Sharing Aircraft Under FAR Part 91...

... or staying clear of Part 134½

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FOR U.S. OPERATORS, CHARGING SOMEONE FOR A RIDE IN THE company jet is a subject thick with claims and counterclaims, ignorance and outright bad behavior. The arguments are old, but some of the consequences are new. Today, the Internal Revenue Service (IRS) may be more likely than the FAA to punish practitioners of any "Part 134½."

The straightforward options for sharing aircraft under Part 91 are time-sharing, joint ownership and interchange, which are defined in Part 91.501. The less-than-straightforward options are dry leasing your aircraft or "sharing the expenses" under Part 61.113.

The easiest way to share a corporate jet with another company or individual is a "time sharing agreement" under Part 91.501. Such an agreement is a lease of the aircraft with crew, but the reimbursement is limited to double the cost of fuel plus the flight-specific expenses. Because a time-sharing agreement is a lease, you must also comply with the "Truth in Leasing" notification requirements of Part 91.23.

Although time-sharing flights are conducted under Part 91, they are "commercial" for Federal Excise Tax purposes, so you must collect and remit the 7.5% FET plus segment fees on all time-sharing flights. And therein lies the rub: FET audits have become fierce battles. Now, even the most circumspect flight department that enters into a time-sharing agreement and remits the proper tax might well be repaid with an IRS audit of the entire operation.

If the new flying partner is going to be a regular user of the aircraft, and you want to avoid FET, you may want to consider a joint ownership agreement. Under Part 91.501(c)(3), "A 'joint ownership agreement' means an arrangement whereby one of the registered joint owners of an airplane employs and furnishes the flight crew for that airplane and each of the registered joint owners pays a share of the charge specified in the agreement."

"Registered" is the key to joint ownership. Sharing ownership of an LLC that in turn owns an aircraft is not registered joint ownership. Because of the simplicity of registered joint ownership from an FAA enforcement perspective (just look at the registration certificate), joint owners have great latitude in shaping the arrangement to meet their needs.

Part 91.501 also contains an interchange concept that is useful for some, but it comes with strings, and FET. Interchange is an hour-for-hour swap of airplane and crew that is primarily useful for smoothing out the occasional maintenance problem by swapping time with another flight department. The swap is subject to the commercial FET and Part 91.23 Truth in Leasing requirements.

Dry leasing is governed by Part 91 but is not defined in Part 91. Part 119.3 defines "Wet Lease" as "any leasing arrangement whereby a person agrees to provide an entire aircraft and at least one crewmember." The phrases "dry lease" and "wet lease" have nothing to do with fuel. If you lease your aircraft to another company and their pilots (not your pilots) fly the airplane, then you have a dry lease and you can charge whatever the market will bear. However, to the extent that any pilots employed by the lessor end up flying for the lessee, there may be FAA scrutiny to determine if the lessee truly has operational control, and IRS scrutiny to assess FET.

Sharing expenses is more of a myth than an option. Part 61.113(c) states that "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." Case law doctrine limits this even further, requiring that the pilot and passengers share a "common purpose" for the flight. Under this doctrine, if a pilot offers to fly passengers wherever they want to go, then the pilot cannot share the expenses of the flight.

If you don't like your Part 91 options, then explore your Part 135 options. Starting your own certificate may not be a timely solution, but there are still Part 135 operators who welcome corporate aircraft to their certificates. This is still the best option if a company wants its aircraft to earn income whenever the company isn't using it. Part 135 comes with FAA paperwork and oversight and possible IRS FET scrutiny. But there is no unlimited option for charging for flights under Part 91. The upside to Part 135 is that the jet can earn the going rate, flying for anyone, anytime. BCA