Legal Update Article

Manufacturer Operations and Workplace Safety in the Age of Drones

By Robert Frederick Seidler &

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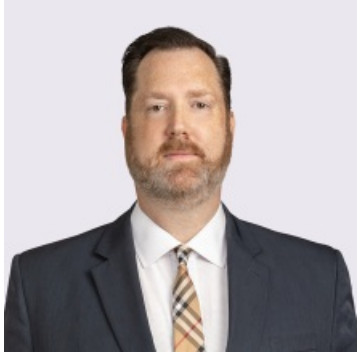

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A rise in more flexible Unmanned Aircraft Systems (UAS or "drones") use as rules are relaxed and expanded could lead to operational and workplace safety changes in the manufacturing industry.

The Federal Aviation Administration's (FAA) final rule expanding the circumstances in which drone operations may be conducted over people, over moving vehicles, and at night is set to go into effect on April 21, 2021. The rule may open the door to manufacturers expanding internal implementation of drone technology to simplify inspections and streamline processes, as well as the Occupational Safety and Health Administration (OSHA) increasing the use of drones as an enforcement tool for workplace safety in the manufacturing setting. Manufacturers must stay abreast of developments in drone regulations to balance workplace safety and productivity with issues of privacy and security.

On December 28, 2020, the FAA announced a final rule, Operation of Small Unmanned Aircraft Systems Over People, which permits expanded routine operations of drones over people without waiver or exemption under certain circumstances. This rule expands operators' ability to fly drones over people, provided that such operations meet the requirements of one of four operational categories. The first three operational categories are based on the risk of injury that drones pose to people on the ground. The last category is based on the airworthiness certificate of the drones. The effective date of the FAA's final rule has been delayed until April 21, 2021, in accordance with the Biden administration's regulatory freeze.

In the wake of UAS flexibility, deployment of internal manufacturer drones could increase. In recent years, the manufacturing industry has seen a steady rise in the use of drone technology. Drones offer manufacturers increased productivity and access to data otherwise deemed too dangerous or difficult to obtain. For example, manufacturers use drones for asset monitoring in production by capturing thermal images of lines and machinery to detect temperature changes, which signal for quick and proactive action when equipment is too hot. In addition, manufacturers leverage drones to swiftly perform inventory checks and transport parts across plants for delivery. With the FAA's more flexible rule, the operational possibilities for drone use by manufacturers will only expand. Nevertheless, manufacturers should be attentive of employee privacy and safety concerns with drones flying overhead by establishing sound drone policies, procedures, and training prior to deployment.

In addition, deployment of OSHA drones for safety inspections could increase in the manufacturing setting with the FAA's final rule. In May 2018, OSHA released a memorandum permitting the use of UAS during OSHA inspections and *only* with an employer's express consent. OSHA is exploring the option of filing an application for a Blank Public Certificate of Authorization from the FAA for nationwide drone operations.

However, currently, each of OSHA's 10 regions must appoint a UAS program manager to institute the drone program in compliance with 14 CFR part 107, Small Unmanned Aircraft Systems. Among other things, OSHA inspections must comply with the "plain sight rule," which allows the scope of an inspection to expand if additional violations are observed in plain view. However, a drone's plain view overhead a facility is vastly different, and arguably clearer, and certainly broader than that of an inspector on foot. While the use of drones promises faster and more effective workplace inspections, the practice also could compromise operations or specialized equipment that constitute manufacturers' trade secrets.

Despite the FAA's expanded rule, to date, no regulation has been issued requiring employers to consent to an OSHA drone inspection. Nevertheless, the FAA's final rule could encourage OSHA to update its drone policy to increase regular drone use during inspections — possibly even without employer consent. Given manufacturing facilities' typically larger area and ceiling clearance, it is more likely OSHA will seek to use drone inspections in manufacturers' facilities than other types of employers'. Therefore, manufacturers must remain alert to protecting their rights in the wake of aerial drone inspections.

Jackson Lewis attorneys are available to answer questions on or provide assistance with workplace safety and health matters, manufacturing and other industries, and OSHA and other safety agency compliance investigation and enforcement actions. Please contact a member of the Jackson Lewis Workplace Safety and Health practice or the Jackson Lewis attorney with whom you regularly work.