

TRANSPORTATION

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This article addresses the advantages and challenges of owning a plane from a legal and business perspective.

Aircraft Ownership Considerations - So You Bought a Plane, Now What?

ABOUT THE AUTHOR



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For many of our clients, aircraft ownership is not only practical (having one aircraft on which to train for a pilot certificate can increase efficiency, for example), but it can also be a business advantage. However, aircraft ownership can come with unique challenges all on its own. At the 2023 SMU Air Law Conference, there were several great discussions about aircraft ownership concepts. This article expounds upon some of the key concepts, so that our aircraft owner clients have a starting point for considering some of the legal issues that may arise.

1. Should you own an aircraft through an LLC?

When an individual-pilot purchases and aircraft, s/he can do so personally, or she/he can be a single-member owner of an LLC that then owns the aircraft. To be clear, with an LLC, the owner of the aircraft becomes the LLC, not the individual. However, there is a misconception that just by “sticking the aircraft into an LLC” it separates the individual pilot from liability, which is not the case. The LLC can provide protection from liability between the LLC and the individual members, but the members need to treat the LLC as a fully functioning company, complete with proper legal documentation and dry leases. For our aviation clients, we have discussed that, for some, the “juice may not be worth the squeeze,” if the only person who would operate the aircraft would be the sole member of the LLC. Indeed, if the sole member of the LLC is the pilot, the pilot is unlikely to be able to escape

liability for a flight simply because the LLC is the aircraft ownership entity.

A key discussion point we have with clients is whether the LLC will protect the member from his/her own acts or omissions related to the flight operations. The liability exposure is worth an individualized discussion with our Aviation Law Practice Group, which would also help aircraft owners determine the most appropriate ownership structure for the intended use of the aircraft.

Now, when there is more than one person or entity, who wants to use or operate an aircraft, then an LLC can be the best structure for the aircraft ownership, especially where the aircraft costs can be shared, the management duties can be allocated, and the members of the LLC can limit liability for operations of the aircraft that the other pilots may incur. We can help our clients maximize the “juice” they can squeeze from an LLC by assisting with the preparation of the legal documentation and consulting with clients about how to effectively treat the LLC as a fully functioning company (even though it may not a profit-making business).

2. What are my options for owning an aircraft?

There are lots of options the FAA recognizes for individuals seeking to own aircraft, but the regulations and restrictions can make the choice a difficult balancing act. Generally, below are the requirements to

consider for aircraft ownership under 49 U.S.C.A. §§ 40102(a)(15); 44102(a); 14 CFR §§ 47.2, 47.9 et seq. The following can own an aircraft:

- An individual who is a U.S. citizen
- An individual who is a resident alien (citizen of a foreign country lawfully admitted to the U.S. for permanent residence);
- A partnership, whose partners (general and limited) are individuals who are U.S. citizens;
- A corporation or association (including LLCs, business trusts, and statutory trusts):
 - organized under the laws of the U.S. or a state, the District of Columbia, or a U.S. territory;
 - of which the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens and under the actual control of U.S. Citizens; and
 - in which at least 75 percent of the voting interest is owned or controlled by persons who are U.S. citizens;
- A U.S. government unit or subdivision; or
- A non-U.S. citizen corporation (not an LLC) incorporated and doing business under the laws of the U.S. or one of the states as long as the aircraft is based and primarily used in the U.S. (60 percent of all flight hours must be from flights starting

and ending within the U.S. and there are additional reporting requirements for this category).

Each of these options also has some nuances that might apply where there is more than one owner and/or where the parties operate the aircraft in certain ways.

3. Who has operational control?

Sometimes people confuse ownership with “operational control” of the aircraft, but these are two different legal concepts. Operational control refers to the “exercise of authority over initiating, conducting, or terminating a flight.”¹ The FAA considers the party with operational control to be the party responsible for the safe conduct of the flight. And, the FAA scrutinizes this legal definition to determine which Federal Aviation Regulations (FARs) apply (e.g. 14 C.F.R. Part 91 or Part 135). Generally, when the owner is an individual and the pilot, the owner has operational control. However, when an LLC owns the aircraft and does not operate the flights itself, but rather “dry leases” the aircraft to another operator, then the operational control shifts to the lessee –if the documentation is properly established between the parties.

For “Part 91” general flight operations, there are restrictions on whether there can be compensation for the provision of air transport, which is a thorny subject. We regularly review aircraft operations for our clients to help them evaluate if they are

¹ 14 C.F.R. § 1.1

operating within Part 91 or if there is risk that the FAA will scrutinize their operations as potentially falling under Part 135 or other provisions.

For “Part 135” operations, a Part 135 certificate is required, and the carrier (not the owner) can provide carriage of persons and property for hire for compensation. Operational flexibility is also then more restricted and operators must meet many FARs to remain compliant.

So, when we talk with clients about aircraft ownership, we always start with the question – **how with the aircraft be operated?** We also ask about **cost sharing**, because the FARs have specific cost sharing restrictions depending on the type of aircraft ownership structures.

4. What’s the big deal?

The FAA has authority to assess civil penalties (i.e. monetary fines) against persons who violate the FARs, it can issue “cease and desist” orders and terminations under certain circumstances,² and even refer/initiate criminal prosecution if the violation involves criminal conduct. The FAA does not tolerate conduct that could deceive the public’s perception of safety in aviation, or which appear to be intentional violations of the FARs. The FAA scrutinizes and pursues enforcement actions specifically when it suspects illegal charter operations, intentional operations without required certifications, as well as

drug/alcohol testing violations, and intentional falsification of records.

Essentially, the FAA is concerned about aircraft owners who might be operating flights that effect either interstate air commerce or air transportation and are carrying person or property, for which the operator is receiving some form of compensation. The FAA interprets the term “compensation” very broadly. Generally, there has been a distinction in the FAA’s interpretation of how an aircraft is leased to another person or entity: either it is a “dry lease,” meaning *without crew*, or it is a “wet lease,” meaning *with crew*. This question opens the door to how the FAA interprets who is operating the aircraft—in a dry lease, the lessee is the operator; in a wet lease, the lessor retains operational control.

Once the FAA determines who the operator is, then the question is what kind of operator is it? If the FAA determines the operator should be considered a “commercial operator” or “direct air carrier, then the FAA must have more regulatory oversight and required certifications. If neither, then the operator is “non-commercial” and can conduct the flights under Part 91 with much less FAA oversight.

If the FAA has reason to believe (or has received an allegation) of an aircraft owner’s illegal operations, it will likely investigate and request to see the documentation for the LLC (or whichever entity). The FAA can also request copies of leases and other

² 49 U.S.C. §46301



agreements, payment information, emails/correspondence, banking information, and aircraft or pilot records for its investigation, and then it may assess civil penalties or take other enforcement action.

So, in conclusion, it is vital for aviation industry clients to seek legal counsel on getting their aircraft ownership structure correct and evaluating the operation of the aircraft under the correct FARs. Aviation lawyers can provide much needed guidance on mitigation of issues.

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