



## IMMIGRATION UPDATE - DECEMBER 06, 2021

*Posted on December 6, 2021 by Cyrus Mehta*

### Headlines:

[Biden Administration Increases Travel Restrictions in Response to New 'Omicron' Coronavirus Variant](#) – In a rapidly developing situation, following new travel bans imposed on several countries, the Biden administration announced additional measures, effective December 6, 2021, including a requirement that inbound international passengers take a COVID-19 viral test within a day of their departure, regardless of their vaccination status, and an extension of a mask requirement on domestic flights and public transportation—including buses, trains, planes, bus terminals, and airports—through March 18, 2021.

[Stopgap Funding Bill Averts Government Shutdown, Includes Immigration Provisions](#) – The U.S. Congress passed a bill to extend funding through February 18, 2022, to prevent a federal government shutdown that otherwise would have begun December 4, 2021. The bill includes several immigration measures.

[Following Court Order, U.S., Mexico Announce Return to 'Remain in Mexico' Policy for Asylum Seekers](#) – After the Biden administration's suspension and then termination in June 2021 of the Trump-era policy known as "Remain in Mexico" or the "Migrant Protection Protocols," under which asylum seekers who wish to enter the United States through Mexico await processing there, the policy is being reinstated due to a court ruling.

[Labor Dept. Proposes Revising Adverse Effect Wage Rate Methodology for H-2A Non-Range Occupations](#) – The Department of Labor is proposing revisions to the methodology used to determine the AEWRs for non-range agricultural occupations in the H-2A temporary visa program.

[ABIL Global: Canada](#) – This article discusses recent developments in COVID-19-

related border measures.

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### **Details:**

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## **Biden Administration Increases Travel Restrictions in Response to New 'Omicron' Coronavirus Variant**

Last week, in response to concerns and unknowns about a new coronavirus variant, called Omicron (B.1.1.529), President Biden said that most travelers (excluding U.S. citizens and lawful permanent residents) who had been in any of eight countries in southern Africa for the prior 14 days would be barred from entry into the United States. The countries include South Africa, Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, and Zimbabwe. Since then, the new variant has spread to at least 23 countries, including the United States, and more are likely, according to the World Health Organization. The Biden administration subsequently announced additional measures, effective December 6, 2021, including a requirement that inbound international passengers take a COVID-19 viral test within a day of their departure, regardless of their vaccination status, and an extension of a mask requirement on domestic flights and public transportation—including buses, trains, planes, bus terminals, and airports—through March 18, 2021. Fines for noncompliance with the mask requirement range from \$500 for a first offense to \$3,000 for repeat violations.

For the testing requirement, the CDC rules state that those who recently recovered from COVID-19 may instead travel with documentation of recovery (i.e., a positive COVID-19 viral test result on a sample taken no more than 90 days before the flight's departure from a foreign country and a letter from a licensed healthcare provider or a public health official stating that the passenger was cleared to travel).

Regarding the one-day requirement for testing, the CDC explained:

The 1-day period is 1 day before the flight's departure. The Order uses a 1-day time frame instead of 24 hours to provide more flexibility to the air passenger and aircraft operator. By using a 1-day window, test acceptability does not depend on the time of the flight or the time of day that the test sample was

taken.

For example, if your flight is at 1 pm on a Friday, you could board with a negative test that was taken any time on the prior Thursday.

The Biden administration indicated that more countries could be added to the restricted list if warranted. As this is a rapidly developing, fluid situation, travelers should check the latest updates before departure.

