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Inadvertent Flight into Part 135

With rare exceptions, Cirrus pilots and owners fly their birds under Subchapter F – Air Traffic and General Operating Rules of the Federal Aviation Regulations (FARs). More commonly, we refer to them as “Part 91”.

What type of Flights are Allowed Under Part 91?

Most of general aviation is conducted under Part 91. This includes the broad categories of personal recreation, business flights, and flight instruction. Even some commercial operations, such as aircraft ferrying or banner towing, are also flown under Part 91. What gets many pilots and owners in trouble is when they inadvertently cross the line from Part 91 to Part 135... the Part that regulates Air Taxi (Charter) Operations.

Charging Passengers

As a general rule, flying a passenger for “free” will keep most pilots out of Part 135. So long as the passenger pays nothing (no money or quantifiable consideration), pilots are free to fly their friends, family, and most business associates to point near and far. If, however, a passenger is paying for any part of the flight or expenses, failure to maintain strict compliance with FAR §61.113 can result in the FAA declaring the pilot was “charging for the seat” and therefore really operating an unlawful Air Taxi Operation.

The most commonly misunderstood subpart of §61.113 is: *(c) A private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees.* What exactly does “pro rata share” mean? It means add up all the occupants of the aircraft, and divide that into the permissible expenses to be shared. If you fill a Cirrus G5 or G6 with 5 occupants, and if the fuel for the flight was \$200, the pilot must pay \$40 of that fuel and the passengers can pay the rest. What about hourly reserves for maintenance? Nope. Hangar expenses? Negative. Insurance premiums? Nada. However, money isn’t the only restriction. The flight must have a “common purpose”¹ which is a term coined by the FAA and not actually found in the text of §61.113 itself. Basically, all those who are sharing expenses must have a common purpose to fly to the same place for the same reason. For example, 3 COPAns hop in an SR22 and fly from Atlanta to New Orleans so they can all attend M17 (a worthy, and common purpose). Now, change the facts to: “*hey let’s post on Facebook that we are two pilots looking to fly to New Orleans on October 16*”

and need another passenger to split the cost”. A passenger responds: “Sure, I’ll pay 1/3 since I want to go to New Orleans to see my sister”. Rest assured, the FAA will find that your Facebook post, and the final passenger’s expense payment, to be lacking a “common purpose”. Since neither the pilot nor the aircraft was authorized to fly under Part 135, the FAA could declare that flight an illegal Air Taxi Operation.

Rideshare vs Flight Share

Uber? Lyft? AirPooler? FlyteNow? Two of these four companies are still in business. Two are not. The FAA put these and other flight sharing companies out of business by declaring their electronic bulletin boards (aka, websites) to be a violation of the “common purpose” doctrine. After losing at an NTSB Hearing before an Administrative Law Judge, FlyteNow appealed to the U.S. District Court, and ultimately to the U.S. Court of Appeals for the D.C. Circuit, before finally exhausting all practical remedies. In the Circuit Court’s decision, it was held: *“The common-purpose test has no bearing on whether compensation in the form of passengers’ expense sharing, together with holding out to the general public, tends to show that a private pilot is operating as a common carrier.”*²

In sum, before you accept one dime from a paying passenger, may sure you are compliant with both the letter and spirit of §61.113.

The Flight Company Department

A common ownership structure for aircraft is the Limited Liability Company. Often, the LLC “leases out” the aircraft to its members, which is sometimes another business entity that is its sole member. So far, so good. Leasing out the aircraft, and only the aircraft (aka, “dry”) is fine. Be careful about “leasing” an aircraft from a sole purpose entity that has no other real operations besides the aircraft. If the aircraft is provided “wet” (meaning with at least one crew member), the FAA will deem the LLC owner to be flight company department. Unless the LLC has a valid Part 135 Air Taxi Certificate, bad things will happen. In addition to the FAA certificate action against the pilot(s) and owners, the IRS will levy a 7.5% federal excise tax on all such flights.

How can LLC owners avoid this? With a two-part defense:

- 1) Make it crystal clear, in the form of a written lease, that the LLC is only leasing the aircraft “dry”. The LLC does not provide any crew, nor even suggest where the lessee should find them.
- 2) Ensure the lessee hires the pilot(s) and pays for them from a source different than the LLC.

As an example, ParentCo, Inc. is a tech business that forms SubsidCo Aviation, LLC to buy a Cirrus SR22. The LLC can lease the aircraft to the ParentCo, but ParentCo must hire the pilot and pay for the pilot (either as a staff pilot or as an independent contractor). Similarly, if one of ParentCo’s executives wants to fly the Cirrus for personal use, the executive must rent the plane and then either: a) pilot the aircraft themselves, if qualified to do so; or b) hire a pro pilot and pay for the pilot personally.

Keeping Out of Part 135

There are many mechanisms for pilots to share expenses, legally. Comply with both the letter and spirit of §61.113, and most FSDOs will leave you alone. However, if you charge too much, or don't have a common purpose with your passengers, it won't pass the smell test.

LLCs are a perfectly acceptable way to own an aircraft. Just remember to keep the aircraft rental completely separate from any pilot services, and you can avoid inadvertent flight into Part 135.

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¹ [https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/data/interps/2009/mangiamele%20-%20\(2009\)%20legal%20interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/data/interps/2009/mangiamele%20-%20(2009)%20legal%20interpretation.pdf)

² <https://www.cadc.uscourts.gov/internet/opinions.nsf/77E3D4B73DFDB22685257F1F005456E8/%24file/14-1168-1589331.pdf>