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Flying While Intoxicated: Options for Pilots, Airlines, and the FAA in Dealing with Alcohol Issues

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**FLYING WHILE INTOXICATED: OPTIONS FOR PILOTS,
AIRLINES, AND THE FAA IN DEALING
WITH ALCOHOL ISSUES**

CATHERINE PARSLEY*

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I. INTRODUCTION

DESPITE SHOCKING AND frequent news stories about intoxicated pilots, current United States government- and airline-imposed regulations actively monitor employees' conditions, allow and encourage pilots to seek help when they need it, and establish procedures for swift action when alcohol-related incidents take place. Pilots, like all other employees, have privacy rights. Those rights are protected in part by the Healthcare Insurance Portability and Accountability Act of 1996 (HIPAA) and the Americans with Disabilities Act of 1990 (ADA). Airlines, as employers, want to avoid any potential litigation both from pilots (under HIPAA, the ADA, or otherwise) and from customers who may be injured by a pilot who suffers from alcoholism or who made a bad alcohol-related choice. This tension puts airlines between a rock and a hard place and is

exacerbated by the public perception that intoxicated pilots are common and threatening.

Luckily, if a pilot does struggle with an addiction to alcohol, the Federal Aviation Administration (FAA) has measures in place to encourage those pilots to seek the help they need instead of risking their lives and the lives of the airline's customers.¹ Pilots cannot be licensed to fly by the FAA if they suffer from alcoholism, and pilots may face criminal charges if they report to work in a compromised state. However, this rarely happens thanks to vigilant peer monitoring and reports to authorities by concerned citizens. Airlines are also required to conduct random alcohol testing before flights,² and very few pilots fail those tests.

The question remains: are these safeguards sufficient? Other areas offer different solutions that the FAA may benefit from incorporating into airline regulations. Two notable areas are Indian laws requiring universal pre-flight alcohol testing and U.S. state laws requiring the installation of ignition interlock devices in the cars of drunk-driving offenders. While neither system is a perfect fit for federal air law, they both offer interesting solutions and helpful ideas.

This comment seeks to explore and compile United States statutes and regulations and compare relevant options for improvement. Part II will start with background information regarding pilot licensing, pilot privacy under the ADA and HIPAA, and airline safety in order to frame the subsequent discussion. Part III will address the current law governing air transport pilots and alcohol use and paths available to pilots after an incident. Part IV will analyze how news stories affect public perception of the risk of intoxicated pilots and how lessons learned from laws in India, requiring mandatory pre-flight alcohol testing, and from state laws in the United States, requiring automobile interlock devices for drunk driving offenders, can be applied to air law. It will also discuss new technology under

¹ See, e.g., *About HIMS*, HUMAN INTERVENTION MOTIVATIONAL STUDY (HIMS), <http://www.himsprogram.com/Home/About> [<https://perma.cc/4ZX2-FML4>] (last visited Mar. 30, 2017); *What Steps Must I Take to Return to the Performance of Safety-Sensitive Functions After I Have Violated the FAA's Drug and Alcohol Testing Regulation?*, *Q&As for Safety-Sensitive Employees*, FED. AVIATION ADMIN., https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/policy/qa_sse/a2/ (last modified Oct. 5, 2016) [<https://perma.cc/5L29-3MDE>] [hereinafter *FAA Q&As for Safety-Sensitive Employees*].

² 49 C.F.R. pt. 40 (2016); 14 C.F.R. pt. 120 (2017).

development in the automobile industry that could be of great benefit to airlines in the future. The final section will conclude this comment and provide suggestions for possible changes.

II. PILOT LICENSING PROCEDURES, PRIVACY SAFEGUARDS, AND AIRLINES' RESPONSIBILITIES TO PROVIDE SAFE TRANSPORT

All pilots must be licensed under the Federal Aviation Regulations to be authorized to fly any aircraft.³ One of the licensing requirements is that pilots undergo and pass regular medical examinations.⁴ On one hand, like anyone else, pilots' privacy interests are protected by the HIPAA⁵ and the ADA.⁶ On the other hand, airlines are required to carry out their business with the utmost care and concern for safety,⁷ which requires some amount of regulation and oversight on their part. This article will examine the requirements for licensing, the available protections for pilots, and the duties placed on airlines before considering laws specifically addressing alcohol problems in pilots.

A. PILOT LICENSING PROCEDURES

All pilots must be licensed under Federal Aviation Regulations Part 61.⁸ The requirements for licensure vary based on the type of license sought.⁹ The requirements for airline transport pilots (those authorized to act as pilots-in-command for commercial passenger flights) include being at least twenty-three years old, passing a first-class medical examination, passing a knowledge examination, and logging at least 1,500 hours of flight time.¹⁰ The requirements to pass a first-class medical examination and earn a first-class certificate are governed by Part 67.¹¹ To receive a first-class certificate, a pilot must meet certain standards for: general medical condition;¹² mental health;¹³ ear,

³ 14 C.F.R. pt. 61 (2017); Michelle Northcutt, Comment, *General Aviation Accident Rate: How General Aviation Differs from Commercial Airline Flight and How to Correct the Discrepancy*, 78 J. AIR L. & COM. 381, 383 (2013).

⁴ 14 C.F.R. §§ 67.101–113 (2017).

⁵ 45 C.F.R. §§ 160.001–.552, 164.102–.106, 164.500–.534 (2016).

⁶ 42 U.S.C. §§ 12101–12213 (2012).

⁷ 49 U.S.C. § 44701(d) (2012); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 633 F. Supp. 779, 790 (D.C. 1985).

⁸ 14 C.F.R. pt. 61 (2017).

⁹ *Id.*

¹⁰ 14 C.F.R. § 61.153 (2017).

¹¹ 14 C.F.R. pt. 67 (2017).

¹² 14 C.F.R. § 67.113 (2017).

nose, throat, and equilibrium;¹⁴ vision;¹⁵ neurological history;¹⁶ and cardiovascular functioning, including taking an electrocardiogram (commonly known as an EKG) at each examination.¹⁷ All medical examinations are done by FAA-employed Aviation Medical Examiners (AMEs).¹⁸

The FAA can deny a first-class medical certificate based on any of the health information collected during the exam.¹⁹ The “mental standards” required to receive a first-class certificate preclude the licensure of pilots who suffer from “substance dependence.”²⁰ In the Federal Aviation Regulations, “substance dependence” is defined to include a dependence on alcohol, among other drugs.²¹ This means that if an AME found evidence of such dependence, a pilot would not be able to get his or her first-class certificate and therefore would not be qualified for an air transport license.²² Each first-class medical certificate is valid for a one-year period for pilots under the age of forty and is valid for a six-month period after the age of forty.²³ The effect of requiring such frequent examinations is that pilots have at least a yearly chance of losing their pilot’s license if they cannot pass for any reason. While self-reporting of mental health issues, including alcoholism, is encouraged by the FAA,²⁴ it is easy to imagine why pilots are hesitant to admit that they

¹³ *Id.* § 67.107.

¹⁴ *Id.* § 67.105.

¹⁵ *Id.* § 67.103.

¹⁶ *Id.* § 67.109.

¹⁷ *Id.* § 67.111.

¹⁸ *Id.* § 67.405.

¹⁹ 49 U.S.C. § 44709 (2012); 14 C.F.R. §§ 61.3(c), 67.4 (2017); Northcutt, *supra* note 3, at 386 (“The FAA has the sole authority to issue medical certificates and can issue a certificate or reject certification to a pilot at any time based on medical reasons.”).

²⁰ 14 C.F.R. § 67.107 (2017); Jennifer M. Clark, *Assuring Safer Skies?: A Survey of Aeromedical Issues Post-Germanwings*, 81 J. AIR L. & COM. 351, 358 (2016).

²¹ 14 C.F.R. § 67.107.

²² *Id.* §§ 61.3(c), 67.4; Northcutt, *supra* note 3, at 386.

²³ 14 C.F.R. § 61.23(d) (2017); Northcutt, *supra* note 3, at 386.

