

Client Alert

October 15, 2015

Friendly Skies in California After Governor Brown Vetoes Drone Restrictions, Federal Response Uncertain

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Iconic California tech companies are helping to pioneer the drone revolution. For over a year, Google's advanced-research arm, Google X, has been testing its Project Wing aircraft in cooperation with NASA, moving ever-closer to its goal of deploying a fleet of drones to deliver goods to customers. Elsewhere, Amazon, another tech giant, is building its own drone program, Prime Air, "a future delivery system from Amazon designed to safely get packages into customers' hands in 30 minutes or less using small unmanned aerial vehicles." But drones are not the exclusive province of tech giants. Countless startups with their eyes to the sky are adapting drone technology to many industries. And California has emerged as the launching point.

California Governor Jerry Brown has long supported technological innovation. In 2012, for instance, he signed legislation that opened the door for testing autonomous vehicles in California. So it should come as no surprise that Governor Brown considered bills to regulate drones with a critical eye following the recently concluded legislative session.

SB 142 would have prohibited flying a drone below 350 feet unless the operator obtained express permission from the owners of property under the drone's flight path. Proposed by Hannah-Beth Jackson, D-Santa Barbara, the bill was meant to address privacy concerns. The Governor vetoed it, explaining that "[t]his bill. . .while well-intentioned, could expose the occasional hobbyist and the FAA-approved commercial user alike to burdensome litigation. . .Before we go down that path, let's look at this more carefully." Brown's veto turned away a significant threat to California's leading role in the drone revolution.

Governor Brown also vetoed SB 168, which would have protected emergency responders from interference by drones when performing their duties. Ted Gaines, R-El Dorado, introduced the bill because drones have been increasingly present at wildfires across California this year, in some cases hindering emergency operations. The proposed law would have granted emergency responders immunity for damaging or destroying drones to remove them from the air. It would also subject drone operators to fines of up to \$5,000 and six months in jail.

The one drone regulation bill approved by the Governor is intended to protect individuals from hi-tech paparazzi. AB 856 proposed by Ian Calderon, D-Whitter, effectively amends the definition of "physical invasion of privacy" to cover instances in which paparazzi send drones into the air above someone's land in order to capture photo or video.

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STATE AND LOCAL AIRSPACE

SB 142 would have represented one of the more restrictive approaches to the operation of drones in the United States. Forty-five states have considered 164 bills regulating drone operations, but often these regulatory measures aim to limit the use of drones for surveillance, rather than limiting drone flight altogether. Florida, for example, prohibits a drone operator from capturing images of privately owned property without permission. Texas prohibits drones from flying over critical infrastructure facilities but, at the same time, expressly allows individuals in certain professions to capture images used in those professions as long as no individual is identifiable in the image.

Some states have also passed regulations prescribing how government agencies may use drones, including law-enforcement agencies. Virginia's HB 2125, entitled "Use of unmanned aircraft systems; search warrant required," includes an "absolute prohibition on the use of unmanned aircraft systems by such law-enforcement and regulatory entities unless a search warrant has been obtained prior to such use." New Jersey's similar bill not only would require government agencies to obtain a warrant prior to drone use in law enforcement, but also mandates that any data collected by the drone be deleted within two weeks of its collection.

KEEP YOUR EYES PEELED

Despite Governor Brown's vetoes and a flurry of activity in state legislatures, the future of drone regulation could be largely determined by federal lawmakers. The law applicable to drone operations depends, to a significant extent, on whether the anticipated regulations from the FAA "preempt" state and local authority.

Drone manufacturers, suppliers, and operators want uniform federal standards for operations, rather than a state-to-state crazy quilt. For this reason, many have called for inclusion of an "express preemption clause" in the ongoing FAA rulemaking for small Unmanned Air Systems to foreclose state and local governments from enforcing conflicting laws. Absent an express preemption provision in the final rules, state and local regulation is not foreclosed but would instead be analyzed under existing conflict preemption principles on a case-by-case basis. Because courts have often held that state regulation of traditional aircraft in the area of safety and operations is preempted by federal regulation, it would not be surprising if courts find that final federal regulations preempt at least some state laws in this area even in the absence of an express preemption provision.

The FAA has yet to issue final regulations and clarify the legal landscape, but one thing is clear: the drone revolution is underway, and, in the United States, California is continuing to lead the charge.

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