#### Details:

- "New U.S. Travel Rules: What You Need to Know About the Changes Prompted by Omicron," CNN, Dec. 3, 2021, <https://www.cnn.com/travel/article/new-us-travel-rules-omicron-what-to-know/index.html>
- "U.S. Tightens Travel Testing Requirements, Mask Mandates as Part of Broader Plan to Fight Covid," CNBC, Dec. 2, 2021, <https://www.cnbc.com/2021/12/02/omicron-covid-variant-us-tightens-travel-testing-requirements-mask-mandates.html>
- "Requirement for Proof of Negative COVID-19 Test or Documentation of Recovery From COVID-19," CDC, Dec. 2, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>
- "U.S. Imposes Travel Ban From Eight African Countries Over Omicron Variant," Nov. 27, 2021, <https://www.reuters.com/world/us/us-impose-travel-curbs-eight-southern-african-countries-over-new-covid-19-2021-11-26/>
- "A Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019," White House, Nov. 26, 2021, <https://bit.ly/312b35x>

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### **Stopgap Funding Bill Averts Government Shutdown, Includes Immigration Provisions**

The U.S. Congress passed a bill to extend funding through February 18, 2022, to prevent a federal government shutdown that otherwise would have begun December 4, 2021. The House of Representatives passed the bill by a vote of

221-212, and the Senate passed it by a vote of 69-28. President Biden signed it into law on December 3.

The immigration provisions include:

- \$7 billion to support Operation Allies Welcome, including resettlement of Afghans who aided U.S. military operations in Afghanistan
- \$1.6 billion for services for unaccompanied minors crossing the U.S.-Mexico border who are under the care of the Department of Health and Human Services

Details:

- Text of law to be posted at <https://www.congress.gov/bill/117th-congress/house-bill/6119/text>
- "BGOV Bill Summary: H.R. 6119, Stopgap Funding and Refugee Aid," Bloomberg Government, Dec. 2, 2021.
- "Avoiding Shutdown, Congress Approves Bill to Fund Government Through Feb. 18," NBC News, Dec. 2, 2021, <https://www.nbcnews.com/politics/congress/house-democrats-announce-plan-fund-government-prevent-shutdown-n1285214>
- "Senate Passes Stopgap Funding Bill, Avoiding Shutdown," Associated Press News, Dec. 3, 2021, <https://apnews.com/article/coronavirus-pandemic-business-health-congress-aa30e5922cb6650e9235b0a66813b2f4>

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### **Following Court Order, U.S., Mexico Announce Return to 'Remain in Mexico' Policy for Asylum Seekers**

After the Biden administration's suspension and then termination in June 2021 of the Trump-era policy known as "Remain in Mexico" or the "Migrant Protection Protocols," under which asylum seekers who wish to enter the United States through Mexico await processing there, the policy is being reinstated due to a court ruling in August 2021. President Biden previously called the policy "inhumane" because it forced tens of thousands of people to wait for months in conditions that included violent crimes perpetrated against them, among other risks.

Under the reinstated policy, at Mexico's request, COVID-19 vaccinations will be

provided, exemptions will be possible for reasons including physical and mental health issues, and the time spent in the program will be limited to six months per applicant. The Department of Homeland Security also said that the U.S. government is committed to reimplementing the program "in a way that enhances protection for individuals enrolled in the program." Among the measures being taken are the provision of access to shelters in Mexico and "safe transit" to and from ports of entry to the shelters, to enable individuals to attend court hearings. Additionally, DHS said, the government of Mexico "has committed to ensuring that individuals enrolled in are provided temporary legal status in Mexico and will, as a result, be able to work and access services in Mexico." DHS also said that family units would not be separated for purposes of enrollment in the program. DHS said it would observe "non-refoulement" principles and that no individual who demonstrates a "reasonable possibility of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" or a "reasonable possibility of torture in Mexico" will be returned to Mexico involuntarily.

According to reports, the policy is expected to be re-implemented on December 6, 2021.

#### Details:

- "U.S. and Mexico to Restart Trump-Era 'Remain in Mexico' Policy," BBC News, Dec. 2, 2021, <https://www.bbc.com/news/world-us-canada-59509854>
- DHS guidance, Dec. 2, 2021, [https://www.dhs.gov/sites/default/files/publications/21\\_1202\\_plcy\\_mpp-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/21_1202_plcy_mpp-policy-guidance.pdf)

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### Labor Dept. Proposes Rule Revising Adverse Effect Wage Rate Methodology for H-2A Non-Range Occupations

The Department of Labor (DOL) is proposing revisions to the methodology used to determine the Adverse Effect Wage Rates (AEWRs) for non-range agricultural occupations in the H-2A temporary visa program. DOL said the proposed methodology "will strike a reasonable balance between the statute's competing goals of providing employers with an adequate legal supply of agricultural labor and protecting the wages and working conditions of U.S. workers similarly

employed."

