



BUSINESS AVIATION AND THE BOARDROOM



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A Trap For The Unwary: Flight Department Companies.

Among the first decisions that any company considering an aircraft acquisition must make is how to structure its ownership and operations. Forming a separate entity for providing air transportation is fraught with unique issues, cautions Troy Rolf.

A company that has a legitimate need for Business Aviation to transport its executives, employees and property in connection with the company's business can own and operate its aircraft "in house" as a division of the company. However, many companies decide to own and operate their aircraft not "in house", but rather to form a new company, separate from the primary operating business, whose sole purpose is to own and operate the aircraft and

provide air transportation services to the primary operating business. A company formed for this purpose is commonly referred to as a "Flight Department Company".

Typically, a Flight Department Company is owned as a direct subsidiary of the primary operating business, but it is also common for a Flight Department Company to be owned in other ways, such as directly by the CEO or majority shareholder of the primary operating business. In any event, Flight Department Companies typically either employ, or obtain from third party vendors, the services of flight crews, maintenance technicians, and all other support personnel required for the operation of the aircraft. They typically provide air transportation services to the primary operating business, and often to other affiliated entities and associated individuals as well, while operating under Part 91 of the Federal Aviation Regulations ("Part 91").

The costs of flight operations in such cases are usually funded by direct payments from the primary operating business to the Flight Department Company. Flight Department Companies usually operate on a break-even basis, with payments from the primary operating business merely covering the Flight Department Company's actual costs of owning and operating the aircraft.

WHY FLIGHT DEPARTMENT COMPANIES?

The prime motivating force behind selecting an ownership and operating structure of this nature usually is the desire to protect the assets of the primary operating business from potential catastrophic liability. The legal theory behind such a structure is that a potential plaintiff will only be entitled to recover damages from the Flight Department Company, and that the statutory liability shield under which the Flight Department Company operates will protect the assets of the primary operating business from the claims of the potential plaintiffs.

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What the Boardroom needs to know about Business Aviation



Any company that has as its primary purpose the ownership and operations of aircraft to provide air transportation services to any other person or entity, and that receives compensation of any kind whatsoever for such services, falls within the regulatory definition of a commercial charter air carrier, and therefore must be certificated in accordance with Part 119 of the Federal Aviation Regulations (“Part 119”), and operate under Part 135 of the Federal Aviation Regulations (“Part 135”). This is true regardless of whether or not the aircraft operating company provides air transportation services to the general public or only to the company’s own parent company, and regardless of whether or not the aircraft operating company is a profit-making business or is only reimbursed for actual expenses.

Flight Department Companies are commercial charter air carriers under the Federal Aviation Regulations—period, end of discussion.

NON-EXISTENT PROTECTION

Very few Flight Department Companies actually make the investments in time and capital necessary to obtain certification as commercial charter air carriers, however. Consequently, most Flight Department Companies operate illegally as unlicensed charter operators, often without even realizing they are violating the law, with the result that the oft hoped-for liability protection may be illusory.

The prohibition against Flight Department Companies is widely ignored by many aircraft owners, perhaps in part because the Federal Aviation Administration historically has not actively sought out violators. In fact, some Flight

Department Companies have operated for several decades without the FAA ever initiating an enforcement action.

One should not, however, interpret the passive stance of the Federal Aviation Administration as an endorsement of this practice. In fact, based on historical practice, FAA scrutiny of the operations of a Flight Department Company is not likely to occur so long as the Flight Department Company continues to operate safely and only for its own parent company and affiliates, but rather will be most likely to arise following some event that brings attention to the operation, such as an accident or incident, or the occurrence of some other regulatory violation.

In such an event, regulatory violations associated with the operations of a Flight Department Company could violate representations and warranties in the liability and hull insurance policies covering the aircraft resulting in denials of insurance coverage, and/or could be grounds for piercing the corporate veil if it can be shown that the purpose for which the Flight Department Company was formed (i.e., the provision of air transportation services for compensation or hire under Part 91), was an illegal purpose.

In light of the potential legal pitfalls associated with the operations of Flight Department Companies, any company that utilizes, or is considering the utilization of a Flight Department Company should consult with an aviation attorney.

Do you have any questions or opinions on the above topic? Get them answered/published in World Aircraft Sales Magazine. Email feedback to: Jack@avbuyer.com
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