²⁴ James R. Fraser, *Pilot Fitness Aviation Rulemaking Committee Recommendations*, 54 FED. AIR SURGEON’S MED. BULL. 1 (2016), https://www.nbaa.org/admin/personnel/medical/201601_editorial.pdf [<https://perma.cc/SFZ6-QSKM>]; *FAA Encourages Pilots to Seek Mental Health Treatment*, USA TODAY (June 9, 2016), <http://www.usatoday.com/story/news/2016/06/09/faa-encourages-pilots-seek-mental-health-treatment/85648708/> [<https://perma.cc/4RBV-FKJE>].

have a problem when such an admission will automatically bar them from flying.²⁵

B. PILOT PRIVACY SAFEGUARDS UNDER THE ADA AND HIPAA

Pilots, like all employees, enjoy privacy rights under both the ADA²⁶ and HIPAA.²⁷ Airlines, as employers, then carry risk of litigation on two fronts: from employees who perceive discrimination based on their alcohol use or medical records,²⁸ and from passengers (or the families of passengers) who are injured or killed while in the airline's care.²⁹ This double-edged sword necessitates that airlines find a balance between getting necessary information about their pilots in order to ensure customer safety while being careful not to intrude on those pilots' privacy in the process.³⁰

1. *Alcoholism is Not Per Se Included as a Disability Under the ADA, But May be Considered to be One in Some Circumstances*

As employers, airlines are prohibited by the ADA from discriminating against employees who have known disabilities.³¹ If faced with workplace discrimination, an alcoholic pilot would need to establish a prima facie case of the alleged discrimination by proving that "(1) he is disabled within the meaning of the statute, (2) he is qualified to perform the essential functions of his job, either with or without reasonable accommodation, and (3) he suffered an adverse employment action because of his disability."³² The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."³³

²⁵ *More About Birds of a Feather and Its Beginnings*, BIRDS OF A FEATHER INT'L (BOAF), http://www.boaf.org/more_about_boaf.html [https://perma.cc/UER6-W8FE] ("Thus an aviator having a problem with alcohol whose condition became known was automatically grounded. BOAF was formed in 1975 to assist troubled airmen to sobriety, thereby saving lives and careers.")

²⁶ 42 U.S.C. § 12112(d)(3)–(4) (2012).

²⁷ 45 C.F.R. §§ 160.001–.552, 164.102–.106, 164.500–.534 (2016).

²⁸ *See, e.g.*, *Burch v. Coca-Cola Co.*, 119 F.3d 305, 315–16 (5th Cir. 1997).

²⁹ *See, e.g.*, *Katonah v. USAir, Inc.*, 876 F. Supp. 984, 985 (N.D. Ill. 1995).

³⁰ *See Clark, supra* note 20, at 360.

³¹ 42 U.S.C. § 12112 (2012); *Clark, supra* note 20, at 361.

³² *Serviss v. United Airlines Corp.*, No. 00-CV-2290, 2002 WL 31486226, at *2 (C.D. Ill. Oct. 7, 2002).

³³ 42 U.S.C. § 12102(1) (2012).

Major life activities are further defined as including, “but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”³⁴

Alcoholism is not per se included under the ADA’s definition of disability.³⁵ The determination of whether alcoholism can be considered a disability in any given case is a fact-dependent inquiry focused on the permanency of the impairment caused by the supposed disability.³⁶ Some courts have rejected this reasoning based on a more recent amendment to the ADA, the Americans with Disabilities Amendment Act of 2008.³⁷ The amendment expanded the definition of disability to include impairments that are either (1) not long-term; (2) in remission; or (3) episodic.³⁸ Another hurdle that affected pilots have to overcome is proving that they can be considered a “qualified individual.”³⁹ If the disability is so severe that the pilot cannot “perform the functions of [his] former position,” then he will not be able to make the necessary prima facie case.⁴⁰ Assuming a terminated pilot can clear these hurdles, he may have a case against an airline for unlawful discrimination under the ADA,⁴¹ which is something that airlines certainly want to avoid.

2. *HIPAA Works to Protect the Privacy of Pilots’ FAA Medical Certificate Examination Results*

HIPAA also provides protection to pilots by limiting the disclosure of sensitive healthcare information.⁴² Generally, HIPAA

³⁴ *Id.* § 12102(2)(A).

³⁵ *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (“[T]he EEOC has not attempted to classify alcoholism as a per se disability, and we decline to adopt such a questionable position.”).

³⁶ *Id.* at 317.

³⁷ *See Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d. 964, 968 (S.D. Tex. 2011).

³⁸ *Id.*

³⁹ *See, e.g., Serviss v. United Airlines Corp.*, No. 00-CV-2290, 2002 WL 31486226, at *3 (C.D. Ill. Oct. 7, 2002) (“He also is not a ‘qualified’ individual because he concedes that he is completely disabled and unable to perform the functions of his former position.”).

⁴⁰ *Id.*

⁴¹ *See, e.g., Miners v. Cargill Commc’n, Inc.*, 113 F.3d 820 (8th Cir. 1997) (reversing summary judgment in favor of a company that fired an employee who refused to participate in a treatment program for her perceived alcoholism).

⁴² Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. §§ 160.001–.552, 164.102–.106, 164.500–.534 (2016).

prohibits health providers from releasing protected health information to employers without the employee-patient's written consent.⁴³ HIPAA includes the Standards for Privacy of Individually Identifiable Health Information (the Privacy Rule),⁴⁴ which applies to information that is created or received by healthcare providers, among other persons, and relates to an individual's health or condition.⁴⁵ The Privacy Rule requires that a health professional get written authorization from an employee in order for that employee's employer to receive the results of the employee's pre-employment examination.⁴⁶ Although the FAA is a governmental entity, the AMEs are still required to follow the Privacy Rule's safeguards.⁴⁷ This means that airline employers cannot receive the results of a pilot's medical certificate examination without either "the written consent of the applicant or an order from a court of competent jurisdiction."⁴⁸

C. WHAT ARE AIRLINES' RESPONSIBILITIES IN PROVIDING TRANSPORT FREE OF INTOXICATED PILOTS?

Notwithstanding the protections that the ADA and HIPAA provide to pilots, airlines are required to carry out their business with the utmost care and concern for safety.⁴⁹

The Federal Aviation Act states that "the Administrator [of the Federal Aviation Agency] shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest" Federal

⁴³ *Health Information Privacy: Your Rights Under HIPAA*, DEP'T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html> [<https://perma.cc/H7VG-S4MU>] (last visited Mar. 30, 2017).

⁴⁴ 45 C.F.R. §§ 164.500–.534 (2016).

⁴⁵ 42 U.S.C. § 1320d(4) (2012); Celina Munoz, Note, *Privacy at the Cost of Public Safety: Reevaluating Mental Health Laws in the Wake of the Virginia Tech Shootings*, 18 S. CAL. INDERDIS. L.J. 161, 173 (2008). ("Protected health information under HIPAA includes: 'Any information . . . that, (A) is created or received by a health care provider . . . ; and (B) relates to the past, present, or future payment for the provision of health care to an individual.'").

⁴⁶ *Summary of the HIPAA Privacy Rule*, DEP'T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html?language=es> [<https://perma.cc/CEL4-WFMA>] (last visited Mar. 30, 2017).

⁴⁷ *General Information—Privacy of Medical Information, Application Process for Medical Certification, Guide for Aviation Medical Examiners*, FED. AVIATION ADMIN., https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/app_process/general/privacy/ [<https://perma.cc/9ZF2-2FSA>] (last modified Dec. 2, 2010).

⁴⁸ *Id.*

⁴⁹ 49 U.S.C. § 44701(a)–(b) (2012).

regulations promulgated pursuant to the Federal Aviation Act make clear that it is the air carrier's responsibility to evaluate the competency of its pilots and detect defects in training and "personal characteristics that could adversely affect safety."⁵⁰

The Federal Aviation Act, as a whole, is recognized as emphasizing safety,⁵¹ and the FAA's baseline standards are disseminated with the goal of promoting safe operations.⁵² These safety standards are written as prerequisites to airplane certification in Part 121 of the Federal Aviation Regulations⁵³ and include (1) aircraft requirements;⁵⁴ (2) special airworthiness requirements;⁵⁵ (3) instrument and equipment requirements;⁵⁶ (4) airman requirements;⁵⁷ (5) flight crewmember requirements;⁵⁸ (6) crewmember qualifications;⁵⁹ (7) flight time limitations;⁶⁰ (8) flight operations;⁶¹ and (9) dispatching and flight release rules.⁶² Certification is only possible if each aircraft and crewmember complies with the very thorough regulations.⁶³ The FAA regulations act as "the floor, not the ceiling, for airline safety standards,"⁶⁴ allowing airlines to build on and strengthen them.

