

May 2016

Effective July 1, 2016, VML Insurance Programs (VMLIP) will provide limited liability coverage for members operating unmanned aircraft systems (UAS), commonly referred to as drones. The limitation is for coverage to apply, the use of the drone must be in accordance with both federal and state law/regulation and must be scheduled on your VMLIP liability policy.

Congress has required that the Federal Aviation Administration (FAA) establish regulations to incorporate drones into the national airspace; however that work remains in process thus the current landscape is subject to change.

Current federal requirements include, but are not limited to:

- (1) requires an FAA certificate of authorization (COA)
- (2) drones weighing between .55 lbs. (250g) and 55 lbs. (25kg) must be registered with the FAA
- (3) must be flown under 400 feet
- (4) must be flown during daytime conditions within line of sight
- (5) stay away from airports (2-5 nautical miles depending on size and type of airport)

For details please visit the FAA website at www.faa.gov/uas.

Current state law provides that [§19.2-60.1 - in part]:

B. No local government having jurisdiction over criminal law enforcement or regulatory violations, and no department of law enforcement as defined in § 15.2-836 of any county, city, or town shall utilize an unmanned aircraft system except during the execution of a search warrant issued pursuant to this chapter or an administrative or inspection warrant issued pursuant to law.

C. Notwithstanding the prohibition in this section, an unmanned aircraft system may be deployed without a warrant (i) when an Amber Alert is activated pursuant to § 52-34.3, (ii) when a Senior Alert is activated pursuant to § 52-34.6, (iii) when a Blue Alert is activated pursuant to § 52-34.9, (iv) where use of an unmanned aircraft system is determined to be necessary to alleviate an immediate danger to any person, (v) for training exercises related to such uses; or (vi) if a person with legal authority consents to the warrantless search.

D. The warrant requirements of this section shall not apply when such systems are utilized to support the Commonwealth for purposes other than law enforcement, including damage assessment, traffic assessment, flood stage assessment, and wildfire assessment. Nothing herein shall prohibit use of unmanned aircraft systems for private, commercial, or recreational use or solely for research and development purposes by institutions of higher education and other research organizations or institutions.

E. Evidence obtained through the utilization of an unmanned aircraft system in violation of this section is not admissible in any criminal or civil proceeding.

In 2016, a bill was passed to not allow local governments to regulate use of drones within their boundaries with a 2019 sunset clause. Expect the General Assembly to craft statewide drone legislation before then.

As Virginia follows the Dillon Rule, local governments must be given the right to act by statute. This, in our view, mean that local governments may not use drones for other purposes than what is permitted by statute such as inspections, public events such as festivals or parades, to make tourism videos, etc. While there are any number of good uses for drones by localities, those activities must be permitted by the Virginia General Assembly.

Contracting for Drone Services

The FAA regulates commercial use of drones as “civil aircraft operation.” Civil aircraft operation is regulated through a different process referred to as “Section 333 exemption.” In both public and civil aircraft operations, part of the process for granting the COA or Section 333 exemption includes review of intended use. Civil aircraft restrictions do not apply directly to local government use, but they have implications for local governments that contract for drone related services. Local government entities contracting with commercial operators who have a Section 333 exemption can eliminate the need for a public aircraft COA, although uses of leased drones may still be considered public aircraft operation. This means public entities contracting with vendors who have an existing Section 333 exemption may benefit from expedited approval.

Public entities should be particularly cautious about accepting services using drones owned and operated by volunteers. A company that operates drones as part of its business is regulated by the FAA and cannot be considered a recreational user for regulatory purposes when providing services to a public entity, even on a volunteer basis. Thus, professionals must comply with all FAA requirements even if they are not being paid for their services.

An individual drone enthusiast who does not engage in commercial drone operations and is considered to be a recreational user might also volunteer services and drone use to a local government or school. Such circumstances could raise risks for public entities, because the volunteer may be less experienced, less knowledgeable of FAA requirements, may not have the correct exemption/permission, and may not be amenable to allocating liability through a written agreement. Even if a volunteer is amenable to allocating liability, without demonstrated insurance coverage there would be no guarantee of funds to cover losses.

If your entity plans to contract for drone services, you are encouraged to utilize VMLIP’s contract review service to ensure your entity is protected.

