

2021 Aviation Legal Updates & Initiatives

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What has been happening in Aviation Law this year?

- * Actions by the Biden Administration
- * FAA personnel and office changes
- * NTSB personnel and office changes
- * New and continuing policies
 - * Compliance Program vs FAA hot buttons
 - * PBOR, FAA Order 2150.3C, draft Advisory Circulars, and Flight Training
- * Rule changes – Remote ID, over people, and at night; PRD
- * Cases of note
 - * NTSB cases, the few
 - * Federal courts
- * New legislation introduced in Congress

The Biden Administration

- * Took office January 20, 2021
- * Country-wide infrastructure is a focus, including airports
 - * Recent infrastructure plan - \$25B toward airports & \$5B for FAA
- * Appointed Pete Buttigieg as DOT Secretary whose focus is safety, equity, climate change, and economic security
- * Limited movement on political appointments related to aviation since taking office
 - * FAA Administrator Steve Dickson is still in a 5-year term
 - * Bradley Mims appointed as Deputy Administrator
 - * No appointed DOT General Counsel or FAA Chief Counsel
 - * John Putnam appointed as DOT Deputy General Counsel, now acting
 - * Shanetta Griffin appointed as Associate Administrator for Airports
 - * Winsome Lenfert returns to Deputy & Kevin Willis as Director of Compliance
- * No news of any proposed appointments in the pipeline

NTSB Personnel Movements and Updates

- * NTSB General Counsel Kathleen Silbaugh
- * NTSB Board Members Jennifer Homendy (Chairman), Bruce Landsberg (Vice Chair), Michael Graham, and Tom Chapman
 - * Robert Sumwalt retired from the Board on June 30, 2021
 - * 4 of the 5 member positions currently filled
- * Two new NTSB Administrative Law Judges – Darrell Fun and Alisa Tapia, both coming from the Social Security Administration
- * 2021-2022 Most Wanted List – additional & expanded flight monitoring devices and greater SMS requirements

FAA Personnel Movements

- * FAA Administrator Steve Dickson, sworn in on August 12, 2019
 - * Intends to stay until 2021, at President Biden's discretion
- * FAA Acting Chief Counsel Mark Bury and Acting Deputy Chief Counsel Lorelei Peter (after Arjun Garg's resignation in January)
 - * AGC-300 Assistant Chief Counsel for Enforcement – Cynthia Dominik (after Naomi Tsuda's retirement in December)
 - * Deputy Assistant Chief Counsel for Enforcement – Adam Runkel
 - * 7 Enforcement Teams nationwide reporting to Headquarters
 - * Northeast, Southern, Midwest, Southwest, Western, Alaska, Miramar)
- * FAA Acting Associate Administrator Chris Rocheleau
 - * Rick Domingo, Executive Director of Flight Standards
 - * Susan Northrup, Federal Air Surgeon
 - * Earl Lawrence, Executive Director Aircraft Certification
 - * Jay Merkle, Executive Director UAS Integration
- * FAA is still straight-lined from the field to Headquarters

FAA Policy Updates

- * Compliance Program
 - * 2015 to date, and across all FAA program offices, FAA Order 8000.373B
 - * Updated guidance into FAA Orders 2150.3C and 8900.1
- * Pilots Bill of Rights of 2012
 - * Substantially implemented but still outstanding items
- * Big change for industry – flight training constitutes operations for compensation or hire, specifically in limited, experimental, and primary category aircraft
 - * Court decision 4/2/2021, Federal Register Notice 7/12/2021
 - * LODAs and Exemptions to permit instruction going forward
 - * Industry fear of unintended (or intended?) consequences

FAA Policy Updates

- * Zero Tolerance for Unruly passengers
 - * Announced January 13, 2021
 - * Change 4 to Order 2150.3C – C&E Bulletin #2021-1
- * ASRS extended to UAS operators
 - * Advisory Circular 00-46E (4/2/2021)
- * Drone Advisory Committee – 12 new members
- * Draft Advisory Circulars – opportunity to comment
- * FAA Hot Buttons
 - * Still illegal charter, drug & alcohol testing violations, and intentional falsification

