

National Companies Considering Commercial Drones Must Consider State Privacy Laws

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On Feb. 15, the Federal Aviation

Administration proposed a regulatory framework applicable to small commercial drones, or unmanned aircraft systems, meaning those weighing less than 55 pounds.¹ The comment period on this proposed framework has closed, but it could be months before the FAA promulgates final rules. Because of this delay, U.S. Sens. Cory Booker, D-N.J., and John Hoeven, R-N.D., introduced the Commercial UAS Modernization Act, which would help to bridge the gap until final FAA regulations take effect. In its current form, the proposed legislation would impose additional, immediate requirements upon those who want to use and test drones for commercial purposes, such as establishing interim guidelines that they must follow. It also sets up a reasonable framework for registration and use of UAS for commercial purposes.² Any company considering the commercial use of drones in the United States will need to adhere to the eventual FAA regulations and possibly the senators' proposed law. Those operating in more than one state, however, must also consider the impact of state privacy laws to protect themselves from potentially unforeseen liability. Many states have already enacted privacy laws that implicate drone operation, some of which expressly apply to the operation of unmanned aircraft. Anyone interested in operating drones throughout the U.S. should take note of these applicable, but potentially overlooked statutes. This commentary

highlights just some of the differences in states that have not enacted drone- specific legislation and others that have, such as California, Florida and Texas. It is important to remember that there are 50 state legislatures, as well as the District of Columbia that have acted, or could act, in this area. Thus, this commentary is intended as a “drone’s eye view” of the applicable legislation and is not all-encompassing. For state-specific or application-specific questions, companies should review the individual state’s privacy laws to determine whether those laws expressly or impliedly affect the company’s intended drone operations. **COMMON LAW OR DRONE-SPECIFIC STATUTE?** New York has yet to enact a drone-specific privacy law, although multiple proposals have been introduced. This does not mean, however, that there is no restraint on commercial drone use under the state’s law. Rather, a company considering drone use in New York must review the state’s common law torts jurisprudence, as well as other areas of law involving privacy issues before implementing a drone policy. Similar to New York, California has not enacted any drone-specific legislation, but it did expand its existing privacy law to apply to “any device,” thus ensuring that drones fall within its ambit.³ In contrast, Florida enacted a drone-specific bill, which Republican Gov. Rick Scott signed into law May 18, expanding the state’s Freedom from Unwarranted Surveillance Act.⁴ That law originally applied only to law enforcement, but was recently expanded to apply to private actors. Texas also enacted a drone-specific law. It was one of the first states to do so, and the law took effect Sept. 1, 2013.⁵ Understanding the extent of each state’s prohibitions is key to an effective drone policy. **CALIFORNIA** California Civil Code Section 1708.8(b) prohibits using a drone “in a manner that is offensive to a reasonable person” to capture or attempt to capture “any type of visual image, sound recording or other physical impression” of a person “engaging in a private, personal or familial activity.” It does not matter if the device actually trespassed on the person’s land if it captured an image, sound recording or other physical impression that would otherwise require a physical trespass. So long as a person has a reasonable expectation of privacy based on the circumstances, a “private, personal or familial activity” that a drone may not capture includes:

- Intimate details of an individual’s personal life.
- Interaction with the individual’s family or significant others.
- Any activity that occurs on residential property.
- Other aspects of private affairs or concerns.

California provides for treble damages, as well as punitive damages and a civil fine, where the surveillance was conducted for financial gain. However, California law does not specifically provide for attorney fees and costs. **FLORIDA** In contrast to California’s law, Florida’s statute prohibits the infringement of a reasonable expectation of privacy through surveillance, which is defined in terms of individuals on privately owned real property and the property itself. With respect to individuals on privately owned real property, surveillance means the observation of such individuals with sufficient visual clarity to be able to obtain information about their identity, habits, conduct, movements or whereabouts. With respect to privately owned real property, surveillance means the observation of

