

## PART 91 AND 135 OPERATIONS: AN IMPORTANT DIFFERENCE

Kevin M. Reynolds  
Whitfield & Eddy, PLC  
Des Moines, Iowa

One of the recurring issues I face in the aviation segment of my law practice is the distinction between Part 91 (or private) operations and Part 135 (commercial) operations. This appears to be an area where many pilots may have a basic misunderstanding of the applicable Federal Aviation Regulations (FARs).

Having a good, working knowledge of the difference between Part 91 and Part 135 operations is critical for at least two reasons: first, if a private pilot is unknowingly engaging in Part 135 operations, that conduct could result in a suspension or revocation of the airman's privileges. Second, in the event of an aircraft incident or accident, involving either personal injury or property damage, if it turns out that a private pilot was, in fact, involved in a Part 135 operation, the liability insurance company will have a legal right to deny coverage. From the insurance company's point of view, they were insuring the risks attendant to a private, not commercial, operation.

A few points are worth keeping in mind. First, just because a pilot has a commercial certificate, and a Class II medical, this does not mean that it is legal for the pilot to fly passengers or cargo "for compensation or hire." If the operation is later deemed to be governed by Part 135 (commercial, charter or air taxi operations), it is also necessary for the operation to be certified under Part 135. Part 135 operations have very detailed and strict operational requirements and legal aspects. This is probably one of the most common misconceptions: that just because a pilot has a commercial certificate and Class II medical, they can fly people "for compensation or hire" They clearly may not.

A little-known fact is this: a pilot with a commercial certificate, and/or Class II medical, who does not have a flight operation licensed with a Part 135 certificate, is, at all times, exercising the rights and privileges of a private pilot under Part 91.

Second, any time a pilot is flying an airplane “for compensation or hire,” that brings the specter of a Part 135 or commercial operation into play. There are a few very narrow exceptions to this rule: A) if the flying “is only incidental to the pilot’s business or employment,” and the aircraft does not carry passengers or property for compensation or hire; B) the compensation involves “sharing of expenses” (discussed in more detail below); C) the flying involves a charitable airlift that has been pre-approved by the FAA; D) the “compensation” involves mere reimbursement for operating expenses directly related to search and rescue operations; E) an aircraft salesman may, under certain circumstances, demonstrate an aircraft in flight to a prospective buyer; and F) a private pilot with certain qualifications may act as pilot in command of an aircraft towing a glider.

With regard to “sharing expenses,” this exception is very narrow. Under this provision a private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided that the expenses only involve fuel, oil, airport expenditures (such as landing fees or tie down fees), or rental fees.

Third, any time a pilot is providing both pilot service and an aircraft to a customer, that means the pilot has “operational control” and a Part 135 operation is likely involved.

Fourth, some pilots believe that they may fly passengers or cargo “for compensation or hire” so long as they do not “hold themselves out to the public” for doing this kind of service. But this is not true. This is the basis for the distinction between “private” and “common

carriage,” and does not define an operation governed by Part 135.

Fifth, the terms “for compensation or hire” are construed by the FAA very broadly. For example, even if no charge is made for pilot service, but the cost of renting the aircraft is passed onto the customer, that constitutes “for compensation or hire.” Also, even if no money or remuneration changes hands, say, as for example, a pilot provides an aircraft and pilot for a customer simply so the pilot “can get more flying experience,” that will be considered by the FAA as flying “for compensation or hire” and will be deemed a Part 135 operation.

All airmen should know that the FAA views an unlicensed Part 135 operation very harshly. The agency uses a “[S]anctions Guidance Table” when assessing discipline against pilots for various infractions. This table is used by FAA attorneys and other personnel in fashioning appropriate punishment. Under the violation described as “[O]peration for compensation or hire without commercial pilot certificate” the “[S]anction per violation” is listed as: “180 day suspension to revocation.” So, please take notice and govern yourself accordingly!

Finally, perhaps the most severe consequence of engaging in an impermissible Part 135 operation is the voiding or total loss of your insurance coverage. This will occur even though you may have paid thousands of dollars in premium to bind coverage. In every jurisdiction, and not just Iowa, aircraft incidents or accidents that occur as part of a Part 135 operation are not insured by liability coverage for a private pilot who is supposed to use his or her aircraft solely in Part 91 operations. This makes sense: an insurance company charges a premium based on the risk inherent in a particular operation, and if a pilot has misrepresented the nature of the risk being undertaken, then the carrier has a legal right to deny coverage, and this denial will be upheld in the courts.

These are just a few of the “rules of the road” governing the important differences between Part 91 (private) and Part 135 (commercial or charter) operations. All airmen should be mindful of this distinction in order to keep themselves out of trouble with the FAA and to avoid the potential, critical loss of insurance coverage.