III. THE CURRENT STATUS OF RELEVANT UNITED STATES LAW

A. AIR TRANSPORT PILOTS AND ALCOHOL USE

Commercial pilots suffer from alcoholism in the same proportion as the general population does.⁶⁵ The 2015 National Survey

⁵⁰ *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 633 F. Supp. 779, 790 (D.C. 1985) (quoting 49 U.S.C. § 1421(b), now codified at 49 U.S.C. §§ 44701(d)(1)(A), and 14 C.F.R. § 121.413(4)(i)(ii)).

⁵¹ *Doe v. Fed. Aviation Admin.*, 412 F.2d 674, 677 (8th Cir. 1969) ("The Act has an emphasis on safety and we have so recognized.").

⁵² 49 U.S.C. § 44701 (2012).

⁵³ 14 C.F.R. pt. 121 (2017).

⁵⁴ 14 C.F.R. §§ 121.151–163 (2017).

⁵⁵ *Id.* §§ 121.211–295.

⁵⁶ *Id.* §§ 121.301–360.

⁵⁷ *Id.* §§ 121.381–397.

⁵⁸ *Id.*

⁵⁹ *Id.* §§ 121.431–459.

⁶⁰ *Id.* §§ 121.470–527.

⁶¹ *Id.* §§ 121.531–590.

⁶² *Id.* §§ 121.591–667.

⁶³ *Id.* § 121.1.

⁶⁴ *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 633 F. Supp. 779, 786 (D.C. 1985).

⁶⁵ *About HIMS*, *supra* note 1.

on Drug Use and Health (NSDUH) reported that 6.2% of the population aged eighteen and over had an alcohol use disorder.⁶⁶ An alcohol use disorder is defined as “a medical condition that doctors diagnose when a patient’s drinking causes distress or harm. . . . [Alcohol use disorder] integrates . . . alcohol abuse and alcohol dependence, into a single disorder called alcohol use disorder, or AUD, with mild, moderate, and severe subclassifications.”⁶⁷ However, a much larger percentage of the population drinks alcohol in some amount.⁶⁸ There are regulations prohibiting any applicant who has a history of substance abuse from obtaining a first-class medical certificate and therefore an air transport license⁶⁹ as well as regulations that prohibit alcohol use in close proximity to operating a flight.⁷⁰ A pilot can lose his license through either mechanism, and the FAA takes enforcement of these rules seriously.⁷¹

1. *Alcoholism as a Barrier to Receiving a First-Class Medical Certificate*

As stated in Part II above, all commercial airline pilots must pass a first-class medical examination in order to receive their air transport license.⁷² The examination requires that an applicant meet certain mental standards, including not having a history or diagnosis of (1) a severe personality disorder;⁷³ (2) a psychosis;⁷⁴ (3) a bipolar disorder;⁷⁵ or (4) substance dependence.⁷⁶ Substance dependence is defined as “a condition in which a person is dependent on a substance . . . as evidenced by—(A) Increased tolerance; (B) Manifestation of withdrawal symptoms; (C) Impaired control of use; or (D) Continued use despite damage to physical health or impairment of social, per-

⁶⁶ *Alcohol Facts and Statistics*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (NIAAA), <https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics> [https://perma.cc/DFY4-YMU6] (last updated Feb. 2017).

⁶⁷ *Id.*

⁶⁸ *Id.* (stating that 86.4% of people aged eighteen and over have consumed alcohol at some point in their lifetime, 70.1% within the past year, and 56.0% within the past month).

⁶⁹ 14 C.F.R. § 61.107(a)(4) (2017).

⁷⁰ *Id.* § 91.17(a).

⁷¹ *Id.* § 120.221.

⁷² *Id.* §§ 67.101–.113.

⁷³ *Id.* § 61.107(a)(1).

⁷⁴ *Id.* § 61.107(a)(2).

⁷⁵ *Id.* § 61.107(a)(3).

⁷⁶ *Id.* § 61.107(a)(4).

sonal, or occupational functioning.”⁷⁷ A history of substance abuse will not preclude issuance of a first-class certificate if there is evidence of the applicant’s total abstinence from the substance for a minimum of the previous two years.⁷⁸

One recourse for applicants who, except for a recent history of alcoholism, otherwise qualify for a first-class medical certificate is to apply for a special issuance medical certificate.⁷⁹ A special issuance medical certificate can be issued by the Federal Air Surgeon “if the [applicant] shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering public safety during the period in which the Authorization would be in force.”⁸⁰ The FAA may require “a showing that the pilot has totally abstained from alcohol and has continued meeting with a treatment facility and the [Employee Assistance Program] committee.”⁸¹ These special issue certificates can be revoked by the FAA at any time and can be conditioned on the results of subsequent “medical tests, examinations, or evaluations.”⁸² Any license that is granted based on the special issuance certificate will expire on the date that the certificate expires, and the pilot must reapply for a new special issuance certificate.⁸³ A pilot may reapply multiple times, though a grant of one special issuance certificate does not guarantee the approval of subsequent applications.⁸⁴ For example, one pilot “lost his medical certificate due to his alcoholism and applied for a special issuance certificate five times” during his career with United Airlines.⁸⁵ The FAA only approved his applications for special issuance certificates “on a few occasions,” denying the other applications, and United eventually terminated his employment.⁸⁶

⁷⁷ *Id.* § 67.107(a)(4)(ii)(A)–(D).

⁷⁸ *Id.* § 67.107(a)(4).

⁷⁹ *Id.* § 67.401.

⁸⁰ *Id.* § 67.401(a).

⁸¹ *Serviss v. United Airlines Corp.*, No. 00-CV-2290, 2002 WL 31486226, at *1 (C.D. Ill. Oct. 7, 2002).

⁸² 14 C.F.R. § 67.401; *Application Process for Medical Certification*, FED. AVIATION ADMIN. (July 10, 2015), https://www.faa.gov/about/office_org/headquarters_of_fices/avs/offices/aam/ame/guide/app_process/general/appeals/authorization/ [https://perma.cc/9TVG-9YFG].

⁸³ 14 C.F.R. § 67.401 (2017).

⁸⁴ *See Serviss*, 2002 WL 31486226, at *1.

⁸⁵ *Id.*

⁸⁶ *Id.*

2. *The FAA's Eight-Hour "Bottle-to-Throttle" Rule Aims to Prevent Intoxicated Flight, No Matter the Reason for the Pilot's Intoxication*

Whether a pilot is suffering from alcoholism or is simply an occasional drinker, the FAA has regulations regarding when pilots can drink alcohol in relation to their scheduled flight times and imposes strict limits on allowable blood or breath alcohol concentration.⁸⁷ The "Bottle-to-Throttle" rule makes pilots responsible for ensuring that sufficient time has elapsed between their drinking any alcohol and reporting for flight duty.⁸⁸ It prohibits a "person [from] act[ing] or attempt[ing] to act as a crewmember of a civil aircraft—(1) Within 8 hours after the consumption of any alcoholic beverage; (2) While under the influence of alcohol; [or] . . . (4) While having an alcohol concentration of 0.04 or greater in a blood or breath specimen."⁸⁹ Airlines are allowed to increase the time limit⁹⁰ or decrease the allowable blood or breath alcohol concentration level;⁹¹ for example, many airlines implement a twelve-hour rule instead.⁹² A pilot can be, and typically will be, disciplined pursuant to airline policy separately from any discipline brought by the FAA.⁹³

Crewmembers are asked to monitor each other and report any suspicious behavior to a supervisor or other authority for testing.⁹⁴ If a pilot is suspected of having an alcohol addiction, the Human Intervention Motivational Study (HIMS) program is available to help him recover from the addiction and regain his pilot's license.⁹⁵ Reports do not just come from airline person-

⁸⁷ 14 C.F.R. § 91.17(a) (2017).

⁸⁸ *Id.* § 91.17(a)(1).

⁸⁹ *Id.* § 91.17(a)(1)–(2), (4).

⁹⁰ *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 633 F. Supp. 779, 785–86 (D.C. 1985) (stating that airline increased "bottle-to-throttle" time to twenty-four hours).

