Traveler Angst, New Protocols Free Airlines From Laptop Ban

By **Linda Chiem**

Law360, New York (July 20, 2017, 7:05 PM EDT) -- Traveler pushback and pressure on the Trump administration to be flexible on its border security demands, combined with the swift implementation by nine Middle Eastern and African airlines of the government's heightened screening procedures for U.S.-bound flights, likely propelled the lifting of a 4-month-old laptop ban, experts say.

The rapid clip at which Etihad, Emirates, Turkish Airlines, Qatar Airways, Royal Jordanian Airlines, Kuwait Airways, Royal Air Maroc, Egypt Air and Saudia implemented the U.S. Department of Homeland Security's new enhanced security mandates at 10 airports in the Middle East and Africa suggests the carriers were strongly motivated by a desire to get out from under the U.S.' ban on large personal electronic devices in the aircraft cabins of all U.S.-bound flights from those destinations.

As of Thursday, the laptop ban had been lifted for all 10 of the airports in Jordan, Egypt, Turkey, Kuwait, Saudi Arabia, Morocco, Qatar and the United Arab Emirates that had been hit with the ban in March.

The airlines taking on the role of taskmaster allowed the Trump administration to tighten U.S. border security while sidestepping potential conflicts with foreign governments over how to secure their airports by instead having the airlines pressure their governments to tighten up their protocols, experts say.

"While I believe that consumer outcry played a role, it's clear that DHS' carrot-and-stick approach has had great effect," said Kenneth P. Quinn, global chair of Baker McKenzie's aviation practice and a former chief counsel at the Federal Aviation Administration.

Quinn said the laptop ban had a major impact on the affected airlines, which prompted them to convince their governments to enhance airline passenger screening and airport perimeter security.

"They knew that door number 1, a laptop ban, was hurting their most lucrative passengers, the time-sensitive business traveler," he said. "And door number 2, enhanced actual security, was not only long overdue, but less of a revenue hit."

DHS unveiled the new enhanced security mandates in late June, putting much of the onus on airlines to collaborate with airport staff and officials to enact procedures that included more intensively screening passengers and personal electronic devices larger than a cellphone at checkpoints, as well as screening the areas around the aircraft and where passengers congregate within the airport.

The DHS measures also include asking the airports to add explosive-detection equipment at checkpoints and deploy more bomb-sniffing dogs and advanced next-generation screening technology, as well as potentially adding Transportation Security Administration Pre-Clearance locations at other airport locations.

By targeting the airlines themselves, the Trump administration sought to get a high level of compliance with its constantly evolving border security regulations, while also working within the limits of its power, experts have told Law360.

"Because of the shroud of secrecy with which DHS has surrounded this subject since the Middle East laptop ban was first announced in March, one can only speculate about the measures and the factors involved," Alan B. Hoffman, an attorney with Husch Blackwell LLP, told Law360.

"However, since then, it has seemed to follow the pattern in which burdensome new security measures are imposed and then modified in response to resistance from the airlines and the traveling public. It seems likely that a similar dynamic played a role here," he added.

The administration had considered expanding its laptop ban to dozens more airports worldwide, including in Europe, but experts say that would have been a far more unpopular move that would have triggered serious blowback and caused a logistical mess. The enhanced security directives were a far more reasonable alternative.

"An alignment of interests between the airline industry and its passengers helped to spur the regulators into taking action that was eminently more reasonable than what was threatened," Stinson Leonard Street LLP partner Roy Goldberg told Law360.

"What appears to have been an entirely unnecessary logistical nightmare and inconvenience has been averted," he said. "The fact that passengers from all affected airports and airlines are now able to use their laptops and similar electronics during long-haul flights — by implementing basic security measures such as extra screening and bomb-sniffing dogs — inevitably suggests a possible lack of forethought and common sense when the ban was initially implemented."

Goldberg added that it appears the laptop ban may have been a well-intended yet knee-jerk reaction that failed to consider logistical realities or reasonable alternatives to an outright ban.

"For some reason, the initial ban, limited in geographical scope, was accepted without much controversy, but when TSA threatened to expand the ban to U.S. and prominent international carriers, the agency backed down," he said. "Ideally, the TSA will in the future pursue more workable solutions in the first instance."

Going forward, DHS will be keeping the pressure on airlines worldwide to roll out the new security measures. The deadline for the first phase of implementation was reportedly this week. Issued directly to commercial airlines, DHS' enhanced security directive is far-reaching: It impacts 180 domestic and foreign carriers flying from 280 airports in 105 countries and affects an average of approximately 325,000 passengers on 2,100 flights headed to the U.S. daily.

The directive warns that a failure to comply will result in stiff penalties, ranging from fines to a complete ban on large personal electronics.

Crowell & Moring LLP partner Paul Rosen, a former senior government executive at DHS and chief of staff to former Homeland Security Secretary Jeh Johnson, explained that aviation security is all about striking the balance between strong, multilayered security and the facilitation of travel and commerce.

"Security determinations are often rooted in the constantly evolving threat landscape, and it's something that is always being recalibrated and re-evaluated," Rosen said. "In doing so, DHS has the very tough job of figuring how much to ratchet up security in times of threat without being unnecessarily broad. The question becomes what is the appropriate balance, taking into account the latest intelligence and the impact on travelers and the industry."

"In my experience, the airlines have been great partners with DHS in an evolving threat landscape where they are being asked to do more and more," Rosen added. "That partnership and those relationships are going to be critical as the government continues to evaluate intelligence and adjust its security requirements on airlines and airports."

--Editing by Philip Shea and Catherine Sum.