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Pilot Counsel

Interpreting the rules on business flying

BY JOHN S. YODICE (From *AOPA Pilot*, October 1997.)

Under the Federal Aviation Regulations a private pilot may legally fly on business — with one important proviso. To paraphrase the regulation, a private pilot may act as pilot in command of an aircraft in connection with any business or employment so long as the flight is only *incidental* to that business or employment. What is meant by *incidental* is crucial, but not always easy to apply.

Let's start with some basics. FAR 61.113 is the regulation that specifies the privileges and limitations of a private pilot certificate. It tells us that there are two limitations to these privileges: One, the holder of a private pilot certificate may not receive compensation to act as pilot in command of an aircraft. Two, whether or not the pilot receives compensation, a private pilot may not act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire.

The FAA interprets the term *compensation* in its broadest sense. Compensation is not only the payment of money, but it is the receipt of anything of value, and even the mere expectation of some benefit. To show you how broad the FAA interpretation is, the agency, on several occasions, has said that just building up flight time is compensation to the pilot where the pilot does not pay the cost of operating the aircraft. The most extreme position that I have seen the FAA take is that the expectation of a tax deduction to a pilot of a charitable flight is compensation. The FAA backed off that one.

Clearly, then, a pilot who in his or her employment sometimes flies on business in connection with that employment is still being paid a salary while piloting the aircraft. That's compensation. So, too, a self-employed person piloting an aircraft in pursuit of that employment — even if it has not yet become profitable — has the hope and expectation that the business will become profitable. That, also, is compensation.

Such flights would be in violation of FAR 61.113 but for the fact that the regulation goes on to permit a private pilot to engage in some types of compensated flights. One common type that we have reviewed in this column is the so-called "shared expense flight." A pilot sharing the expenses of a flight with his or her passengers is receiving money — compensation — yet may do so as a private pilot. Our earlier article ("[Pilot Counsel: Sharing expenses](#)," March 1995 *Pilot*) explained that there must be a bona fide sharing of expenses among all of the occupants of the aircraft, including the pilot; that only the direct operating expenses may be shared; and that the flight must be for the pilot's own purpose other than merely providing transportation for the passengers. If these conditions are met, the flight is legal despite being conducted by a private pilot. Other types of compensated flights that are permitted include charitable airlifts

("Pilot Counsel: Charitable flights," March 1996 *Pilot*), search and location operations, aircraft sales demonstrations, and glider towing.

So, what is *incidental* in the business flying context?

That is a term difficult to apply in many situations because sometimes persons will try to use the *incidental* tag to justify what would otherwise be considered a commercial operation. A commercial operation requires an FAA commercial operator certificate, as well as a commercial pilot, and it must be operated under more stringent safety regulations in addition to FAR Part 91. The FAA takes a practical approach. If it looks like a commercial operation, or an operation that should require a commercially certificated pilot, the FAA will scrutinize the operation. We may not always agree with the FAA's conclusions.

On the other hand, there are many situations that legitimately are incidental. A 1977 legal interpretation by the FAA is a good example, and it also mentions some factors that the FAA will consider in determining a legitimate from an illegal flight. The FAA told the County of San Bernardino that it was OK for Probation Department employees to fly juvenile wards between foster homes and the central detention facility (many hours' driving time), under the privileges of their private pilot certificates. In this situation, the pilots were not compensated for piloting the aircraft over and above their usual salary. Aircraft operation was not part of the pilots' job description, nor a condition of employment or advancement. The county paid for the aircraft rental.

In this opinion, the FAA spelled out some of the factors that it will consider. The FAA said that the amount of a pilot's work time spent operating an aircraft is an important factor. The greater the amount of time, the less the operations are incidental to employment. Also, if the piloting of an aircraft is a condition of employment or advancement on the job, or part of the job description, it's not incidental. Or, if the pilot is compensated for flying the aircraft over and above his normal salary, it's not incidental.

Not only must the flying be incidental to the pilot-employee's employment, but the flying must be incidental to the business of the employer. A 1980 FAA interpretation spells this out for us. It involved a night aerial advertising operation. The owner of the operation, a private pilot, asked the FAA if he could legally fly in the operation incidental to his employment. In turning him down, the FAA looked to the nature of the company's business. "The business of Southwest Sky Signs is night aerial advertising. Flight operations are conducted as *integral* parts of a commercial endeavor of the company and *not merely incidental* to the night aerial advertising."

So, too, in a 1990 legal opinion, the FAA said that aerial patrols of the transmission lines of a power company are not incidental to the business of the power company and may not be flown by an employee who is a private pilot. The pilot had sought the FAA's opinion of a plan, proposed as a cost-saving measure, to replace a private contractor who patrolled the lines five times a year. The pilot's main job was as a heavy equipment operator. He asked the FAA whether he, as a private pilot, could fly some of these patrols. The FAA answered "no." The lines are routinely patrolled on foot once a year, and by air by power line employees when there are unscheduled power outages. According to the FAA, aerial power line patrol operations are a foreseeable and normal part of the power company's business, even if relatively infrequent, and are therefore not incidental. The power company must use commercially certificated pilots.

These FAA legal interpretations do help us to better understand the term *incidental*, but as I said earlier, the term is not always easy to apply. Some situations will be clear. Others will skirt closer to the line between private and commercial operations — and may invite FAA scrutiny. Whatever the situation, we can appreciate that the privilege of the holder of a private pilot certificate to

pilot an aircraft on business could be an important one to us. We should know about it and take advantage of it as the law allows.

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