Control of Contract Pilots

By Kent S. Jackson

To the FAA, there are no independent contractors.

ON SEPT. 10, 2007, the FAA published a Legal Interpretation in response to a simple question from a contract pilot. The FAA answered more questions than the poor pilot asked, and raised new questions for the industry as a whole.

The Legal Interpretation begins by repeating a simple scenario that was the basis of the pilot’s query. An ATP and CFII, he said he was a self-employed contract pilot and flight instructor hired by Customer A to fly him and his law firm associates in As Bonanza. The pilot also flies a Cessna 421 to transport its owner, Customer B, a non-pilot. He bills both A and B monthly for his pilot services.

What the inquiring pilot wanted to know was if Customer A leased Customer B’s twin Bonanza to take employees on vacation, could the pilot fly it without violating Part 135 regulations, even though the passengers would not be charged, the lease payment would cover only direct operating costs and Customer A would be billed by the pilot for his pilot services.

Before answering the question, the FAA inserted, as “a preliminary matter,” the following warning: “When you fly A and A’s law firm employees on A’s aircraft, if A does not acknowledge that you are A’s direct employee or agent for the flight and does not acknowledge that A is liable for your actions or inactions, then A is not assuming operational control of the flight. Instead, it would appear that A has hired you for your aviation expertise to transport A and A’s law firm employees from point to point. As such, you would have operational control of this ‘compensation or hire’ flight. As such you would have to be certificated to conduct Part 135 operations.” And, it added, the same could be true when flying Customer B.

Ironically, the vast majority of “contract” pilots fly without any such formal agreement and those who do typically have an “independent contractor” document, which means they are not direct employees or agents. Usually these independent contractor contracts were not drawn to conduct illegal charter, but rather simply to avoid tax problems for their customers. However, this new interpretation from the FAA could have consequences that go beyond the contract pilot world.

The FAA is not simply saying that the company that hires a contract pilot must acknowledge operational control over company Part 91 flights. FAR Part 91.23 requires an operational control statement in leases for aircraft over 12,500 pounds MTOW. The FAA’s use of the term “agent” comes from the new Part 135 Operations Specification A008. But it did not originate there. Part 91.103 requires fractional aircraft owners acknowledge potential civil liability for having operational control over their flights.

For legal history buffs, the sequence went like this: (1) acknowledgement of operational control civil liability was imposed on fractional aircraft owners pursuant to an FAR, (2) this responsibility was extended to Part 91 operators in charter-management agreements through Opspec A008; and now (3) this responsibility was extended down to the Bonanza level of Part 91 operations through this formal FAA Legal Interpretation.

In responding to the contract pilot’s original question as to whether the proposed vacation flight would violate Part 135, the FAA Legal Interpretation goes into an analysis of why Part 91.501(b)(4) is inapplicable. Finally, the FAA got to the heart of the matter, addressing the question with this response: “If the lease is truly a dry lease for a vacation flight of Customer A’s employees, Customer A would have to understand that A is assuming operational control and responsibility for the operation of Customer B’s aircraft during the vacation flights.”

The FAA then (incorrectly) advised the contract pilot of the operational control clauses that must be included in a lease under Part 91.23. This regulation actually does not apply to a Cessna 421 since the aircraft has a gross takeoff weight of less than 12,500 pounds, but the fact that most inspectors (and even FAA attorneys) forget that distinction proves that smart pilots and operators will simply use the Part 91.23 language when operating any aircraft whether it is required or not.

The FAA goes on in the Interpretation to explain how this dry lease, that is a lease of an aircraft without crew, could become an illegal wet lease, cautioning, “if it appears from a pattern or from the evidence in a particular case that Customer B is acting in concert with you to furnish B’s aircraft, with you as the pilot, to others as a package, the operation or operations would be considered a ‘for hire’ wet lease operation.”

For years the FAA has warned contract pilots not to arrange a “transportation package” for customers through dry leases that didn’t give lessees any choice in selecting a pilot. But the message has now picked up a new twist, since the letter continued to caution that even when B does not provide the airplane and pilot as a package, if A “does not consider you its employee or its agent for the vacation flight and thus if A would not agree that it is liable for your acts or omissions during the flight, then you would be viewed as having ‘operational control.’” And, accordingly, would need a Part 135 certificate for “transporting other people or property for compensation or hire.”

Do all Part 91 operators understand that they have responsibility and civil liability for the actions of independent contractor pilots? Probably not. According to the FAA, pilots, and perhaps even management companies, must now make sure that Part 91 operators not only acknowledge operational control, but understand its implications as well.