



Aviation Technology Solutions

Operational Control

Introduction

Operation of passenger-carrying flights for compensation or hire requires an air carrier certificate and appropriate operations specifications issued under Title 14 Part 119 of the Code of Federal Regulations (CFRS). A key requirement for an air carrier certificate holder conducting operations under Part 135 is to maintain control and authority over the initiation, continuity, conduct, and termination of its Part 135 flights. Among other things, the air carrier must have knowledge of the flights beforehand, have legal possession of the aircraft and have all required records to show how it determined legal aircraft and legal crew before the flight.

The Title 14 CFRs makes it incumbent on the Part 135 charter operator to maintain that control, referred to as *operational control*. Failure to maintain operational control subjects an air carrier to enforcement action by the Federal Aviation Administration (FAA). At the same time, any entity that assumes operational control of a Part 135 flight, without having its own air carrier certificate and appropriate operations specifications, violates the Title 14 CFRs and is subject to administrative, civil and criminal penalties.

Aircraft Owner's Need to Generate Revenue

Owners of aircraft, including businesses owning and operating aircraft for business purposes, who operate under Part 91 often cannot fully utilize the aircraft and seek to defray costs of aircraft ownership and operation by placing the aircraft with a Part 135 charter operator to obtain revenue. Conversely, it is attractive for Part 135 charter operators to obtain part-time use of a corporate aircraft for charter purposes because there are no capital costs associated with acquiring the aircraft, only an effective sharing of revenue generated by the chartering; however, the air carrier must maintain operational control of its flights.

It is increasingly common for aircraft owners to enter into arrangements with Part 135 charter operators whereby the Part 135 charter companies operate the aircraft under a lease arrangement, with the owner using the Part 135 charter company's services on a regular basis. These arrangements are attractive to owners because they allow the owners to combine the tax advantages of aircraft ownership with an additional income stream from charter operations.

Regulatory Issues with Common Lease Arrangements for Aircraft and Crew

The lease arrangement between the aircraft owner and Part 135 Charter Company is extremely important. While this arrangement has many benefits, the owner and Part 135 charter company must be careful to stay within the FAA's rules regarding operational control. Aircraft owners will not be able to take advantage of arrangements with Part 135 operators if they are unwilling to truly cede operational control.

One of the greatest challenges for aircraft owners and Part 135 charter operators is the proper handling of flight crew issues. The aircraft owner cannot directly supply the crew to the charter, as this would be an illegal "wet lease" under 14 CFR. 119.53. To avoid this problem the

"owner's pilots" can work for the charter operation as the Part 135 charter operator's "agents" under an agreement separate from the lease or use agreement. This arrangement allows owners to *potentially* get their favorite flight crews when chartering back their aircraft. Regulatory concerns arise, however, if the owners are effectively guaranteed to get the flight crews they request when chartering back their aircraft.

It is important for both aircraft owners and Part 135 charter operators to understand that simply designating an owner's pilot as an agent of the charter company does not eliminate the danger of violating the FAA rules. Regardless of the formal relationship between the Part 135 charter company and the aircraft owner, the Part 135 charter company must make the flight crew and aircraft assignments. While the owner can ask for a specific aircraft and flight crew, when making charter requests, the owner cannot veto the Part 135 charter company's choices. The FAA has taken severe enforcement action in a number of cases where "agency" agreements were found to be invalid wet lease arrangements that required the aircraft operator to hold its own Part 135 certificate.

FAA Response to Operational Control Issues

The FAA expressed concern over certain commercial arrangements that call into question whether a Part 135 charter operator really has control over the operations of the aircraft under the authority of its certificate. To address this concern the FAA revised Op Spec A008 and Op Spec A007 to place greater emphasis on issues of operational control.

The FAA has also created a sophisticated two-tier classification system for charter-operator personnel. The top tier is "management" personnel who must be direct employees of the Part 135 charter operator (*i.e.*, they must receive a W-2 from the Part 135 charter operator). The second tier carries out management's instructions and includes pilots and mechanics. The first tier may delegate operational control to the second tier, usually through the pilot-in-command. The net effect of the complicated system is to further specify the level of control a Part 135 charter operator must have.

Penalties for Operational Control Violations

Violation of these rules could have very serious consequences. Perhaps the greatest risk a violator faces is criminal penalties for illegal charter operations without an air carrier certificate. Other possible penalties include civil penalties, certificate suspension or revocation and the suspension or revocation of certificated personnel. Denial of insurance coverage in the event of an accident is also a serious risk. Most insurance policies covering aircraft have exceptions to coverage if an accident happens while the aircraft is operated in violation of FAA rules. As the rules about operational control are intimately tied to concerns about flight safety and accident responsibility, violations of these rules will likely be highly relevant to any insurance coverage litigation.