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Operational Control Best Practices

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Overview



- Operational Control is a broad topic
 - Not just the piloting of an aircraft or the manipulation of its controls
 - Extends to legal and regulatory responsibility for flight operation
 - Often affects parties with no direct involvement in physical aspects of operation
- Operational Control is very much about safety
 - The FAA has recently shown an increased interest in operational control issues
 - Important for aircraft operators to be thoroughly familiar with the subject

Introduction to Operational Control

FAA Definition

- With respect to a flight: Operational control means “the *exercise of authority* over initiating, conducting or terminating a flight.” [14 CFR 1.1]
 - Not to be confused with pilot-in-command authority
- “Exercise of authority” is crucial factor in this context
 - Related to FAA’s definition of *operate*, i.e. to “use, *cause to use or authorize to use* aircraft, for the purpose of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).” [14 CFR 1.1]
- Note breadth of these definitions
 - Authority/authorize common to both

Key Aspects of Operational Control



- Aircraft
 - Operator must have a possessory interest in the aircraft (gives rise to authority to exercise control)
 - Simple in personal aviation – where as a rule legal owner of aircraft also manipulates controls
 - Often harder to delineate in business aviation
 - Aircraft management agreements with Part 135 operators: often involve frequent transfers of possession and with it O/C
 - Dry vs. Wet lease (source of crew is key differentiator)
- Crew
 - Who employs them? Who controls them? (Not always the same)
 - Directly employed vs. contract crew
 - If not a direct employee of aircraft operator (i.e., party in possession of the aircraft), written crewmember agency agreement crucial
- Passengers
 - Should be briefed pre-flight on the entity having operational control
 - Eliminates any confusion on passengers' part – consistent with their expectations?

Regulatory Responsibility and Legal Liability

Regulatory Responsibility

- Person having operational control has regulatory responsibility
 - *The Operator*: subject to FAA oversight and enforcement (goes hand in hand with O/C)
 - *Person* may include “an individual, firm, partnership, corporation, company, association, joint-stock association, or government entity”
- Operator accountable for safety and all other aspects of the aircraft operation
 - Must have full knowledge of flight operations
 - Airworthiness, eligibility of flightcrew, identity of passengers
 - Flightcrew must determine on operator’s behalf whether flight can be conducted safely and in accordance with regulations, etc.
 - Delegation of functions to qualified employees and agents: yes
 - Transfer of O/C responsibility and accountability: no

Regulatory Responsibility (cont.)

- Note: Operator determination may indicate need for FAA air carrier certification
 - Part 119 – Requires an aircraft operator to hold commercial certification (typically, a Part 135 certificate) when providing air transportation for compensation or hire
 - Compensation or hire: defined very broadly by FAA
 - Common issue: flight department company (FDC)
 - a subsidiary company that engages in no business other than operating (and perhaps owning and managing) aircraft
 - Compensation or hire: yes
 - Distinguish flight department (okay) from flight department company (not okay)



Legal Liability

- Operator has legal liability for the aircraft operation
 - Primary legal liability should an accident or incident occur
- Importance of Insurance
 - Are insurer's liability limits enough to protect operator, as well as its personnel and its assets?
 - Do pilots meet insurer's qualifications for licenses, training, experience, etc.?
 - Is the aircraft operated in a manner consistent with the terms, limitations, and conditions of the policy?
 - Specifically, any prohibitions on commercial operations?
 - Note: a Part 91 FDC may be in violation of noncommercial insurance policy conditions in addition to FAA regulations

International Operations

Significant Implications of Operator Determination

- Commercial carriers operating abroad are subject to bilateral air transport agreements between the US and other countries
 - All agreements require some form of foreign licensing
 - Some restrict access even with appropriate license
 - May limit number of flights or points served, or multi-leg itineraries
 - Cabotage considerations (absence of additional charge immaterial)
- All flights, either commercial or private, are subject to various customs, immigration, taxation, security, and operational rules and restrictions imposed when arriving and departing a foreign country

Tax Considerations (FET)

- According to the IRS, FET status depends on who has “possession, command and control” of flight
 - For example, the charter price of a domestic flight operated by a Part 135 certificate holder is subject to a 7.5% Federal Excise Tax (FET) (plus a \$3.80 segment tax per passenger), but is largely exempt from the per-gallon federal fuel tax.
 - With few exceptions, the 7.5% FET and segment tax are not applicable to flights operated under Part 91, while the full fuel tax does apply.
 - See NBAA Federal Excise Tax Handbook for more information
- The FAA, IRS, and other government agencies often produce inconsistent assessments of the same set of facts
 - Determinations binding only within the agency

Operational Control in a Part 91 Internal Flight Department Environment

Owner Flown Operations

- Simplest type of operational control arrangement
 - Person with possessory interest in aircraft (owner or lessee) manipulates the controls himself or via employed or contracted pilots
 - Sometimes use management company to assist with operational control functions while still retaining responsibility
 - E.g. providing contract pilots and maintenance
- Operator should have written crewmember agency agreement
 - Signed by each contract pilot, acknowledging that pilot is acting as operator's agent and that operator maintains operational control
 - Prevents unintentional transfer of liability to pilots
 - Prevents unintentionally placing insurance coverage in jeopardy

