Drones: Coming Soon to Your Municipal Air-Space

BY WILLIAM C. CONNOR, ATTORNEY AT LAW, P.C.

AN INDUSTRY TAKING OFF

"Secret Service Arrests Man after Drone Flies Near White House," NYTimes, Michael S. Schmidt, May 14, 2015. *"Government Employee Piloted Drone That Crashed at the White House,"* David Jackson and Bart Jansen, USA TODAY, Jan. 26, 2015. "A passenger jet approaching LaGuardia airport in New York was forced to swerve at 2,700 feet after it nearly collided with a drone." (*"New York Bound Plane Nearly Collides with Drone,"* Telegraph, David Lawler, May 29, 2015, telegraph.co.uk/news)

These are just a few of the increasing number of headlines involving drone mishaps. Such near misses and mishaps are on the increase and with them the increased chance of litigation and certainly increased regulation. The Washington Post reports that "since June 1, commercial airlines, private pilots, and air-traffic controllers have alerted the FAA to 25 episodes in which small drones came within a few seconds or a few feet of crashing into much larger aircraft, the records show." (*"Near-Collisions Between Drones, Airliners Surge, New FAA Reports Show,"* Craig Whitlock, Washingtonpost.com, Nov. 26, 2014. www.washingtonpost.com/wp-srv/special/national/faa-drones/)

Drones are not new. In various places around the world, drones have been in use for several years. They are being used to deliver packages, spray fertilizer and pesticides on crops, take images of real estate properties, for mapping purposes, searches, mining, law enforcement, and much more. In Illinois, the state police are now using drones to photograph traffic accident sites in order to clear traffic more quickly. A spokesman for the State Police Department said that they were "intentionally avoiding the word 'drone' because 'it carries the perception of pre-programmed or automatic flight patterns and random, indiscriminate collection of images and information.'" (*"Illinois State Police Will Fly 'Unmanned Aircraft' Not Drones,"* arstechnica.com/tech-policy/2015/05/). Illinois' Freedom from Drone Surveillance Act prohibits using drones to collect information except in the cases of a high risk of terrorist attack, in conjunction with a search warrant, probable cause that would require quick action, finding a missing person, or photographing the scene of a crime or traffic accident. (*"15 States Have Drone Privacy Laws And More Are On The Way,"* Timothy Kidwell, Drone360, Special 2015, p. 50) While drones can be found hard at work around the globe, the industry in the United States is just starting to take off.

According to Fortune online, the drone industry is currently a 2.5 billion dollar a year industry. Experts are predicting that the unmanned aircraft (UA) industry will grow to 25 billion dollars in just the next five years. The FAA estimates that within the next 20 years there will be 30,000 unmanned aircraft (drones) in operation around the country. The price of commercial drones is already dropping to very affordable rates. The Wall Street Journal reports that "SZ DJI Technology Co. has become the world's biggest consumer drone maker by revenue, selling thousands of its 2.8-pound, square-foot devices (DJI Phantoms) for about $1,000 each . . . The DJI Phantom series is like the Model T." (*"Who Builds the World's Most Popular Drones?,"* Jack Nicas and Colum Murphy, wsj.com, Nov. 10, 2014)

REGULATIONS SLOW IN COMING

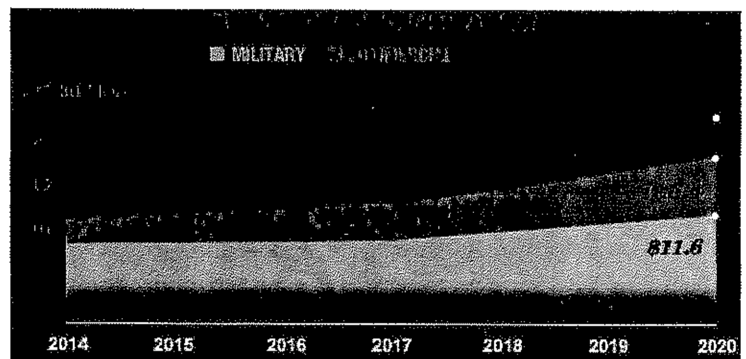

Chart Source: Frost & Sullivan

This new industry is also bringing with it a host of questions and disputes that will need to be regulated and litigated as federal, state, and local governments work to reconcile the

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growing use of drones by both government and private business with the interests and responsibilities to maintain the health, safety, and privacy of citizens and residents.

The FAA defines an Unmanned Aircraft (UA) as the flying portion of an Unmanned Aircraft System (UAS). The system includes the control station, data links, telemetry, communications, and navigation equipment, etc. There are three different types of UAS in operation.

1. Public (Government)
2. Civil (Non Government)
3. Model Aircraft (hobby or recreation)

(https://www.faa.gov/uas)

How can drones be used? Where and when can they fly? How are they to be controlled? What safety systems should be included in the technology of a drone? Where should launching and landing areas be located for commercial use? What are the rules of the road? How high or low can they fly? How loud can they be? What information can they collect and what are the rules for storing such information? These are just a few of the questions that require answers. But given the complexity of the issues involved and the creativity of the marketplace, it is clear that these answers cannot all come from the same single source like the federal government.