Risks of Drone Use

There are many possible benefits resulting from public entity use of drones. There are also risks, most of which have not yet fully been explored because drone use is so new. We cannot quantify the likelihood or impact of potential risks, but rather provide some starting ideas for further consideration and evaluation. In exploration of risk areas, probabilities, and possible impacts, it might be helpful to consider likely sources of drone risk:

- Piloting error
- Inadequate training of personnel controlling drones, or overseeing drone use
- Mechanical or technical failure of the drone
- Mechanical or technical failure of associated drone software, hardware, or associated systems
- Maintenance and storage of data and information, including images, captured via drone use
- Inappropriate use of a drone by an employee
- Unauthorized breach of drone technology systems, including data and information storage and control systems
- Contracts related to drone use and operations
- Drone accidents

Thinking further about how these risk sources might translate into claims against public entities, it might be helpful to consider the following possible risk scenarios.

Accidents. A drone might crash during use, itself sustaining physical damage or causing physical damage to property (city or private) or even personal injury. A drone could also collide with another aircraft, creating the same sorts of risks. A drone crash or collision could also injure an employee of the public entity operating or overseeing operations of the drone – including the pilot, controller, or others in the general area at the time of the accident.

Trespass. Drone use could entail allegations of trespass on private property, including trespass into the airspace above private property. If a drone needs to be retrieved because of malfunction or crash, and if permission from a landowner is not appropriately granted, there could also be direct trespass concerns.

Privacy breach and civil rights violations. There are risk considerations regarding privacy breach both in law enforcement use of drones and in other public entity use of a more general nature. If a drone is used by law enforcement, there are risks related to appropriate warrant procedures such as the need for a warrant and the approval of the requested warrant. There may be privacy and civil rights risks related to recordings made by cameras or other devices employed by law enforcement through a drone (or any other means). Even more generalized use of a drone by a public entity could raise privacy breach concerns – for instance an aerial parks survey conducted by drone could record private activity in the home on an adjoining property. Even if the local government entity does not use such private information in any direct way, the mere recording of information could be cause for privacy concerns.

Public officials' liability. Where there is underlying risk to a public entity, there may be risk of public officials' liability for an elected body. Of particular concern may be a cause of action somehow involving a drone used in a circumstance where the elected body allowed its use outside federal or state rules and regulations, whether or not it did so knowingly.

Cyber risks. Collection of information and images by drones can provide robust data, stored electronically, to local governments and schools. Such data or images might be subject to the same sorts of cyber attacks or accidental release as are other electronic information sources. In addition, the remote operation of drones could make them subject to direct cyber attack, such as a non-authorized pilot commandeering a drone being operated for a public purpose. This could result in

theft or destruction of the drone, itself, but more importantly could lead to liability for the public entity that failed to adequately protect against such cyber-jacking of its (owned or contracted) drone.

Airport operations liability. Public entity airports may have special considerations when it comes to drones, including direct liability as well as contract liability concerns with airport managers or fixed base operators. The proposed FAA Notice would permit drone operations near controlled airports with the permission of air traffic control. Consequently, drones may begin to be used at some point at municipally owned airports, or approved by air traffic control at the municipal airport. Such regulations would certainly be an issue to consider for any municipal airport, including how to best allocate drone risks in any contracts with airport managers or fixed base operators.

Regulatory violations. The FAA regulations apply to public entity use of drones, and in some cases there may be penalties for failure to comply. As drone regulation increases and takes firm shape at the federal and state level, other penalties could apply for violation of rules or restrictions.

Land use liability. Local government attempts to regulate when, where, or how drones can be used within their jurisdictions may face push-back from commercial or recreational users, in particular with regards to land use rights for private property.

Failure to supervise or limit use. For any situation where drone use over public property creates a liability concern – for instance by causing damage through a crash or collecting private information – there could be a tort claim against the local unit of government or school for failure to supervise use, failure to protect against dangers, or failure to appropriately limit the use of drones in public areas. These claims could be made regardless of whether the local government, itself, operates a drone, allows a drone to be used, or fails to limit drone use over public property.

If your entity owns a drone and would like to insure it for liability and/or physical damage, please contact your underwriter at (800) 963-6800.