Flight Department Operations

- Internal flight departments directly hire pilots and mechanics as company employees (with W-2s)
 - Operational control is maintained by the principal company
- Contrast with flight department *companies* (FDCs): FAA considers them to be unauthorized commercial operators
 - Significant legal and regulatory risks for principal company, FDC, employees



Dry Leases

- Arrangements whereby an aircraft is furnished by its owner (the lessor) to an operator (the lessee) without flightcrew
 - May be more than one lessee (a nonexclusive lease)
 - Document each transfer of possession
 - Lessee maintains operational control if it provides directly employed (W-2) flightcrew or contract crew it selects
 - Aircraft and crew come from different sources, unlike wet lease



Time Sharing Agreements

- Arrangement “whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified” in §91.501(d) of the FAA regulations
 - Operator (time sharer) maintains operational control
 - Time sharer’s own W-2 or contract employees are included in the time share to the receiving person (time sharee)
- FAA rules only rarely permit time sharing operations
 - Time sharing is an exception to the prohibition on wet leasing by Part 91 operators
 - There is an exceedingly narrow window of legality
 - See NBAA Personal Use of Business Aircraft Handbook

Interchange Agreements

- Arrangement “whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person’s airplane, and no charge, assessment, or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating, and maintaining the two airplanes.”
 - Operational control remains with person whose airplane is being operated
 - Crewmembers (W-2 or contract employees) are provided by that airplane’s operator
- Subject to substantial FAA regulatory restrictions
 - Like time shares, interchange agreements are an exception to the prohibition on wet leasing by Part 91 operators

Parent-Subsidiary Operations



- Another exception to the Part 91 prohibition against wet leasing
- Allows an aircraft to be operated by a parent company at the request of its subsidiary
 - For a purpose within the scope of and incidental to the business of the subsidiary, under the operational control of the parent
 - Subsidiary is permitted to reimburse the parent up to the fully allocated cost of the flight
 - Based on the overall cost of owning, operating, and maintaining the airplane
 - No reimbursement allowed if a guest is carried, unless carriage is within the scope of and incidental to the subsidiary's business
- Exception applies in reverse as well
 - Subsidiary is Part 91 operator and the parent wishes to utilize the aircraft under the operational control of the subsidiary
 - Subsidiary still not permitted to operate as an FDC
 - Would require FAA certification as a commercial operator to do so

Operational Control in a Part 91 External Flight Department Environment

Management Agreements

- Part 91 operator (owner or lessee) may outsource aircraft management to a third party versus having an internal flight department
 - Management company may provide crewmembers, conduct aircraft maintenance, arrange flight planning services, etc.
- Aircraft owner retains operational control
 - Management agreement must clearly establish legal and regulatory liability continues to be vested in aircraft owner
 - No dilution of operational control

Crew and Maintenance Issues

- In external flight department model, many Part 91 operators rely on crew provided by the management company
 - Must have agreement in place with management company defining the role of pilots vis-à-vis operational control, etc.
 - In addition, crewmember agency agreements
 - If pilots are direct employees of the aircraft owner/operator, such agency agreements may not be necessary
 - Clear delineation of employed crewmember's delegated responsibilities remains prudent in this situation
- Management company may also arrange for or provide maintenance services
 - Part 91 operator maintains ultimate responsibility and accountability for determining airworthiness prior to each flight

Liability Considerations

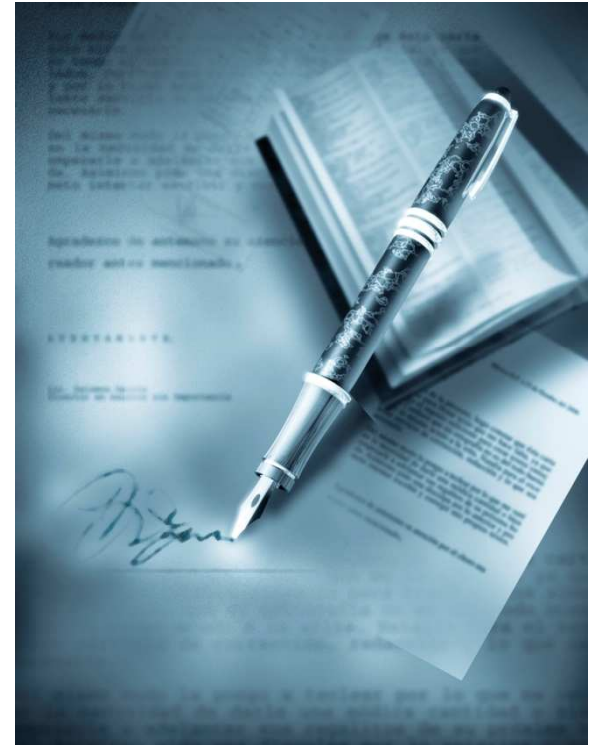
- Part 91 operator retains primary liability and responsibility as the exclusive operator of the aircraft
 - Management company lacks operational control
 - Counterintuitive? Perhaps so, but laws and regulations are clear
- Part 91 operators can protect themselves through appropriate insurance policies and, to a lesser degree, indemnification provisions in management agreements
 - If operator finds these protections insufficient, it might consider dry leasing its aircraft to a Part 135 certificate holder

