



COOLING & HERBERS P.C.

**Your Aircraft Dry Lease
The Flight Crew
And The FAA**

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There has been a great deal written in recent months about the FAA's enforcement activities focused on illegal charter operations. A significant amount of the attention in this area has been devoted to aircraft dry leases, which merits continuing vigilance on your part to ensure that all your aircraft's operations are both safe and compliant.

Part 91 or Part 135?

Some aircraft owners seek to generate revenues to offset their ownership costs by making their aircraft available for charter flights operated under Part 135 of the FARs. But other owners prefer lease arrangements of their aircraft to defray some of the costs of ownership, and these operations typically take place under Part 91, with less restrictive regulations. The FAA permits Part 91 Dry Lease operations, but will look very closely at any arrangement considered to be a disguised form of charter, sometimes characterized as "single source charter flights."

Dry Lease Operations

First of all, it is important to understand the structure involved. An aircraft owner leases its aircraft to a lessee by way of a Dry Lease, which has nothing to do with the fuel, but rather refers to a lease of the aircraft only – without a crew. The lessee pays an agreed rental for the aircraft usually based on hours of operation, but not always. The lessee then takes responsibility to hire the flight crew. The lessee also takes full operational control and responsibility for the flight under Part 91, which is normally reflected by a clear lease provision to that effect.

The flight crew must be hired by the lessee who may use a management company or another provider of pilot services, and the arrangement is often documented with a signed pilot services agreement. In this simple example, the FAA would not typically express much concern about compliance under Part 91, so long as the lessee clearly understands his/her obligations.

But change the example just a bit, and legal concerns can begin to multiply. For example, what if the aircraft owner has five or ten different lessees using the aircraft at different times? And what if all those lessees enter into pilot services agreements with the same management company or pilot provider? And what if those lessees use the aircraft to provide flights to other people? At each of these steps, the use of the aircraft begins to look like air transportation normally reserved to Part 135 charter operators, and the FAA's interest in looking for a so-called illegal charter may grow.

The Flight Crew

The flight crew must always be thinking of their privileges from the FAA to fly the aircraft, and they are unquestionably at risk of any enforcement action by the FAA for a suspected illegal charter. Accordingly, they must exercise diligence in learning the details of the flight. While the lessee may be exposed to a civil penalty, the lessee often has no FAA certificate at stake. And responsibility for compliance by the crew and the lessee is clear. The FAA will have no patience for “I thought everything was okay.” Therefore, whatever the owner or lessee can do to help the flight crew determine and document compliance will be of real value. Our recommendation is a checklist the flight crew can complete before the flight for the selected details.

Operational Control – The Critical Component

The lessee, the flight crew, and sometimes the passengers, must understand who has operational control of each leg of each flight, and what that means. The term is defined in the FARs as this:

“Operational control, with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight.”

Therefore, the lessee of the aircraft maintains that authority, subject to Regulation 91.3, which makes the pilot in command the final authority as to operation of the aircraft. But generally speaking, the lessee can otherwise determine when and where a flight begins, the general route, stops along the way, the destination, and other matters.

FAA Published Guidance

There are a number of FAA publications addressing different aspects of this situation. The most recent and direct of these are on the website at [www.faa.gov/about/initiatives/safe charter operations/](http://www.faa.gov/about/initiatives/safe_charter_operations/) Along with FAA guidance, there is posted a publication co-sponsored by several industry associations, entitled “General Aviation Dry Leasing Guide.” Many detailed examples that can provide helpful information are included.

Real Life Enforcement Actions

The FAA enforcement actions relating to illegal charters seem to be multiplying as well. Several representative examples are instructive.

- A management company arranged flights for members of the general public, and received their payment for both a lease of the aircraft and pilot services. The company hired the pilots who then flew under Part 91. Although one pilot thought the flight was a Part 91 demonstration flight, The FAA suspended both pilots’ certificates for operating an illegal charter.

- A company which owned an aircraft leased it to other persons, and had its principal employee act as pilot. The pilot thought it was a legal Part 91 operation, but the FAA held it to be an illegal charter and revoked his certificates.
- An aircraft management company arranged for dry leases of several privately owned aircraft to a single lessee, who in turn used a flight crew arranged by the management company. The FAA asserted a civil penalty against the management company.
- An aircraft management company leased aircraft to members of the general public, and required them to hire their own pilots, but provided a recommended list of pilots already approved by the insurance company. The FAA found an illegal charter and revoked the pilot's certificate.
- A pilot services company arranged dry leases of various owners' aircraft, and required the lessees to use its employee pilots. The pilot received an extended suspension of his certificate.

It has happened before that the FAA will interview the aircraft occupants after a flight with the question "Who had operational control?" First, the lease should specifically say so. Next, the flight crew and lessee should know and understand the concept of operational control.

Conclusion

Each owner/lessee situation is different, as is each flight crew. Care in setting up this arrangement and diligence in the operations are necessary to ensure safety and compliance. The flight crew should use their checklist to ensure they understand the details of the flight. Legal counsel can provide valuable assistance in developing an appropriate checklist.

The recent visible enforcement activity by the FAA demonstrates the scope of the problem created by illegal charter operators and valid concerns for the safety of the flying public. The aircraft owner's benefits from dry lease structures are substantial enough to merit continued use within the FAA's requirements.