DOL proposes to determine AEWRs using wage data reported by the U.S. Department of Agriculture's Farm Labor Survey (FLS) and DOL's Bureau of Labor Statistics Occupational Employment and Wage Statistics (OEWS) survey. For the six occupations comprising the field and livestock worker (combined) category within the FLS, which DOL said constitute the majority of H-2A job opportunities, the agency proposes to set a single AEWR using the annual average hourly wage for field and livestock workers (combined) for the state or region, as determined by the FLS. For all other job opportunities, and in circumstances where the FLS does not report wage data for the field and livestock worker occupations, DOL proposes to use OEWS wage data to set the AEWR at the statewide annual average hourly wage for the occupational classification, or the national annual average hourly wage if statewide data is unavailable.

#### Details:

- Announcement, Office of Foreign Labor Certification, Dec. 1, 2021, <https://www.dol.gov/agencies/eta/foreign-labor>
- Proposed rule, Employment and Training Administration, DOL, Dec. 1, 2021, <https://www.federalregister.gov/documents/2021/12/01/2021-25803/adverse-effect-wage-rate-methodology-for-the-temporary-employment-of-h-2a-nonimmigrants-in-non-range>

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## **ABIL Global: Canada**

*This article discusses recent developments in COVID-19-related border measures.*

The government of Canada announced on November 26, 2021, that as a precautionary measure due to concerns about the new "Omicron" variant of concern, until January 31, 2022, Canada is implementing enhanced border measures for certain travelers.

Also, on November 19, 2021, the government of Canada announced upcoming adjustments to Canada's border measures. In a press release, the government of Canada indicated that it will continue to prioritize the health and safety of Canadians. As vaccination levels, case counts, and hospitalization rates evolve,

Canada will continue to consider further targeted measures at the borders—and when to lift or adjust them—to keep Canadians safe. As the pandemic situation remains fluid, travelers should check for the latest requirements before traveling.

According to the November 19 announcement, as of November 30, 2021, fully vaccinated Canadian travelers will no longer be subject to testing requirements for trips outside of the country for less than 72 hours; the list of accepted vaccines will expand to include Sinopharm, Sinovac, and COVAXIN; and vaccination will be required for travel within and out of Canada.

The government of Canada also announced that as of January 15, 2022, certain groups of travelers who are currently exempt from entry requirements will only be allowed to enter the country if they are fully vaccinated with one of the vaccines approved for entry into Canada.

Below is a summary of developments:

### ***What is changing now?***

As noted above, due to concerns about the new variant, additional restrictions are being imposed on certain travelers. According to the November 26 press release, until January 31, 2022, Canada is implementing enhanced border measures for all travelers who have been in the Southern Africa region—including South Africa, Eswatini, Lesotho, Botswana, Zimbabwe, Mozambique, and Namibia—within the last 14 days before arriving in Canada. Foreign nationals who have traveled in any of these countries within the previous 14 days will not be permitted entry into Canada. They will be directed to be tested and to quarantine while they await their test results.

Canadian citizens, permanent residents, and people with status under the *Indian Act*, regardless of their vaccination status or having had a previous history of testing positive for COVID-19, who have been in these countries in the previous 14 days will be subject to enhanced testing, screening, and quarantine measures. These individuals will be required to obtain, within 72 hours of departure, a valid negative COVID-19 molecular test in a third country before continuing their journey to Canada. Upon arrival to Canada, regardless of their vaccination status or having had a previous history of testing positive for COVID-19, they will be subject to immediate arrival testing. All travelers will also be required to complete a test on day 8 after arrival and quarantine for 14

days. They must also have a suitable quarantine plan.