Operational Control in a “Managed Charter” Environment (Parts 91 & 135)

- Common for an individual or company to outsource aircraft management to charter operator holding an FAA Air Carrier Certificate, i.e. a Part 135 certificate holder
 - Charter company assures the aircraft meets FAA commercial use requirements and places aircraft on its Part 135 op specs
 - Allows charter company to use the aircraft for public commercial air transportation
 - Owner uses the aircraft under Part 91 on its/his/her own flights
- Essentially, two entities share use of the aircraft
 - Can lead to confusion over operational control
 - Appropriate safeguards necessary

Charter Management Agreements

- In all cases, comprehensive management agreements must be in place to define responsibilities and the respective operations that may be flown with the aircraft
 - Set specific parameters for determining which entity will exercise operational control for each flight
 - Only one entity can have operational control
 - Establish mechanism for documenting transfer of aircraft possession (and therefore operational control) between parties
 - A permanent record specifying who is in operational control each time the engines are started



Owner Flights Under Part 91

- Owner can provide its own pilots or contract them from the charter company, but owner retains operational control
- Aircraft's maintenance typically arranged or performed by the charter company
 - Especially important since aircraft is listed on charter company's FAA op specs and available for public charter, so must be maintained according to Part 135 requirements
 - Charter operator is responsible for ensuring airworthiness whenever aircraft is operated on charter

Owner Flights Under Part 135

- Owner charters its own aircraft from the charter company
 - All flights, including for owner, are operated by the charter company under its O/C
- Considered commercial flights because they are operated under the charter company's 135 certificate
 - FET applicability
 - Owner not in operational control

Charter Company Flights Under Part 91

- Charter company may never provide air transportation under Part 91
- However, certain kinds of flights are operable by the charter company under Part 91
 - Aircraft positioning flights, flights required for maintenance or testing, and training flights are examples
 - Charter company retains operational control

Charter Company Flights Under Part 135

- After aircraft is added to the charter company's op specs, the company may charter the aircraft to any person, charging whatever the traffic will bear
 - Charter company has operational control during these flights operated under Part 135
- Charter operator is responsible for ensuring airworthiness standards are met

Operational Control in a Pure Charter Environment

- Aircraft owner decides entirely against operating its own flights
- Agreement vests O/C of all flights in FAA-certificated charter company
 - Thus charter company has exclusive possession of aircraft
- Concerning operational control, there is no difference between a flight chartered by the aircraft owner and one chartered by a third party



Operational Control in a Fractional Aircraft Program

- 1980s: Business model created that allowed purchase of fractional share of an aircraft, dry-lease exchange of multiple aircraft among the fractional owners, and agreements with owners whereby fractional aircraft program manager provided flightcrews, maintenance, etc.
- Initially, Part 91 regulations applied
 - Considered non-commercial operation exclusively
- Effective 2005, Subpart K of Part 91 (“Part 91K”), set basic rules for fractional aircraft ownership programs, defined responsibilities of owners and managers, and set specific requirements for operational control

Fractional Ownership Contract Requirements

- FAA requires each owner in a fractional program have a contract with program manager
 - Establishes legal relationship between owner and manager, services provided, etc.
- FAR 91.1013 requires program manager to brief fractional owner on its/his/her operational control responsibilities, with owner giving written acknowledgement
 - Must define when owner has operational control and resulting responsibilities and liabilities
 - Specific acknowledgment requirements include: responsibility for compliance with FAA management specifications issued to manager and applicable regulations, enforcement actions for noncompliance, and liability risk
 - Signed acknowledgement by owner must be available for inspection by FAA

Operational Control Responsibilities and Delegation

- §91.1011(a) states: *Each owner in operational control of a program flight is ultimately responsible for safe operations and for complying with all applicable requirements of this chapter, including those related to airworthiness and operations in connection with the flight. Each owner may delegate some or all of the performance of the tasks associated with carrying out this responsibility to the program manager, and may rely on the program manager for aviation expertise and program management services. When the owner delegates performance of tasks to the program manager or relies on the program manager's expertise, the owner and the program manager are jointly and individually responsible for compliance.*
- Affirms that fractional owner has ultimate responsibility for operational control of its/his/her flights
- Delegation of tasks to program manager allows for shared *compliance* responsibility

Operational Control of Fractional Ownership Flights

- FAR 91.1009 clarifies what types of fractional program flights may occur under which operating regulation
 - Fractional owners need not be on board a program flight to exercise operational control over the flight
 - Flight must be at owner’s discretion – either passenger or cargo
 - Illustrates breadth of operational control concept
 - “exercise of authority”
 - “use, cause to use or authorize to use”
- Program manager with FAA air carrier certificate may operate 135 flights using the fractional program aircraft if the aircraft are included in its FAA op specs
 - Program manager retains operational control as usual for Part 135 flights
- In all cases, pilot is required to advise passengers of name of entity in operational control of flight (FAR 91.1035[c])



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