that issued the test results or letter (as the case may be). Either paper or digital documentation is acceptable under the Pre-Departure Testing Order. Passengers must retain the testing/proof of recovery documentation presented to the airline or air operator, and produce that documentation upon request to any U.S. governmental official or state or local health authority.

In addition to presenting the required documentation summarized above, passengers must attest to the airline or air operator that they have complied with the requirements imposed under the Pre-Departure Testing Order. The CDC has published a single attestation form that contains the attestations required under both the Pre-Departure Testing Order and the Vaccination Order (summarized above). As with the Vaccination Order, airlines and other air operators must retain the attestation required under the Pre-Departure Testing Order for two years but are not required to retain copies of passenger-provided testing/proof of recovery documentation. As with the Vaccination Order, airlines and other air operators must confirm that passengers have the required documentation and provide the required attestation *before* the passenger boards the aircraft.

The Contact Tracing Order

This order modifies data collection requirements that have been applicable to airlines and other air operators engaging in passenger-carrying operations since February 2021 with respect to passengers and crew members arriving into the United States, in order to assist federal, state, and local officials with efforts to isolate persons infected with COVID-19 and facilitate contact tracing and management. More specifically, the scope of information (designated information) that must be collected for such individuals, to the extent such information exists,⁴ now includes:

- a. full name;
- b. address while in the United States;
- c. primary contact phone number at which the individual can be contacted while in the United States;
- d. secondary contact phone number (emergency contact or home or work number);
- e. email address the individual will routinely check while in the United States;
- f. date of birth;
- g. airline name;
- h. flight number;
- i. city of departure;
- j. departure date and time;
- k. city of arrival;
- l. arrival date and time; and
- m. seat number.

Data elements (a) through (e) must be provided by the passenger and maintained for crew members. Data elements (f) through (m) must be provided to the extent the information is available and maintained by the airline or other air operator. Designated information must be collected for all passengers *before* boarding, *but no more than 72 hours* prior to departure. For crew members, designated information must be regularly maintained. Certain flights (to include those performed under contract with the U.S. military, or for which a CDC exemption has been issued (in the case of charters performed under contract with other U.S. government agencies), or for which the airline or other air operator has been designated as a state aircraft under international law) are not subject to the Contact Tracing Order.

When collecting designated information from passengers, airlines and other air operators must provide notice of the following:

1. the purpose and intent of the collection;
2. that the obligation to provide complete and accurate information is a U.S. government requirement; and
3. failure to comply may result in criminal penalties.

Confirmation must be obtained from each passenger as to the completeness and accuracy of the designated information collected. Designated information (whether for passengers or crew members) must be retained for 30 days from the flight's departure and transmitted to CDC upon request within 24 hours of such request, via secure, electronic means approved by CDC. If the airline or air operator chooses to routinely transmit designated information using established Department of Homeland Security systems, no data retention is required.

Airline and Air Operator Compliance and CDC Enforcement

Non-compliance with the orders' requirements is subject to civil penalties and, in certain cases, criminal penalties. However, in the case of passenger-provided documentation of vaccination status, test results, and proof of recovery, the CDC does not intend to take enforcement action against an airline or other air operator that accepts such documentation in good faith and uses its best efforts to comply with the requirements. The CDC has emphasized in the orders that persons who willfully give false or misleading information to the government are subject to criminal penalties, including those imposed under 18 U.S.C. § 1001, which include fines or a term of imprisonment of up to five years, or both.

¹ As of October 25, 2021, these countries include Afghanistan, Algeria, Angola, Armenia, Benin, Burundi, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Haiti, Iraq, Kenya, Kiribati, Liberia, Libya, Madagascar, Malawi, Mali, Mozambique, Myanmar, Namibia, Nicaragua, Niger, Nigeria, Papua New Guinea, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Syrian Arab Republic, Togo, Uganda, United Republic of Tanzania, Vanuatu, Yemen, and Zambia.

² As of October 25, 2021, accepted COVID-19 vaccines are limited to two-dose series of Pfizer-BioNTech, Moderna, AstraZeneca, Covishield, BIBP/Sinopharm, and Sinovac, and single dose Janssen/J&J.

³ Certain narrow categories of individuals and organizations are exempted from these requirements, including but not limited to crew members of airlines or other air operators traveling as passengers (e.g., crew moving in "deadhead" status) and adhering to industry standard COVID-19 prevention protocols, U.S. law enforcement personnel on official orders, and individuals and organizations for which a humanitarian exemption has been issued.

⁴ For example, and as noted by the CDC in the Contact Tracing Order, a passenger may not have an email address or phone number, in which case the passenger would not be required to provide one.