



Commercial use of drones: what is allowed? What is not? FAA, Congress and the states are weighing in

UAS Alert

30 MAR 2016

By:

The varying commercial applications of unmanned aerial systems (UAS) – more commonly referred to as drones – across multiple industries poses a number of opportunities and challenges for companies both big and small.

On the one hand, UAS will give companies access to unprecedented insight and analytics into business operations and provide customers with new and potentially cost-effective commercial services. On the other hand, the commercial use of UAS is currently subject to regulatory scrutiny at both the federal and state levels, increasing liability exposure for prohibited uses or unauthorized operations.

As this technology becomes more mainstream and companies incorporate UAS into day-to-day business operations, it is important to consider the fluid and changing legal and regulatory framework governing what is and is not permitted.

Interested parties should pay close attention to the reforms that the FAA and Congress are proposing in this area, since these will have a dramatic impact on this growing sector and create opportunities for companies across the corporate spectrum.

The Federal Aviation Administration has not yet finalized its rules for the commercial use of small and larger UAS rigs – many experts do not expect this to occur until 2017 as the FAA carefully works to integrate UAS into the national airspace. Thus, at present only a limited number of ways exist to obtain authorization for private commercial use of UAS. Most commercial operators will pursue authorization via a process under Section 333 of the FAA Modernization and Reform Act of 2012, which permits the FAA to authorize certain UAS flights and commercial operations before the finalized commercial UAS rules are issued.

CURRENT GUIDELINES – FAA, STATE, AND LOCAL

Companies must strive to understand the general regulatory restrictions governing commercial operations – not only to appreciate the business opportunities but to avoid unnecessary liability. In the absence of finalized FAA rules, the FAA provides the following non-exhaustive guidelines for permitted private commercial use of UAS. Specifically, a UAS:

- must weigh under 55 pounds (inclusive of payload or other equipment)
- may only be used during daylight hours
- may not be operated at an altitude above 500 feet
- may not exceed 100 MPH
- Is restricted to flights in the visual line of sight of the operator and
- may not be operated over persons not directly involved in the UAS operation without prior permission from those persons.

At this time, the FAA analyzes each request for commercial authorization under Section 333 on a case-by-case basis. The FAA has tightened, or relaxed, the above requirements depending on the nature of the requested operation.

In the absence of federal rules or federal preemption regarding UAS operation, **state and local legislators and regulators are also advancing their local agendas**. This has created a patchwork quilt of state and local UAS rules and regulations. In fact, as of this writing, 45 states have considered or enacted 166 bills which have restricted or defined permissible use. Although many of these state and local rules only address the use or operation of UAS generally, companies must be aware that commercial operations may still be affected by these rules. State and local government have adopted rules and regulations affecting UAS use by:

- prohibiting UAS from entering certain airspace (*i.e.*, near airports, correctional facilities, public gatherings, or public facilities)
- prohibiting UAS from electronically recording information about “critical infrastructure”
- making it a felony to use UAS for “peeping tom” activities or
- creating civil liability for capturing an image or other information of a person or privately owned property without consent.

THE REGULATORY FRAMEWORK TO COME

While the regulatory and legal framework governing the use of UAS is currently in a state of flux, companies should also be mindful of a recent flurry of federal legislative activity. However, many of the complex UAS legislative issues may not be fully resolved until 2017 when the next Congress ramps up activity on this important issue. The current legislative efforts provide us a cursory glimpse of how the final regulatory framework may take shape but these issues are evolving rapidly in Congress. The Federal Aviation Administration Reauthorization Bill of 2016 – still being considered by both the House and Senate – contains a number of UAS-specific provisions which, if passed, will further reshape the regulatory environment. When a comprehensive UAS regulatory bill eventually passes Congress, companies can expect some (but probably not all) of the following significant regulatory reforms to be included:

- The development and implementation of **privacy policies** regarding the use and dissemination of data collected during a commercial UAS operation
- The development of **safety standards governing UAS design and production** for all UAS that are sold or distributed in interstate commerce
- **Expanded authority for the FAA** to approve beyond-visual-line-of-sight and night-time commercial UAS operations

- A pilot program and additional funding to evaluate and research **UAS detection and hazard mitigation** technologies
- A required knowledge and safety **test for all UAS operators** who do not already possess an airman certificate
- The development of **industry standards** for the remote identification of UAS
- A government and industry advisory committee to assess the **viability of a low-altitude UAS Traffic Management (UTM) system** that may facilitate UAS delivery operations
- **A possible provision on federal preemption of all state and local laws** relating to the design, manufacture, testing, licensing, registration, or operation of UAS

KNOW BEFORE YOU FLY

Those wishing to use drones in commercial operations should first make themselves aware of the current FAA guidelines, as well as any state or local laws that regulate or affect commercial UAS operations prior to any UAS flight. In many instances, state or local laws may be more restrictive than federal requirements, and may involve harsher penalties.

Find out more about this rapidly evolving area of law and its meaning for your operations by contacting Matthew Grosack, Steven R. Phillips and Nathaniel J. Bell.