⁹¹ *United States v. Cope*, No. 11-CR-00106-JRT, 2011 WL 2491283, at *4 (D. Col. June 17, 2011) (stating that airline lowered its limit to 0.02 percent).

⁹² See *Alcohol, the Pilot, and the FAA*, AVIATION MED. SERVS., <http://www.airspace.doc.com/alcohol-the-pilot-and-the-faa/> [<https://perma.cc/6KJX-87VQ>] (last visited Mar. 30, 2017); *FAA Rules on Pilot Drug & Alcohol Abuse*, THE AIRPORT GUIDE (Sept. 28, 2016), <http://www.the-airport-guide.com/flying-culture/faa-rules-on-pilot-drug-alcohol-abuse> [<https://perma.cc/REH2-R6LS>].

⁹³ See, e.g., *Northwest Airlines*, 633 F. Supp. at 785.

⁹⁴ See *About HIMS*, *supra* note 1 ("Trained managers and peer pilots interact to identify and, in many cases, conduct an intervention to direct the troubled individual to a substance abuse professional for a diagnostic evaluation."); see also *Cope*, 2011 WL 2491283, at *2.

⁹⁵ *About HIMS*, *supra* note 1.

nel, however—members of the airport public are encouraged to report any suspicious behavior or concerns to local law enforcement, no matter the source of the suspicious behavior.⁹⁶ If the responding local law enforcement suspects a pilot of attempting to fly while intoxicated, it will conduct the blood or breath test in the field.⁹⁷ In that case, the results of the test do not fall under the FAA’s purview.⁹⁸ However, the results can later be used to show that the pilot violated FAA regulations in addition to local laws, and the FAA encourages airlines to disclose the results of field tests.⁹⁹

In addition, testing for drugs and alcohol is required by the Omnibus Transportation Employees Testing Act of 1991¹⁰⁰ as well as through Department of Transportation (DOT)¹⁰¹ and FAA regulations.¹⁰² The DOT regulations apply to “the activities of transportation employers, [and] safety-sensitive transportation employees,”¹⁰³ which includes aviation pilots. The FAA regulations define “safety-sensitive functions” to include “[f]light crewmember duties.”¹⁰⁴ Employers must use the “random drug and alcohol testing minimum annual percentage rate,” published in the Federal Register each December, to determine the number of random tests required for the next calendar year.¹⁰⁵ Airlines are required to conduct the specified number of tests in the coming year, as mandated by the published rate.¹⁰⁶ The employers must use a “scientifically valid method” of randomized selection to determine which employees are chosen during each testing period.¹⁰⁷ Consequences for employee refusal are severe: if a pilot refuses to take a DOT or FAA alcohol test, they will be

⁹⁶ See *FAA Rules on Pilot Drug & Alcohol Abuse*, *supra* note 92.

⁹⁷ *I Have a Pilot that Tested Above 0.04 for Alcohol on a Law Enforcement Test Conducted After the Employee Reported for Duty. Where Should I Report this Information?*, FED. AVIATION ADMIN. (Oct. 31, 2016), http://faa.custhelp.com/app/answers/detail/a_id/480 [<https://perma.cc/S265-K6SG>].

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Pub. L. No. 102-143, 105 Stat. 917.

¹⁰¹ 49 C.F.R. pt. 40 (2016).

¹⁰² 14 C.F.R. pt. 120 (2017).

¹⁰³ 49 C.F.R. § 40.1 (2016).

¹⁰⁴ 14 C.F.R. § 120.215(a)(1) (2017).

¹⁰⁵ FED. AVIATION ADMIN., GUIDANCE ALERT: FAA RANDOM DRUG AND ALCOHOL TESTING PROGRAM, at 2, https://www.faa.gov/about/office_org/headquarters_of_fices/avs/offices/aam/drug_alcohol/policy/faa/media/FINAL-Guidance-Alert-on-Random-Testing.pdf [<https://perma.cc/H9TQ-UAER>].

¹⁰⁶ *Id.*

¹⁰⁷ 14 C.F.R. § 120.109(b)(5) (2017).

immediately removed from their safety-sensitive work, may be terminated by their employer, and may have their certificate revoked by the FAA.¹⁰⁸

The FAA also requires that alcohol testing be done when there is a reasonable suspicion of intoxication.¹⁰⁹ It requires that

[t]he employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.¹¹⁰

A test conducted pursuant to this provision must be done within two hours after the determination that the test is necessary.¹¹¹ Additionally, it must be based on observations "made during, just preceding, or just after the period of the work day that the covered employee is required to be in compliance with this rule."¹¹² Any violation of either the alcohol concentration limit or eight-hour rule¹¹³ must be reported to the Federal Air Surgeon within two days.¹¹⁴ The FAA rules are specific, numerous, and thorough, evidencing its concern for safety when it comes to the dangerous combination of pilots and alcohol use.

B. A PILOT'S NEXT STEPS AFTER AN ALCOHOL-RELATED INCIDENT

When a pilot is reported by a concerned member of the public, he or she will most likely be detained and tested by local law enforcement. If the pilot is reported by a supervisor or fellow crew member, the test may be conducted pursuant to the FAA's ability to test based on reasonable suspicion of intoxication.¹¹⁵ In the latter case, if a violation is found, the pilot will be immedi-

¹⁰⁸ *Id.* §§ 120.37(f), 120.221; FED. AVIATION ADMIN., DO YOU KNOW WHAT YOU CAN LOSE IF YOU REFUSE?, https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/policy/media/refuse.pdf [https://perma.cc/RZ5J-NU52] (last visited Mar. 30, 2017).

¹⁰⁹ 14 C.F.R. § 120.217(d) (2017).

¹¹⁰ *Id.* § 120.217(d)(2).

¹¹¹ *Id.* § 120.217(d)(4)(i).

¹¹² *Id.* § 120.217(d)(3).

¹¹³ *Id.* § 120.37(b), (d).

¹¹⁴ *Id.* § 120.221(c).

¹¹⁵ *Id.* § 120.217(d).

ately removed from performing safety-sensitive functions.¹¹⁶ After a notice of the violation is sent to the Federal Air Surgeon, the pilot will not be allowed to perform any safety-sensitive functions until they obtain another medical certificate, either special issuance or regular.¹¹⁷ To obtain a new medical certificate, the pilot may seek treatment and, if successful, may apply for a special issuance certificate.¹¹⁸ There are programs available to help pilots during and after this process, most notably the HIMS program¹¹⁹ and the Birds of a Feather (BOAF) support group.¹²⁰

1. *Human Intervention Motivational Study, a Program to Rehabilitate and Re-Certify Afflicted Pilots*

The most robust of the pilot-specific programs is the HIMS program. HIMS was founded in the 1970s as a collaborative “study [] designed to test a program for dealing with the presence of alcoholism in the airline pilot population” by an airline labor union (the Air Line Pilots Association) and a federal agency (the National Institute for Alcohol Abuse and Alcoholism).¹²¹ The program coordinates the efforts of “company representatives, pilot peer volunteers, healthcare professionals, and FAA medical specialists” to help afflicted pilots through recovery and re-licensure.¹²² The basic steps in the HIMS program are: (1) the affected pilot seeks out help, either alone or after an intervention; (2) the pilot is assessed by medical professionals; (3) if treatment is deemed necessary, the pilot will enter an inpatient treatment program; (4) after the pilot recovers, they can apply for medical re-certification and a special issuance certificate; and (5) if certified, the pilot is monitored for the duration of the special issuance certificate.¹²³

¹¹⁶ *Id.* § 120.221(a).

¹¹⁷ *Id.* § 120.211(c)(4).

¹¹⁸ *See id.*, stating that,

No covered employee who is required to hold an airman medical certificate in order to perform a safety-sensitive duty may perform that duty following a violation of this subpart until the covered employee obtains an airman medical certificate issued by the Federal Air Surgeon dated after the alcohol test result.

¹¹⁹ HUMAN INTERVENTION MOTIVATIONAL STUDY (HIMS), www.himsprogram.com [<https://perma.cc/R2JN-5LN4>] (last visited Sept. 6, 2017).

¹²⁰ BIRDS OF A FEATHER (BOAF), www.boaf.org [<https://perma.cc/BU83-JU7C>] (last visited Sept. 30, 2017).

¹²¹ *About HIMS*, *supra* note 1.