such property's physical improvements with sufficient visual clarity to be able to determine unique identifying features or its occupancy by one or more persons. Among other exemptions, Florida's law also explicitly creates a blanket exception for any business or profession licensed by the state — provided that the surveillance is reasonably “within the scope of practice or activities permitted under such person's or entity's license.” The Florida statute provides for compensatory damages and punitive damages if certain criteria are met. Additionally, Florida provides that the prevailing party (including the defendant) is entitled to attorney fees, or, in some cases, double attorney fees, if the action is tried to a verdict. **TEXAS** Unlike in Florida, Texas's statute, which broadly states that it is unlawful to intentionally “conduct surveillance on the individual or property captured in the image,” fails to define what surveillance is — thereby potentially banning all conduct that is not specifically permitted. In other words, under Texas law, many, if not all, uses of imaging devices in connection with drone operations are illegal, unless and until the legislature creates a specific exemption. Texas enumerates at least 19 specific exemptions, including for real estate brokers, oil pipelines and rig inspections, and in cases where consent is given. Presumably, under Texas law, a company such as an insurer could include a consent provision in its claims forms to obtain permission to use drones in the adjusting process. Other companies considering drone operation should examine the applicable exemptions to determine whether they may similarly avail themselves of a favorable exception. The Texas law provides for civil penalties of \$5,000 or \$10,000, depending upon how the image is used, or for actual damages if the plaintiff can prove malice. Texas also allows the prevailing party to recover attorney fees. **NAVIGATING THE STATE LAWS** The language disparities between the several states' laws are of particular importance in formulating any commercial drone policy. With regard to the California statute, a company must attempt to determine what is offensive to a reasonable person. Under the Florida law, a company must try to articulate what is reasonably related to the scope of its licensed business practice. To a litigator, these questions and this phrasing represent an explicit invitation from state legislatures to avoid summary judgment, as these will be questions of fact that may not be easily determined at the outset of any case. The penalties for violating the statutes are particularly significant, especially because of the stark differences among each state. All three states provide for injunctive relief, though any injunctive relief is governed by each state's case law. While California provides for a civil fine, Texas actually criminalizes unlawful drone surveillance. Interestingly, Texas provides a defense to prosecution where the image is destroyed as soon as the person knows the image was captured in violation of the law. Florida provides only a civil remedy. There are many other differences among the California, Florida and Texas laws, but these examples provide insight into just how distinct these privacy laws are, and will continue to be, as more states enact legislation that impacts drone operation. Further, in states like New York, which have yet to enact a drone-specific privacy law, a much more extensive review must be undertaken to ensure that the relevant conduct is not prohibited by any blanket privacy law or common law tort doctrine. **FEDERALISM** Most importantly, any company considering commercial drone use must remember that states may have limited ability to regulate drone use. For example, states may be required to defer to FAA regulations in defining the altitudinal bounds of property ownership. This consideration may prove critical for states that couch their drone privacy laws in

terms of trespass, because flying a drone high above another's property may still constitute a trespass upon that person's property. An understanding of this and other interactions between state and federal law is necessary to an effective drone policy. Finally, the legislation recently introduced by Booker and Hoeven would require UAS operators to provide an attestation that they maintain liability insurance coverage on their drones. While some insurers have begun to offer specialty drone insurance, a company must consider whether individual state laws and regulations would allow blanket liability policies to cover drones where the policies were in place prior to the drone use. Just as drones can be purchased on the internet in every shape, size and price, there is no one-size-fits-all approach to establishing an internal commercial drone policy. A company that uses drones could expose itself to substantial liability under various state statutes if it fails to pay careful attention to certain laws that, when enacted, did not contemplate the proliferation of drone activity on such a massive scale. Thus, companies must consider these laws before their first drone takes flight, and continually monitor the law as it evolves. **NOTES**

1. For more information, see [FAA Proposes Framework of Regulations For Small-Scale Commercial Drones](#), 33 Westlaw J. Aviation 1, 33 no. 3 WJAViA 1 (Apr. 8, 2015).
2. Press Release, U.S. Sen. Cory Booker, [Booker and Hoeven introduce legislation to Support Commercial Drone Innovation](#) (May 12, 2015).
3. Cal. Civ. Code § 1708.8.
4. Fla. Stat. 934.50.
5. Tex. Gov't Code Ann. § 423.001 (Vernon's)

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