In November of 2014, the National Transportation Safety Board held (in *Huerta FAA Administrator V. Pirker,* CP-217) that drones are "aircraft" as defined under federal statutes and regulations. As such, Federal Aircraft Regulation 91.13, written for larger manned aircraft applies to drones. This regulation states that "no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." The FAA has proposed some new regulations. "The proposed new regulations would apply to all UAVs that are 55 pounds or less. Drone flight would be limited to daylight hours, at altitudes below 500 feet, and at speeds not to exceed 100 mph. Drones would also need to operate away from people (unless they are directly involved in the flight) and within the pilot's line of sight. . . Lastly, commercial drone operators would need to be at least 17 years old, take a FAA-administered knowledge test and pass a Transportation Security Administration security check." *("FAA Releases Proposed Drone Regulations,"* Drones360, Special 2015, p. 11) Other than this one ruling and the FAA's proposed regulation, there is no federal statute that applies to drones.

Only about half the states have considered legislation regarding the operation of drones and only about ten had enacted some sort of legislation by the end of 2014. Illinois was one of those states. It enacted 725 ILCS 167, the *"Freed From Drone Surveillance Act."* This Act regulates the use of drones in law enforcement by regulating how and when they can be used and how long the data collected by the drones can be stored.

EXPECT A LITTLE LESS OF EXPECTATION OF PRIVACY

Chief among the concerns is the right of privacy. The courts have held that the Fourth Amendment guarantees a reasonable expectation of privacy, which includes a person's home. The Illinois Supreme Court pointed this out in *People v. Pitman*, (211 Ill. 2d 502; 813 N.E.2d 93; 2004). The court wrote, "Thus, Fourth Amendment, protection extends to a home's curtilage, *i.e.*, the land immediately surrounding and associated with the home." (516)

In 2009 a Pennsylvania couple filed suit against Google Inc. (*Boring v. Google*, 58 F. Supp. 2d 695 (W.D. Pa. 2009). The Borings brought claims for invasion of privacy, trespass, and other counts as a result of Google's "Street View" program. The Borings alleged that their residence was only accessible by a road marked with "private" and "no trespassing" signs, yet Google entered their property and took pictures of their home. The case was dismissed, but the U.S. Third Court of Appeals (*Boring v. Google, Inc.,* United States Court of Appeal 3rd Circuit, 09-2350 (January 28, 2010)) reinstated the claim for trespass because the Google vehicle may have entered the Boring's driveway. With the drone technology of today, the same picture might possibly be taken from a safe enough distance without trespassing. This means that property owners who once had an extra measure of privacy due to private drives, distance from a public thoroughfare, and landscaping may have to get used to the idea that in the age of drones, they have less privacy in and around their homes.

State v. Walton, 133 Haw. 66 (2014) was a criminal case taken up by the Supreme Court of Hawaii. In regard to the expectation of privacy, the court raised the question. "Soon and inevitably to come are overflights by drones — will they be too numerous in number to sustain a claim of any expectation of privacy?" (footnote 27). In other words, once drones become common place, can a residence continue to hold a reasonable expectation of privacy while in their back yards as drones fly by? In another case, *Chapdelaine v. Duncan*, 2014 BL 349464, 17 (Conn. Super. Ct, Oct. 28 2014) the court observed that surveillance is ready for an "exponential expansion" by the introduction of drone technology. The fact is drones hold the very real possibility of changing our fundamental expectation of privacy in regard to the space around our own homes.

But when it comes to privacy there are three areas of law that can act as a foundation for drone regulation.

1. Private Property Laws – non-governmental intrusions of trespass (e.g., flying into people's backyards and snooping around)

2. State Privacy Laws – "Peeping Tom" laws, the recording of images, and privacy torts (e.g., using a drone to look into homes and record non-public images)
3. Civil and Criminal Laws that specifically block unwanted aerial surveillance from privately owned manned or unmanned aircraft. (e.g., using drones to conduct surveillance in places where people have a "reasonable expectation of privacy")

(*"The Future of Drones: Sky-High Hopes vs. Regulatory Realities, Denise Chow,"* livescience.com, April, 14, 2014)

TRADITIONAL LOCAL TOOLS

"There have been relatively few legislative proposals to regulate the domestic use of unmanned aircraft systems (UAS) at the county or municipal levels. Almost all of the existing proposals have been drafted specifically to address privacy concerns regarding the use of UAS by public employees, and most of the existing proposals simply ban UAS from airspace above the regulated locality. Notably, the cities of Charlottesville, VA and St. Bonifacius, MN have each passed resolutions restricting the use of UAS." (*"Domesticating the Drone, INSCT, Syracuse University,"* http://uavs.insct.org/local-regulation) Likewise, the City of Evanston, Illinois passed resolution 27-R-13 placing a moratorium on the use of unregulated drone technology within the city limits.