¹²² *Id.*

¹²³ *Get Help Now, HIMS Steps*, HIMS, <http://www.himsprogram.com/Home/HIMSSteps> (last visited Sept. 6, 2017) [<https://perma.cc/2N3Y-4RKS>]; *FAA Re-*

a. The HIMS Path to Re-Certification

The HIMS program helps pilots through their journey to recovery, but that journey must start with the pilot seeking help. If a pilot's family, peers, or supervisors are concerned about an alcohol problem, they may lead an intervention to initiate the process.¹²⁴ No matter what type of intervention is performed, it should be led by a trained intervention specialist.¹²⁵ The other participants will vary depending on the intervention type.¹²⁶ The participants may be mostly family members (classic), supervisors and other staff (company-led), or the pilot's co-workers as orchestrated by the company (peer).¹²⁷ Holding an intervention is not necessary, however, to break through the affected pilot's pattern of denial and begin the recovery process. The HIMS website offers ways for a pilot to directly seek help for themselves, as well as ways for concerned third parties to seek help for someone else.¹²⁸

A pilot's FAA re-certification path is guided and overseen by a sponsoring aviation medical examiner who has been trained by HIMS and approved by the FAA.¹²⁹ This medical examiner sponsor decides when the pilot's case is ready to be resubmitted to the Federal Air Surgeon for special issuance certificate consideration.¹³⁰ To start the process, the FAA first requires a formal evaluation, which can be completed either by the treating inpatient facility or independently.¹³¹ After undergoing this evaluation, the pilot then enters inpatient treatment for a minimum of twenty-eight days.¹³² When the inpatient treatment is successfully completed, the pilot will begin "Intensive Outpatient or Individual Therapy," which lasts at least until the pilot has progressed enough for his medical examiner sponsor to be comfortable recommending the pilot for a return to flight duties, and may last until after duties are resumed.¹³³ When the pilot

Certification, HIMS, <http://www.himsprogram.com/Content/ReCert> (last visited Sept. 6, 2017) [<https://perma.cc/556N-HRLH>].

¹²⁴ *Intervention*, HIMS, <http://www.himsprogram.com/Content/Intervention> (last visited Sept. 6, 2017) [<https://perma.cc/Q436-K5CZ>].

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Get Help Now, HIMS Steps*, *supra* note 123.

¹²⁹ *FAA Re-Certification*, *supra* note 123.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*; *Get Help Now, HIMS Steps*, *supra* note 123.

¹³³ *FAA Re-Certification*, *supra* note 123.

progresses enough to move out of the intensive outpatient treatment phase, the pilot will move into a mandated aftercare program.¹³⁴ This program can incorporate Alcoholics Anonymous meetings or can be based on other monthly meetings; all meetings must be properly documented in order to satisfy the certification requirements.¹³⁵ Concurrently, the pilot needs to identify both a peer sponsor and a company sponsor who should each be trained to understand the aftercare process and meeting requirements.¹³⁶ When all of the pilot's treatment providers agree that the pilot is ready to return to flight duty, the pilot must then undergo psychological and psychiatric examinations before clearance to reapply will be granted.¹³⁷

Final review of the pilot's case comes in the form of the FAA's examination of the special issuance certificate application.¹³⁸ The pilot's sponsoring aviation medical examiner has discretion to "hold the process until the pilot is thought to be in good recovery."¹³⁹ The medical examiner must review the entire file and include all of the treatment records with the application for the Federal Air Surgeon to consider.¹⁴⁰ If the pilot is successful and receives a special issuance certificate, the pilot is responsible for ensuring that all of the requirements in and conditions to the special certificate are met.¹⁴¹ The sponsoring medical examiner can revoke the special issuance certificate at any time and should be vigilant during the pilot's transition back into flight duty.¹⁴² The timing of this process varies between individuals, but HIMS estimates that a pilot can obtain their special issuance certificate as soon as 120 days after beginning treatment.¹⁴³

b. Alternative Path to Re-Certification

The HIMS program is widely lauded as a successful way to encourage pilots to seek help when they need it and get them back into the cockpit safely.¹⁴⁴ Even if a pilot does not go through the

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *FAA Rules on Pilot Drug & Alcohol Abuse, supra* note 92; *Drunk Piloting: How Common is it Really?*, CBS NEWS (Aug. 30, 2016), <http://www.cbsnews.com/news/>

HIMS program, he still must meet the FAA's requirements in order to return to duty.¹⁴⁵ First, the pilot must meet with a Substance Abuse Professional (SAP) for an in-person evaluation.¹⁴⁶ The SAP will recommend education, treatment, or a combination of the two and will create a written report to give to the pilot's employer.¹⁴⁷ After the pilot completes the course of education, treatment, or both, the pilot must again meet with the same SAP in person so that the SAP can evaluate whether or not the program was successful for the pilot.¹⁴⁸ Whether the program is deemed successful or not, the SAP must prepare another written report for the pilot's employer with the results of the examination.¹⁴⁹ Third, the pilot must pass a "return-to-duty test under direct observation."¹⁵⁰ This requires an alcohol test with results that are less than 0.02 percent blood or breath alcohol concentration.¹⁵¹ Lastly, after the pilot returns to work, the SAP will direct follow-up testing, which the pilot must always pass to remain in good standing.¹⁵² These procedures are outlined in Subpart O of the DOT drug and alcohol testing regulations.¹⁵³

2. *Birds of a Feather, a Support Group Made Specifically for Recovering Pilots*

Another resource available to "pilots and cockpit crewmembers active or inactive in private, commercial or military aviation" is the Birds of a Feather network.¹⁵⁴ BOAF "was formed in response to the need for meeting places for pilots and cockpit crewmembers where the subject of addiction to alcohol might be discussed with impunity and anonymity" in or-

drunk-piloting-how-common-is-it-really/ [https://perma.cc/99J7-ZC8L] ("Since the union-backed program started in the 1970s, about 5,300 pilots—more than 100 a year—have gone through rehab and regained their licenses, according to a program official.").

¹⁴⁵ FAA Q&As for Safety-Sensitive Employees, *supra* note 1.

¹⁴⁶ *Id.* The substance abuse professional should be recommended to the pilot by their employer. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* The pilot's employer cannot return them to work in a safety-sensitive position until this test is passed. *Id.*

¹⁵² *Id.*

¹⁵³ 49 C.F.R. §§ 40.281–.313 (2016).

¹⁵⁴ BIRDS OF A FEATHER INTERNATIONAL, http://www.boaf.org/home_page.html (last visited Sept. 6, 2017) [https://perma.cc/23XL-CUZE].

der to aid recovery from alcoholism.¹⁵⁵ The network is made up of “Nests” located in different cities around the world with members who convene regularly, usually on a weekly or bimonthly basis, to support each other.¹⁵⁶ The organization is not affiliated with any governmental agency or employer,¹⁵⁷ and membership requirements are determined independently by each Nest.¹⁵⁸

BOAF, an informal alternative to HIMS and a specialized alternative to general programs such as Alcoholics Anonymous, is a great resource for pilots in their quest to overcome their disease. A group like BOAF could also certainly help a pilot participating in the HIMS program with the aftercare phase on the path to re-certification.

IV. THE PROTECTIONS CURRENTLY OFFERED BY UNITED STATES LAWS AND POSSIBLE SUGGESTIONS FOR IMPROVEMENT

Despite shocking news stories about intoxicated pilots, the regulatory system currently in place, described above, allows airlines to monitor employees’ conditions, pilots to seek help when they need it, and agencies to take action when incidents occur. Existing regulations appear to be useful and comprehensive. However, the media is quick to pick up any incidents of intoxication, suggesting that there might be compromised pilots who fall through the cracks. Adjusting current programs based on tactics implemented in other countries and related industries would be a good way to tighten the safety net.

A. HOW NEWS STORIES AFFECT PUBLIC PERCEPTION OF THE RISK OF FLYING WITH AN INTOXICATED PILOT

Stories of pilots either flying while intoxicated or attempting to fly while intoxicated appear in the news more frequently than any airline customer would like to see. Incidents tend to be heavily reported and sensationalized when they occur, which skews public perception. In reality, only ten pilots failed the FAA’s random alcohol tests in 2015.¹⁵⁹ In fact, in the sixteen and

¹⁵⁵ *Id.*

¹⁵⁶ *Nests and Contacts*, BOAF, http://www.boaf.org/nests_&_contacts.html (last visited Sept. 6, 2017) [<https://perma.cc/LQL5-829V>].