### **Short Trips**

Effective November 30, 2021, full vaccinated individuals with right of entry to Canada who depart and re-enter the country within 72 hours of leaving Canada do not need to present a pre-entry molecular test. This exemption is only for trips originating in Canada taken by fully vaccinated Canadian citizens, permanent residents, or individuals registered under the Indian Act, who depart and re-enter by land or by air and can demonstrate that they have been away from Canada for less than 72 hours. This exemption extends to accompanying children under 12 and individuals with medical contraindications to vaccination.

For fully vaccinated travelers with right of entry into Canada who are traveling by air, the 72-hour period runs from the initially scheduled departure time for their flight leaving Canada to the scheduled departure time for their return flight to Canada. Travelers are responsible for maintaining proof of the 72-hour period to show airline/rail companies and border officials as required (e.g., boarding pass, travel itinerary).

### **Vaccination Status**

Previously, to be considered fully vaccinated, travelers must have received two doses or a combination of the Pfizer, Moderna, or AstraZeneca/COVISHIELD vaccines, or a single dose of the Janssen (Johnson & Johnson) vaccine, at least 14 days before their entry to Canada. As of November 30, 2021, Canada expanded the list of COVID-19 vaccines that travelers can receive to be considered fully vaccinated for the purpose of travel to Canada. The list now includes Sinopharm, Sinovac, and COVAXIN, matching the World Health Organization Emergency Use Listing.

Travelers can receive their vaccines in any country, and must upload their proof of vaccination in English or French into ArriveCAN when traveling to Canada. If the proof of vaccination is not in English or French, travelers must provide a certified translation in English or French.

### **Travel Within and Out of Canada**

Starting November 30, 2021, vaccination is required for travel via air or rail within and out of Canada. A valid COVID-19 molecular test is no longer



accepted as an alternative to vaccination unless travelers are eligible for one of the limited exemptions, such as a medical inability to be vaccinated. Travelers should contact their airline or railway company to obtain the necessary form and submit it in accordance with their carrier's approval process.

While Canadian citizens, permanent residents, and persons registered under the *Indian Act* can still enter Canada if they are unvaccinated or partially vaccinated, they are not permitted to travel beyond their point of entry within Canada on a connecting flight or by rail. These travelers should plan their return accordingly by selecting a Canadian airport that is closest to their final destination, and expect to be subject to testing and quarantine.

### **New ArriveCAN Requirements for Essential Travelers**

As of November 30, 2021, all exempt essential service providers must identify their vaccination status in ArriveCAN, regardless of whether or not they are allowed to enter as unvaccinated.

If an exempt essential traveler previously created a reusable ArriveCAN receipt, they must either download the latest version of the free ArriveCAN mobile app or sign in to the web version, and re-submit all of their information, including the newly required information on proof of vaccination, to get a new exempt reusable ArriveCAN receipt. Once an exempt traveler creates a new reusable receipt, the receipt can be used for subsequent trips.

### ***What will change on January 15, 2022?***

The government of Canada also announced that as of January 15, 2022, certain groups of travelers who are currently exempt from entry requirements will only be allowed to enter the country if they are fully vaccinated with one of the vaccines approved for entry into Canada. These groups include:

- Individuals traveling to reunite with family (unvaccinated children under 18 years of age will retain exemption if traveling to reunite with an immediate or extended family member who is a Canadian, permanent resident, or person registered under the *Indian Act*);
- International students who are 18 years old and older;
- Professional and amateur athletes;
- Individuals with a valid work permit, including temporary foreign workers (outside of those in agriculture and food processing); and
- Essential service providers, including truck drivers.

After January 15, 2022, unvaccinated or partially vaccinated foreign nationals will only be allowed to enter Canada if they meet the criteria for limited exceptions, which apply to certain groups such as agricultural and food processing workers, marine crew members, those entering on compassionate grounds, new permanent residents, resettling refugees, and some children under the age of 18. Exempt unvaccinated travelers will continue to be subject to testing, quarantine, and other entry requirements. Non-exempt unvaccinated or partially vaccinated foreign nationals will be prohibited entry into Canada.