Rules and other changes

- * Drones/UAS
 - * Remote Identification of Unmanned Aircraft, 86 F.R. 4390 (January 15, 2021) – pending review in the D.C. Circuit
 - * Operation of Small Unmanned Aircraft Systems Over People [and at Night], 86 F.R. 4314 (January 15, 2021)
 - * Next and continuing steps to integrate UAS into NAS
- * Pilot Records Database, 86 F.R. 31006 (June 10, 2021) in compliance with statutory requirements
 - * A continuing build on PRIA from 1996
 - * Electronic data system managed by FAA
 - * The sharing of pilot records with input and access by air carriers and operators, including flight departments and fractional companies
 - * Effective August 9, 2021 with phase in extended out to 2024

Enforcement Case Precedent in 2021

- * NTSB cases are being decided
 - * General Counsel's office is staffed up
 - * Seemingly same triage for handling and deciding: emergency, emergency waived, medical denials, suspensions – but definitely not absolute
 - * In 2021, 13 decisions are showing on the NTSB website: 7 were essentially administrative and 6 were decisions on the merits
- * Pham, EA-5889 (1/4/2021)
- * Knight, EA-5892 (3/10/2021)
- * Antonellis, EA-5896 (5/24/2021)
- * Newman EA-5898 (5/27/2021)
- * Kalpin, EA 5899 (6/14/2021)
- * Gendron, EA-5901 (7/2/2021)

NTSB Decisions in Sum

- * Drug testing violations (revocation): Kalpin, Pham, Knight, & Antonellis
 - * Kalpin – EOR fast track; FAA does not bear the burden of proving test was random & missing collector information is de minimus procedural violation; credibility
 - * Pham – EOR fast track based on alleged refusal in leaving; Board found collector's instructions confusing & reduced to 180 day suspension; cross appeals in D.C. Circuit
 - * Knight – Test 8/2016; EOR 12/2016; ALJ decision 10/2017; Briefing 1/2018; Board decision 3/2021; paruresis is a psychological condition that must have previously been documented, not a physiological condition and therefore ascertainable medical explanation
 - * Antonellis – Test 2/2017; EOR 4/2017; ALJ decision 8/2017; Briefing 12/2017; Board decision 5/2021; refusal based on leaving upheld on credibility
- * Intentional falsification (revocation): Newman – Traffic stop in 2011 not disclosed on 2014 and 2016 applications; subsequent second stop 2017 and reported in 2018; credibility but no mention or explanation for passage of time
- * Improper maintenance (suspension): Gendron - Ramp inspection 2/2016; Order 6/2017; ALJ decision 5/2018; Briefing 9/2018; Board decision 7/2021 - Issues of failure to respond to discovery and last minute change of counsel - Credited FAA witnesses and experts over Respondent

Enforcement Case Precedent in 2021 In the Courts of Appeals

- * Fullerton v. FAA, No. 20-3402 (6th Cir. 1/4/2021) – credibility determination over identification of aircraft and pilot; Court holds substantial evidence to support Board decision even though another plausible explanation would be supported
- * Warbird Adventures, Inc. et al. v. FAA, No. 20-1291 (D.C.Cir. 4/2/2021) (unpub) – paid flight training carries a student for compensation which is not permitted in limited category aircraft
- * Bradshaw v. FAA, No. 18-14249 (11th Cir. 2021) – FAA designees do not have a property or liberty interest in their designation; judicial review is limited to internal review process conducted
- * Rojas v. FAA, No. 17-55036 (9th Cir. 3/2/2021) – Consultant documents prepared as if an employee protected against FOIA disclosure as intra-agency memoranda

2021 Legislative Efforts

- * Infrastructure Bill
- * Certainty for General Aviation Pilots Act – S. 2458 & H.R. 4645
 - * Preserves historical treatment of flight instruction
- * Promoting the Launch of Aviation’s Next Era (the PLANE Act) – S. 2453: Ensures de novo review by district courts, and liability protection for designees
- * Hangars Accelerate National Growth and Regional Stability (HANGARS) Act – S. 2459: \$1B in aircraft hangar improvements
- * National Center for the Advancement of Aviation Act – S. 1752
- * Aviation Empowerment Act – S. 1118: flight sharing
- * Also, aerial mobility, job protection, sustainable aviation fuel

Thank you for the invitation
and your attention

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