¹⁵⁷ See BIRDS OF A FEATHER INTERNATIONAL, *supra* note 154.

¹⁵⁸ *Id.*

¹⁵⁹ *Intoxicated in the Air: Drunk Pilots Make News But Are Rare*, CHI. TRIB. (Aug. 30, 2016), <http://www.chicagotribune.com/business/ct-intoxicated-drunk-pilots-20160830-story.html> [<https://perma.cc/X2EW-GR4W>]; *Drunk Piloting*, *supra* note

a half-year period between January 1990 and June 2006, newspapers reported only thirteen incidents, involving seventeen pilots, of alcohol-related violations.¹⁶⁰ All of the pilots involved were suspended or terminated by their employers, and three pilots were criminally prosecuted.¹⁶¹ To an average consumer, however, the trend seems to be increasing despite these statistics. A simple online search reveals two stories of American pilots (and an equal number of international pilots¹⁶²) flying or attempting to fly while intoxicated¹⁶³—as well as several other news stories about how it is not actually as common as it seems¹⁶⁴—all written in 2016 and early 2017. Even the two incidents in 2016, involving three pilots, outpaces the previous yearly average of 0.79 incidents per year¹⁶⁵ and 1.03 pilots per year, averaged over the sixteen and a half-year span between 1990 and 2006.¹⁶⁶ The overall number of pilots who actually violate the alcohol statutes may be a small percentage of all pilots, but the general public seems to perceive a significant risk.

144; Leslie Josephs, *Don't Worry, Only Around One Out of Every 1,300 Pilots is Trying to Fly Drunk*, QUARTZ (Jan. 14, 2017), <https://qz.com/877003/dont-worry-only-around-one-out-of-every-1300-pilots-is-trying-to-fly-drunk/> [<https://perma.cc/Y2LT-FKKG>].

¹⁶⁰ Chadd K. Kraus & Guohua Li, *Pilot Alcohol Violations Reported in U.S. Newspapers, 1990–2006*, NIH PUBLIC ACCESS (2009) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2730652/pdf/nihms18452.pdf> [<https://perma.cc/KRD6-SG6H>].

¹⁶¹ *Id.*

¹⁶² *Pilot Accused of Being Drunk After Video Shows Him Staggering Through Airport*, THE GUARDIAN (Dec. 30, 2016), <https://www.theguardian.com/world/2016/dec/31/pilot-accused-of-being-drunk-after-video-shows-him-staggering-through-airport> [<https://perma.cc/ELM7-AULY>]; Ian Austen, *Airline Pilot, Believed to Be Drunk, Is Pulled From Cockpit in Canada*, N.Y. TIMES (Jan. 2, 2017), https://www.nytimes.com/2017/01/02/world/americas/canada-pilot-drunk-sunwing-airlines.html?_r=1 [<https://perma.cc/4D55-XWQE>].

¹⁶³ Andy Campbell, *Drunk American Airlines Pilot Arrested Right Before His Flight*, HUFFINGTON POST (Mar. 26, 2016), http://www.huffingtonpost.com/entry/drunk-american-airlines-pilot-arrested-right-before-his-flight_us_56f6bf8ae4b0a372181a1ee7 [<https://perma.cc/CY7F-KV3R>]; *2 United Pilots Arrested for Suspected Drunkenness*, CBS (Aug. 28, 2016), <http://www.cbsnews.com/news/2-united-air-lines-pilots-arrested-for-suspected-drunkenness-glasgow-airport/> [<https://perma.cc/Z34F-KQAQ>].

¹⁶⁴ *Intoxicated in the Air*, *supra* note 159; *Don't Worry*, *supra* note 159; *Drunk Piloting*, *supra* note 144.

¹⁶⁵ *See* Kraus & Li, *supra* note 160 (0.79 = 13 incidents / 16.5 years).

¹⁶⁶ *See id.* (1.03 = 17 pilots / 16.5 years).

B. POSSIBLE IMPROVEMENTS TO THE CURRENT REGULATIONS TO INCREASE SAFETY

The FAA relies on reporting from administrative peers, pilots themselves, aviation medical examiners, and members of the public to identify problems, but perhaps these safeguards are not sufficient. Other countries and other areas of the law handle similar alcohol-related situations differently than current FAA and DOT regulations. For example, all pilots in India must pass a breathalyzer test before each flight takes off,¹⁶⁷ and many states in the United States require that drunk driving offenders pass a breathalyzer test in order to start their car.¹⁶⁸ The FAA could borrow from these different approaches to strengthen and improve its enforcement mechanisms.

1. *India's Policy of Mandatory Breath Testing and Its Application in the United States*

Laws in India proscribe very strict requirements when it comes to alcohol safety on flights. Government regulations require that all pilots and crewmembers abstain from drinking any alcohol for twelve hours before any scheduled flight duty and pass a breathalyzer test with no detectable alcohol immediately before boarding a plane.¹⁶⁹ The regulations have requirements for pilots and flight crews of both flights originating in India as well as those originating elsewhere that land in India.¹⁷⁰ The law states that “[f]or all scheduled flights originating from India, each flight crew and cabin crew shall be subjected to pre-flight breath-analyzer examination”¹⁷¹ and “[f]or all scheduled flights originating from destinations outside India, post-flight breath-analyzer examination of each flight crew and cabin crew shall be carried out on reaching in [sic] India.”¹⁷² The regulations go so far as to state that pilots may not use “any drug/formulation or use any substance mouthwash/tooth gel which has alcoholic

¹⁶⁷ *Drunk Piloting*, *supra* note 144.

¹⁶⁸ *State Ignition Interlock Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (NCSL) (Dec. 2016), <http://www.ncsl.org/research/transportation/state-ignition-interlock-laws.aspx> [<https://perma.cc/NCK7-F7NW>].

¹⁶⁹ Indian Civil Aviation Requirements, 2015, Gazette of India, pt. II sec. 3 (Aug. 4, 2015) <http://dgca.nic.in/cars/D5f-f3.pdf> [<https://perma.cc/9ZR5-M5CL>].

¹⁷⁰ *Id.* § 4.3.1–.3.2.

¹⁷¹ *Id.* § 4.3.1.

¹⁷² *Id.* § 4.3.2.

content.”¹⁷³ Pilots must take the mandatory breathalyzer test forty-five minutes before any domestic flight and ninety minutes before any international flight originating in India.¹⁷⁴

The main consideration in determining the viability of similar regulations in the United States is that the U.S. Supreme Court considers breath alcohol tests to be searches under the Fourth Amendment of the U.S. Constitution.¹⁷⁵ Generally, in the United States, searches may only be carried out pursuant to a valid warrant made with probable cause.¹⁷⁶ There are some exceptions, such as those searches performed subsequent to an arrest or in some exigent circumstances.¹⁷⁷ Tests performed by an airline employer in response to a peer or public report of suspicious behavior would be done with probable cause.¹⁷⁸ The random testing programs are implemented pursuant to the FAA and DOT regulations.¹⁷⁹

Mandatory pre-flight breathalyzer tests similar to the ones required in India would not fall into the categories of pursuant to a warrant with probable cause, subsequent to an arrest, or in exigent circumstances. Airlines have wide latitude in determining what safety measures above the FAA baseline are appropriate and required to ensure safety.¹⁸⁰ If an airline believes that mandatory pre-flight testing is required for flight safety, it could change its random testing program into a pre-flight testing program. In that case, flight safety should be prioritized over the privacy concerns of employees. The Supreme Court has stated

¹⁷³ *Id.* § 4.3.7.

¹⁷⁴ Santanu Choudhury, *More Than 100 Pilots Test Positive for Alcohol in India*, WALL ST. J. (May 6, 2016), <https://www.wsj.com/articles/more-than-100-pilots-test-positive-for-alcohol-in-india-1462552103> [<https://perma.cc/4EKX-EJQU>].

¹⁷⁵ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616–17 (1989)

Much the same is true of the breath-testing procedures required under Subpart D of the regulations. Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or “deep lung” breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search. . . .

¹⁷⁶ *United States v. Robinson*, 414 U.S. 218, 224 (1973).

¹⁷⁷ *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173–74 (2016); *Robinson*, 414 U.S. at 224.

¹⁷⁸ 14 C.F.R. § 120.217(d) (2017).