But local governments can and will do more than simply ban the use of drones within their jurisdictions. They have powers to regulate certain aspects of the industry in order to ensure the health, safety, and privacy of their residents. On the other side of the issue, prospective drone entrepreneurs will need to be aware of the developing regulations at the federal, state, and local level. Local governments can create drone-friendly zones to encourage commercial activity along those lines. Local governments can regulate the use of drones in at least three ways:

1. They can regulate their own municipal use.
2. They can regulate the private use of drones and, where violations occur, prosecute violators in order to protect privacy and abate nuisance.
3. Municipalities can also enact zoning ordinances in order to regulate businesses within their jurisdiction that operate drones, providing for and restricting where drones may be launched, landed, and operated.
4. A municipality can regulate and issue licenses for occupations and businesses for the sake of fire protection and public health and safety. (*Father Basil's Lodge, Inc. v. Chicago*, 393 Ill. 246, 253-254, 1946)

THE FUTURE IS HERE

In light of the many unresolved legal issues, some municipalities have begun to pass their own ordinances in order to protect the health, safety, privacy, and quality of life of their residents. The industry and technology are advancing quickly. If local governments are going to benefit from this new industry and head off problems that pose a threat to the health, safety, and privacy of their residents, they need to enact reasonable regulations before the first commercial unmanned aircraft takes off and lands within the city limits.

On the other side of the issue, the use of drones, it seems, is limited only by our own imaginations and regulations. Anyone seeking to start a drone business will need expert legal advice to help minimize risk and navigate the evolving regulatory landscape. Otherwise their new business venture may never get off the ground.

Changes to Wage Payment and Collection Act

BY SUSAN GLOVER AND RACHEL LUTNER, ROBBINS SCHWARTZ

In August 2014, the Illinois Department of Labor ("IDOL") adopted new regulations which significantly broaden the IDOL's reach under the Illinois Wage Payment and Collection Act ("IWPCA"). The new regulations went into effect without a press release or announcement about how the major changes will impact Illinois employers.

The IWPCA governs when, where, how, and how often employers must pay wages, including bonuses, vacation, and final compensation. Employees who believe they have been unlawfully denied wages may file claims against their employer with IDOL.

EMPLOYERS MUST TRACK EXEMPT EMPLOYEES' HOURS

The most surprising and counter-intuitive amendment is the completely new requirement that:

> Regardless of an employee's status as . . . an exempt administrative employee, executive or professional, every employer shall make and maintain . . . records for each employee: [of] . . . the hours worked each day in each work week . . .

56 Ill. Adm. Code ("IAC") 300.630.

Most employers (and exempt employees) will find the new requirement that they record exempt employees' hours "each day in each workweek" a culture shock. Prior to this regulation, neither Illinois nor federal law required this. Now these records must be created and kept for all employees for 3 years. There is no penalty for violating this directive, but the lack of records will mean that an employee, about whom such records do not exist, will prevail in a wage claim. These changes signal IDOL's plans to assist misclassified workers (employees classified as exempt but whose jobs render them nonexempt) recover unpaid (and untracked) overtime.

NEW REGULATIONS IMPACT EMPLOYERS' DAILY OPERATIONS

The amendments prohibit employers from insisting that employees accept payment via direct deposit or payroll card. 56 IAC 300.600. Employees may demand wages via check or cash, and if cash is given, the employer must keep a receipt signed by the employee. Section 4 of the IWPCA requires that wages are paid in "lawful money . . . by check . . . by deposit of funds . . ., or by a payroll card," and permits other arrangements pursuant to "a valid collective bargaining agreement." Thus, employers that pay wages via direct deposit or payroll card pursuant to a collective bargaining agreement may continue to do so.

The new regulations bar "use it or lose it" vacation policies: "An employer cannot effectuate a forfeiture of earned vacation by a written employment policy or practice. . . ." 56 IAC 300.520. To cap time off, vacation policies must be revised so vacation **ceases to accrue** after an employee's unused days reach a certain amount.

IDOL will now enforce unwritten, vague, non-contractual "agreements" between employers and employees. 56 IAC 300.450. Under the new regulations, "agreements" can exist despite an employer's best efforts to prevent them:

> "Agreement" means the manifestation of mutual assent on the part of two or more persons. An agreement is broader than a contract and an exchange of promises . . . is not required . . . An agreement may be reached . . . without the formalities . . . of a contract and may be manifested by words or . . . conduct, such as past practice. Company policies and policies in a handbook create an agreement even when the handbook or policy contains a . . . provision disclaiming the handbook from being an employment contract . . . or an enforceable contract. While a disclaimer may preclude a contract . . . it does not preclude an agreement . . . relating to compensation . . . .

Illinois law has long been that a disclaimer in a policy manual or handbook will eliminate the possibility that policy language creates an enforceable agreement. The new regulation changes that expectation for matters covered by the IWPCA.

NEW RECORDKEEPING AND NOTICE REQUIREMENTS

Employers must now notify all employees of their rate of pay when they are hired in writing "whenever possible." 56 IAC 300.630. When pay rates change, affected employees must be told in writing "unless impossible." Publication of wage rates in a collective bargaining agreement or ordinance probably won't satisfy this requirement unless every bargaining unit member receives a paper copy of the new contract and the salary schedule each time wage rates change.