***What requirements are still in place?***

For trips out of the country longer than 72 hours, all travelers eligible to enter Canada must complete the mandatory pre-entry molecular COVID-19 test. Antigen tests are not accepted. Travelers who have already had COVID-19 and recovered can provide proof of a positive COVID-19 molecular test taken at least 14 days and no more than 180 days before the initial scheduled departure time of their aircraft, or their entry into Canada by water or land. If arriving by air, they must provide proof of their test result to the airline before boarding their flight to Canada.

As has been the case since August 9, 2021, fully vaccinated travelers do not need to take a test on arrival unless they are randomly selected to complete a day 1 COVID-19 molecular test. All travelers who are randomly selected for the border testing surveillance program must complete the mandatory arrival test. However, they do not have to quarantine while awaiting the result.

Fully vaccinated travelers must also be asymptomatic, have a paper or digital copy of their vaccination documentation in English or French (or certified translation, along with the original), and provide COVID-19-related information electronically through the ArriveCAN app before arrival in Canada. They must still present a suitable quarantine plan, and must be prepared to quarantine in case it is determined at the border that they do not meet all of the conditions required to be exempt from quarantine. As with all other exempt travelers, they must follow public health measures in place, such as wearing a mask when in public, keeping a copy of their vaccine and test results, and keeping a list of close contacts for 14 days after entry to Canada.

Details:

- "Government of Canada Introduces New Measures to Address COVID-19 Omicron Variant of Concern," Public Health Agency of Canada, Nov. 26, 2021, <https://www.canada.ca/en/public-health/news/2021/11/government-of-canada-introduces-new-measures-to-address-covid-19-omicron-variant-of-concern.html>
- "Government of Canada Announces Adjustments to Canada's Border Measures," news release, Public Health Agency of Canada, Nov. 19, 2021, <https://www.canada.ca/en/public-health/news/2021/11/government-of-canada-announces-adjustments-to-canadas-border-measures.html>
- ArriveCAN, <https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/arrivecan.html>

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## Firm in the News

**Cyrus Mehta** and **Kaitlyn Box**'s blog, "The Ineffectiveness of the Latest Omicron Travel Ban From the Perspective of Immigration Lawyers," was praised by LexBlog, which said they "make a convincing case" against recent travel bans, "expertly lay out the numerous flaws and hypocrisies inherent to these types of travel bans and illustrate the ways in which they defy scientific reality." LexBlog said the blog is "an incredibly well-constructed takedown of these ill-conceived travel bans and I cannot commend Mehta and Box enough for their thoroughness." LexBlog's comments are at <https://www.lexblog.com/2021/12/03/best-of-law-blogging-omicron-more-omicron-and-e-scooters/>. The blog is at <https://bit.ly/3rzU59n>.

**Mr. Mehta** was quoted by the Economic Times on the 9% drop in H-1B holders in the United States. He said the drop was "clearly attributed to the Covid travel bans and the inability of nonimmigrants to get visas and come to the U.S. under approved H-1B petitions." He said another way of looking at it is that "many in the U.S. who have been in H-1B status may have adjusted to permanent residence over the past year. Also, many who have pending adjustment applications, and have not yet received the green card, may have decided to remain in the U.S. as pending adjustment applicants with work permits rather than remain in H-1B status. Pending adjustment applicants find it easier to remain without an H-1B and have only a work permit as they can exercise job

portability more easily."

<https://economictimes.indiatimes.com/nri/migrate/9-drop-in-h-1b-visa-holders-in-the-us-highest-in-a-decade/articleshow/88050668.cms>

**Mr. Mehta** was an invited speaker at the 54th Annual Immigration and Naturalization Institute on December 1-2, 2021 in New York, where he spoke in person on a panel entitled Trends in Processing and Policy at USCIS - Practical Tips.

**Mr. Mehta** was an invited speaker at the in person Latin and Caribbean Chapter conference of the American Immigration Lawyers Association in Santa Fe, New Mexico, on December 3, 2021, where he moderated a panel entitled The Eternal Resident Applicant.

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