¹⁷⁹ *Id.* § 120.215 . The FAA and DOT do not directly mandate that *pilots* be randomly tested, but instead mandate that all airline *employers* create a random testing program for all employees who perform safety-sensitive jobs, which includes pilots. *Id.* §§ 120.5, 120.203(b).

¹⁸⁰ *Nw. Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 633 F. Supp. 779, 791 (D.C. 1985).

that breathalyzer tests “do[] not ‘implicat[e] significant privacy concerns’”¹⁸¹ because they use air that would be exhaled regardless of the presence of a test and do not collect significant amounts of personal information (only the level of breath alcohol concentration).¹⁸²

Each unique piece of data collected from the tests may not be significant alone, but the combined quantity will be substantial: according to the DOT’s Bureau of Transportation Statistics (BTS), there were 8,061,158 domestic flights in 2015 and 6,850,572 domestic flights between January 2016 and October 2016.¹⁸³ That is an average of over twenty-two thousand flights *every day*.¹⁸⁴ And those are just domestic flights.¹⁸⁵ With at least two pilots required to be on each flight,¹⁸⁶ the FAA would quickly be flooded with overwhelming quantities of health data points to store, analyze, and protect. HIPAA considers information that is created by an employer and “relates to the past, present, or future physical or mental health or condition of an individual” to be health information.¹⁸⁷ It is unlikely that HIPAA would prohibit airline employers from performing pre-flight tests, as it does not seem to inhibit their ability to do other tests. However, protecting that much data would likely be cost- and time-prohibitive even if HIPAA would allow it.

Determining the constitutionality of a program similar to the one in India is beyond the scope of this article. However, it may be a possibility worth pursuing if the number of alcohol-related incidents continues to rise in the United States—but only if airline employers can find a way to manage the voluminous data.

¹⁸¹ *Birchfield*, 136 S. Ct. at 2178 (quoting *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 626 (1989)).

¹⁸² *Id.* at 2177.

[A]ll the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test. . . . Second, breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject’s breath. . . . No sample of anything is left in the possession of the police.

¹⁸³ *Flights: All Carriers—All Airports*, BUREAU OF TRANSP. STAT. (BTS), U.S. DEP’T OF TRANSP. (Oct. 2016), http://www.transtats.bts.gov/Data_Elements.aspx?Data=2 [<https://perma.cc/9PGK-8MEW>].

¹⁸⁴ $(8,061,158 + 6,650,572) / (365 + 304) = 22,289.58$ flights per day.

¹⁸⁵ The BTS reports 1,472,283 international flights in 2015 and 1,262,825 international flights in January 2016 through October 2016. *Flights: All Carriers—All Airports*, *supra* note 183.

¹⁸⁶ 14 C.F.R. § 121.385(c) (2017).

¹⁸⁷ 42 U.S.C. § 1320d(4) (2012).

2. *Automobile Ignition Interlock Devices and Their Implications for Aircraft*

Another area from which the FAA could find inspiration is the use of ignition interlock devices in the cars of drunk driving offenders. These devices prevent the automobile's engine from turning on until the driver passes a breathalyzer test.¹⁸⁸ Twenty-eight states currently have statutes requiring the use of interlock devices by every drunk driver, regardless of whether they are a first-time or repeat offender.¹⁸⁹ However, an offense is required before an interlock device can be mandated.

Twenty-five of the twenty-eight states that have mandatory interlock provisions mandate the device for all alcohol-related offenses.¹⁹⁰ For example, the Texas statute states that “[i]f the person’s license has been suspended after a conviction of [a drunk driving] offense . . . the judge shall restrict the person to the operation of a motor vehicle equipped with an ignition interlock device. . . . The court shall order the ignition interlock device to remain installed for the duration of the period of suspension.”¹⁹¹ Maine and Colorado do not have mandatory requirements for first-time convictions, but do offer incentives for the use of breathalyzers for all offenders.¹⁹² For instance, Colorado only mandates interlock devices for repeat offenders but allows first-time offenders to reduce their full suspension from nine months to one month if they install an interlock device for the remaining eight months.¹⁹³ In California, pilot programs are experimenting with interlock devices in the state’s four largest counties.¹⁹⁴

The National Highway Traffic Safety Administration (NHTSA) and the Centers for Disease Control and Prevention have also released materials giving states successful practical advice for instating interlock device laws in an attempt to encourage every state to have mandatory laws for all offenders.¹⁹⁵

¹⁸⁸ *Reed v. Missouri Dep’t of Rev.*, 2015 WL 4094119, No. 4:15CV00642, at *1 (E.D. Missouri Jul. 7, 2015). (“An IID is a device into which a driver must exhale to activate a vehicle and which will disable the vehicle upon the detection of alcohol.”).

¹⁸⁹ *State Ignition Interlock Laws*, *supra* note 168.

¹⁹⁰ *Id.*

¹⁹¹ TEX. TRANSP. CODE § 521.246 (2015).

¹⁹² *State Ignition Interlock Laws*, *supra* note 168.

¹⁹³ COLO. REV. STAT. § 42-2-132.5 (2016).

¹⁹⁴ *State Ignition Interlock Laws*, *supra* note 168.

¹⁹⁵ CTRES. FOR DISEASE CONTROL AND PREVENTION, NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY

According to the study, “[r]equirements [of interlock use] are strongly associated with increased interlock use,”¹⁹⁶ and the use of several programs together is recommended to obtain best results.¹⁹⁷

The same ignition interlock technology could be useful in an aircraft, but implementation would not be struggle-free. Installing interlock devices into every plane may present the same constitutional issues that a mandatory pre-flight breathalyzer testing program would. As used in automobiles *after* an offense, the devices have been considered legal.¹⁹⁸

In recent years, some affected drunk-driving offenders who suffer from asthma or chronic pulmonary obstructive disorder (COPD) brought complaints under the ADA for lack of reasonable accommodation for their disabilities.¹⁹⁹ Asthma and COPD affect lung capacity, thereby rendering the users unable to supply enough air to allow for proper use of the ignition interlock devices.²⁰⁰ Without a sufficient amount of air, a breathalyzer device cannot run the test properly and the user will fail, even if the user is completely sober.²⁰¹ This leads to an offender’s inability to use their vehicle no matter their alcohol level, thereby negating the larger purpose of installing an ignition interlock device instead of suspending or revoking the offender’s license. At least two district courts have allowed plaintiffs’ ADA claims to go forward over motions for dismissal for failure to state a claim filed by governmental defendants,²⁰² which indicates that these

ADMIN., INCREASING ALCOHOL IGNITION INTERLOCK USE: SUCCESSFUL PRACTICES FOR STATES (2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/ignition-interlock_successful_practices_for_states-a.pdf [<https://perma.cc/3KEW-D6PX>]; *Increasing Alcohol Ignition Interlock Use, Injury Prevention & Control: Motor Vehicle Safety*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/motorvehiclesafety/impaired_driving/ignition_interlock_states.html (last visited Mar. 30, 2017) [<https://perma.cc/4LD5-9NBA>].

¹⁹⁶ INCREASING ALCOHOL IGNITION INTERLOCK USE: SUCCESSFUL PRACTICES FOR STATES, *supra* note 195, at 3.

¹⁹⁷ *Id.* at 1.

¹⁹⁸ *See, e.g.*, *Reed v. Missouri Dep’t of Rev.*, No. 4:15CV00642, 2015 WL 4094119 (E.D. Missouri Jul. 7, 2015); *State Ignition Interlock Laws*, *supra* note 168 (“All 50 states have some sort of ignition interlock law.”).

¹⁹⁹ *See, e.g.*, *Reed*, 2015 WL 4094119, at *1; *McCray v. Kansas Dep’t of Rev.*, No. 12-2188, 2012 WL 3758667, at *1 (D. Kan. Aug. 30, 2012).

²⁰⁰ *See, e.g.*, *Reed*, 2015 WL 4094119, at *1; *McCray*, 2012 WL 3758667, at *1.

²⁰¹ *See Reed*, 2015 WL 4094119 at *1.

