

State & Local Drone Laws

NO SUBSTITUTION FOR STRONG FEDERAL RULES



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With a legal background in corporate outside counsel, civil litigation, insurance defense, and intellectual property and drone/UAV law, Jeffrey began flying radio-controlled aircraft several years ago, which lead him to research new technologies, including first-person viewing (FPV) and drones.

In previous columns, I have discussed federal rules and laws that relate to aviation and drones in particular. This makes sense—after all, the Federal Aviation Administration (FAA) has been tasked with protecting the national airspace and regulating aviation. The FAA currently classifies drones as aircraft and, as readers of this column know, has asserted its authority over many operators.

However, a regulatory vacuum exists in two ways which poses a problem. First, regulations for drones have not yet been finalized. Although the FAA has recently announced that the rules will be final in June 2016, the question remains whether the drone operator program will be ready to implement at that time. Second, the lack of a cohesive, national policy for drones including privacy concerns and where drones are allowed to take off and land is prompting local and state authorities to propose, and in some cases, pass laws that affect drone users. There are serious questions that need to be answered regarding these local attempts at regulation, such as, are they valid? And are they good or bad for the public and the industry? Without having a national policy in place, we are risking having a mish-mash of laws that stifle the industry because of uncertainty of their validity, and we are also risking having the answers be provided through the inefficient process of litigation. Litigation is likely, in the author's opinion, because of the doctrine of federal preemption which this article will discuss below. And, we may not like the answers that litigation provides.

Hobbyist considerations

In Section 336 of the FAA Modernization and Reform Act of 2012, Congress prohibited the FAA from issuing rules or regulations for hobby or recreational use of small drones, though the FAA is authorized to use enforcement action against anyone using their drone when the flight endangers the safety of the national airspace system. However, state legislators and city council members are not directly bound by this mandate, and appear to be allowed to limit what properties may be used for drone takeoffs and landings, so long as there is a rational relationship between the limitation and a legitimate government interest.

Some states and cities have chosen to limit the places where an individual may operate a drone. New York City is considering a ban on civilian drone use within the city, due to safety concerns for uninvolved individuals if the drone should fall. (Consider that at a Memorial Day parade in Massachusetts, a drone operator lost control of his Phantom, which fell from the sky and landed on two

spectators. No one was injured, but that will not always be the case.)

In a similar vein, Chicago is considering adopting an ordinance that would require drone operators to obtain a permit from the Park District prior to flying in the city. Phoenix, Arizona, restricts model aircraft flight to specific parks in the city limits.

There are also laws that limit specific uses of drones. Illinois and Tennessee prohibit people from using a drone to interfere with hunters, and many states have considered, or have passed, laws prohibiting using drones to hunt wildlife.

Of course, privacy is a major concern across the country. Every state will have laws regarding nuisance and trespass that you should consider before taking your quadcopter out in the neighborhood. Some states are also considering modifying existing laws to make it clear they apply to drones as well. Colorado, for example, is considering criminalizing "drone trespass" and "drone harassment."

Law enforcement & government agencies

Many states and cities have laws that only apply to law enforcement or government agencies. Some states, such as Virginia, prohibit any law enforcement use of drones. Other states, including Florida, Iowa, and Montana, require police officers to obtain a search warrant before using an unmanned aircraft to collect evidence. Illinois also limits the amount of time this evidence may be stored. Wisconsin prohibits law enforcement agents from conducting drone surveillance where individuals have reasonable expectations of privacy. In addition to requiring a warrant for law enforcement use of drones, Oregon also requires any model aircraft used by public bodies to be registered with its state Department of Aviation.

Federal Preemption

It is important to remember that FAA regulations may trump, or preempt, local or state laws. That's because the Supremacy Clause of the Constitution makes federal law the supreme law in the United States. In practice, this means that local governments are allowed to pass laws and regulations as long as they do not conflict with federal law. If there is a conflict, though, federal law trumps the local law.

Often, federal law will act as a floor that states can be at, but cannot go under. For example, while the federal minimum wage is \$7.25, Missouri's minimum wage is \$7.65 and Oregon's is \$9.25. A state law authorizing a lower minimum wage would be preempted by the federal minimum wage.

When it comes to a system of regulations governing aviation, it has been recognized since the early 1900s

that a uniform regulatory system—rather than laws that vary from state to state—is necessary. Even when driving between states, without signs announcing border crossings, it can be difficult to tell where one ends and the next begins. This problem is magnified when traveling above the cloud level, with limited, or no, location markers.

No one doubts the FAA's authority to regulate unmanned aircraft operating in the national airspace system. Unfortunately, there is actually a regulatory vacuum due to the FAA's failure to enact a comprehensive regulatory plan. As a result, there are more questions than answers about what is legal, and the United States is severely behind most of the rest of the world when it comes to integrating unmanned aircraft into the national airspace system.

States cannot fill this vacuum. Some states are passing very limited laws over the areas they can control, but state authority is weak. For example, although a state may authorize a certain amount of funding to go to unmanned research, states are also required to follow the FAA's requirements of obtaining a Certificate of Waiver or Authorization (COA) to conduct that research. Local police departments may be authorized by their state to use

unmanned aircraft to collect evidence at crime scenes, but may not be able to actually do that because of FAA limitations.

This is true even when it comes to potentially lifesaving uses. Washington State's Department of Transportation (WDOT) conducted research in 2008—after obtaining the appropriate COA—on using unmanned aircraft to assist its snow avalanche control program. The WDOT quickly realized that the biggest barrier to effective use of the technology was the FAA's tight control over who can fly unmanned aircraft. Similarly, even though Henry County, Indiana's Office of Emergency Management applied for a COA in early 2014—recognizing that using manned aircraft for search and rescue applications was cost prohibitive and would not be included in the budget—it took the FAA over six months to give its approval.

Conclusion

State legislation is no substitute for a strong set of national rules. As I have advocated many times, federal regulation and a clear national policy is necessary to end the current state of limbo the United States commercial drone industry is in. ✈️

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Disclaimer: None of this article constitutes legal advice. Please consult an attorney if you have legal questions. Antonelli Law's associate attorney Amelija Niemi assisted Jeffrey Antonelli with this article. For a discussion on the history of the laws surrounding manned aviation in the United States, take a look at *Who Owns the Sky* by Stuart Banner, published by the Harvard University Press in 2008.