²⁰² *See id.* at *5 (denying defendant Department of Revenue’s Motion to Dismiss plaintiff Reed’s ADA claim); *McCray*, 2012 WL 3758667, at *4 (denying defendant Department of Revenue’s Motion to Dismiss plaintiff McCray’s ADA claim).

cases should be taken seriously. Due to HIPAA, there is no way to know how many pilots are affected by diseases such as asthma and COPD, which might decrease their ability to utilize an ignition interlock device in an aircraft. However, creating a new risk of litigation would likely be low on the FAA's and airlines' list of priorities.

3. *The Intersection of Mandatory Pre-Flight Breathalyzer Tests, Ignition Interlock Devices, and New Car Safety Technologies in Air Transport*

Various state laws regarding interlock devices are the closest U.S. analogy to India's mandatory pre-flight testing, but the state laws still require an alcohol-related offense before mandating an interlock device.²⁰³ The two tactics could be merged, however, by requiring an interlock device for all pilots convicted of an alcohol-related offense. Pilots must already report any "motor vehicle action" taken against them within sixty days of its occurrence,²⁰⁴ but action is only taken against them by the FAA if the "motor vehicle action occur[s] within 3 years of a previous motor vehicle action."²⁰⁵ A "motor vehicle action" includes a conviction, license revocation or suspension, or the denial of a license application due "to a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug."²⁰⁶ Since the FAA requires this reporting already, it would not be difficult to impose testing on those pilots who have incidents to report.

However, implementation of the testing would be difficult. The FAA would have two choices: (1) require that airlines have personnel on hand to test affected pilots before each flight; or (2) require that airlines install interlock devices on their entire fleet of planes since the planes are owned by the companies, not individual pilots. The FAA could look to state interlock laws as a model, but some states' interlock device laws provide an exception for employer-owned vehicles, which would capture the airlines' fleets. For example, Texas has an exception in place for employees who meet five criteria related to ownership of the ve-

²⁰³ See, e.g., COLO. REV. STAT. § 42-2-132.5 (2016); TEX. TRANSP. CODE § 521.246 (2015).

²⁰⁴ 14 C.F.R. § 61.15(e) (2017).

²⁰⁵ *Id.* § 61.15(d).

²⁰⁶ *Id.* § 61.15(c)(1)–(3).

hicle and employer notification.²⁰⁷ Neither of these options seems ideal, as both would require time, money, and inconvenience for both airlines and pilots. The second option begins to look more like India's mandatory pre-flight testing policy than the states' interlock device requirements and would run into the same constitutional questions.

There may be better options coming. In 2008, the NHTSA began a collaborative project with the Automotive Coalition for Traffic Safety, a group funded by seventeen auto makers, to develop and research the Driver Alcohol Detection System for Safety (DADSS) project.²⁰⁸ In 2013, the project was extended for an additional five years.²⁰⁹ The goal of DADSS is to create

a noninvasive system that could accurately and reliably detect when a driver is above the legal alcohol limit of 0.08 BAC adopted by all 50 States and territories. The automatic system would be enabled every time the car is started, but unobtrusive so it would not pose an inconvenience to the non-intoxicated driver.²¹⁰

To meet this goal, the project is currently developing two different systems.²¹¹ One system is touch-based and measures alcohol levels by shining an infrared light (installed in either the steering wheel or the ignition button) through the driver's fingertips.²¹² The other system is breath-based technology that would measure the driver's breath as they exhale normally in the driver's seat, and would even ensure that it would not be confounded with a passenger's breath.²¹³ When ready for production, these systems will be available as additional safety features through any automaker who elects to offer them.²¹⁴

²⁰⁷ TEX. TRANSP. CODE § 521.246(e).

²⁰⁸ *Frequently Asked Questions*, DRIVER ALCOHOL DETECTION SYSTEM FOR SAFETY (DADSS), <http://www.dadss.org/faq/> (last visited Sept. 6, 2017) [<https://perma.cc/P5VV-HYXF>] [hereinafter DADSS FAQ].

²⁰⁹ *Id.*; Press Release, National Highway Transportation Safety Administration (NHTSA), U.S. Dep't of Transp., U.S. Department of Transportation Extends Cooperative Research Program with Automotive Industry to Cut Drunk Driving on U.S. Roads (Dec. 23, 2013), <https://www.nhtsa.gov/press-releases/us-department-transportation-extends-cooperative-research-program-automotive-industry> [<https://perma.cc/4KAM-FJ28>] [hereinafter NHTSA Press Release].

²¹⁰ NHTSA Press Release, *supra* note 209.

²¹¹ DADSS FAQ, *supra* note 208.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 11.

These types of noninvasive devices may solve several of the problems posed by the after-market ignition interlock devices as well as traditional breathalyzer tests. If the new systems run in the background, instead of requiring active use, they will take less time than—and will not collect as much data as—a standard breathalyzer. Conventional breathalyzer machines require a “controlled environment [that] is especially conducive to reliable testing”²¹⁵ and must be administered by someone other than the person being tested.²¹⁶ Both the after-market ignition interlock devices and traditional breathalyzer tests take time to complete and require that the driver take additional steps before the vehicle is ready and the driver is cleared to drive.²¹⁷ Using either conventional method before flights would increase the time and expense of flight preparation. Methods requiring the pilot to blow into a machine may also introduce the risk of asthma- or COPD-related ADA litigation to airlines and the FAA.²¹⁸ It is safe to say that, like all businesses and governmental entities, neither airlines nor the FAA want to create new avenues for litigation. The new DADSS systems would also be instantaneous²¹⁹ and would not produce the voluminous amounts of data that traditional testing would.²²⁰ These features make the DADSS systems the best choice for installation in aircraft. These systems would relieve HIPAA concerns, time management issues, and would lower costs. Though it began as a national effort, DADSS recently began partnering with states to work on topics “from manufacturing and vehicle integration, to field operational tests, as well as public awareness and acceptance” on a local level.²²¹ The FAA may be in a favorable position to collaborate in the future. The NHTSA, one of the original partners of the

²¹⁵ *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2168 (2016).

²¹⁶ See *United States v. Cope*, 2011 WL 2491283, No. 11-CR-00106-JRT, at *3 (D. Col. June 17, 2011).

²¹⁷ See *Birchfield*, 136 S. Ct. at 2168. Even with new infrared technology “the whole process takes [] a few minutes from start to finish,” which is likely more than any pilot would like to add to their pre-flight routine. *Id.*

²¹⁸ See *Reed v. Missouri Dep’t of Rev.*, 2015 WL 4094119, No. 4:15CV00642 (E.D. Missouri Jul. 7, 2015); *McCray v. Kansas Dep’t of Rev.*, 2012 WL 3758667, No. 12-2188 (D. Kansas Aug. 30, 2012).

²¹⁹ DADSS FAQ, *supra* note 208.

²²⁰ *Id.* (“Today, all automakers have security measures in place to protect customer data from being accessed by unauthorized parties, and DADSS will be no different.”).

²²¹ *DADSS Partners with State of Virginia*, DADSS (Dec. 27, 2016), <http://www.dadss.org/dadss-program-partners-with-state-of-virginia/> [<https://perma.cc/8ZSF-5G3X>].

DADSS project, is also part of the DOT, and the DADSS program appears to be actively expanding its reach.

V. CONCLUSION: SOME IMPROVEMENTS MAY BE POSSIBLE, BUT WILL FACE LEGAL ROADBLOCKS

The news stories about intoxicated pilots seem to be coming at a faster rate than ever, but the FAA's system of regulation allows airlines to monitor employees' conditions, pilots to seek help when they need it, and action to be taken when incidents occur. Pilots are addicted to alcohol at about the same rate as the general population, and so they make mistakes in judgment just as the general population does. However, unlike the general public, pilots hold many lives in their hands each time they report for work. This great responsibility means that they must be monitored and course-corrected whenever issues arise. Privacy rights should come behind safety concerns in the aviation industry. HIPAA and the ADA help protect pilots from the disclosure of sensitive, personal information and from discrimination based on disability, but airlines should be able to test and monitor alcohol use as needed for flight safety, insofar as that use interacts with flying.

The systems in place seem to be working well, but there is always room for improvement. Other jurisdictions can offer some insight and ideas about how to improve the FAA regulations. The most promising path forward is for airlines to incorporate the DADSS technology into planes once it becomes available. Until then, airlines should use traditional testing more frequently to prevent intoxicated pilots and help assuage the public's fears. In the meantime, we can rest assured that the FAA, airline companies, and the pilots themselves are actively working to keep us, the flying public, safe onboard flights.