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RACQUEL H. REINSTEIN
CO-CHAIR

rreinstein@panynj.gov

SARAH G. PASSERI
CO-CHAIR

sarah.passeri@hkllaw.com

PHILIP WEISSMAN

Secretary

philip.weissman@clydeco.us

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Drone Delivery Presents Opportunities to Restaurants During the COVID-19 Pandemic and Beyond

Bradford P. Meisel¹
BMeisel@mdmc-law.com



The ongoing COVID-19 Pandemic and government orders limiting or restricting dine-in restaurant services have forced many restaurants to depend on delivery operations in order to remain economically viable. For restaurants seeking to expand delivery operations without significantly increasing labor costs or their dependency on third party delivery services, drone delivery may emerge as an attractive option. Drone delivery has the potential to revolutionize their business model both during and beyond the COVID-19 Pandemic.

In recent years and months, various restaurants have begun to develop their own drone delivery services and the ongoing COVID-19 Pandemic has significantly increased interest in drone delivery.² In 2016, Domino's began conducting experimental drone pizza deliveries in New Zealand using autonomous drones and announced an ambitious goal of ultimately making all of its pizza deliveries by drone.³ UberEats revealed plans to begin making food deliveries by drone in October of 2019.⁴ In August of 2020, a Mobile, Alabama based Buffalo Wild Wings franchisee partnered with Deuce Drone to demonstrate drone food delivery and announced plans to begin delivering orders by drone later in 2020.⁵

In order to deliver packages such as those containing food beyond their drone operators' lines of sight, restaurants must receive an Air Carrier Certificate from the Federal Aviation Administration (FAA) pursuant to Federal Aviation Regulations found at 14 CFR Part 135. In

¹ Bradford P. Meisel is an Associate at McElroy, Deutsch, Mulvaney & Carpenter specializing in corporate transactions, cybersecurity, data privacy, and drone law who previously served as a Senate Judiciary Committee Law Fellow to U.S. Senator Sheldon Whitehouse of Rhode Island and Cybersecurity and Technology Law Clerk to U.S. Senator Gary Peters of Michigan.

² Curtis Silver, "The Time for Delivery Drones to Rise Up is Now," Forbes (April 14, 2020) <https://www.forbes.com/sites/curtissilver/2020/04/14/the-time-for-delivery-drones-to-rise-up-is-now/#51ebd8bb382a> (All links in this newsletter last accessed on March 18, 2021).

³ Stephen Feller, "Domino's Tests Drone Delivery of Pizza in New Zealand," UPI (November 17, 2016) https://www.upi.com/Business_News/2016/11/17/Dominos-tests-drone-delivery-of-pizza-in-New-Zealand/4271479363638/.

⁴ Alex Davies, "Uber Eats Hopes Drones Can Lift it to Profitability," Wired (October 28, 2019) <https://www.wired.com/story/uber-eats-drones-lift-profitability/>.

⁵ Tyler Fingert, "Drone Delivery Closer to Reality in Mobile After Demonstration; First Order to be Sent in October," Fox 10 News (August 13, 2020) https://www.fox10tv.com/news/mobile_county/drone-delivery-closer-to-reality-in-mobile-after-demonstration-first-order-to-be-sent-in/article_ee1f3208-ddb1-11ea-8f76-f7562a380915.html accessed.

order to receive such a certificate, the applicant must have a physical location and drone access; drone liability insurance; and have a President, 2/3 of the Board of Directors, and individuals controlling 75% or more of its interest who are U.S. citizens.⁶ Moreover, restaurants' drone operators will be required to obtain remote pilot certificates and their drones must be registered with the FAA and marked with their assigned FAA registration numbers.⁷

The federal Drone Operator Safety Act, which was introduced by Sen. Sheldon Whitehouse (D-RI) and Rep. Jim Langevin (D-RI) and enacted as part of the bipartisan FAA Reauthorization Act of 2018, criminalizes drone operations in airport runway exclusion zones. Consequently, restaurants likely cannot offer drone delivery to locations near airports and restaurants located near airports likely cannot offer drone delivery.⁸

Restaurants seeking to offer drone delivery may be able to argue that any state or local laws, ordinances and regulations governing drone operation, noise, and safety are federally preempted and unenforceable. The U.S. District Court for the District of Massachusetts upheld the concept of preemption when it decided that a municipal ordinance requiring drone registration and prohibiting drone operation outside operators' lines of sight, flights below certain altitude over private property absent express permission of property owners, and flights over public property were federally preempted.⁹ However, it is possible that municipal land use and zoning ordinances and regulations restricting and limiting drone take offs and landings in certain zones may be enforceable and not affected by federal preemption, since numerous courts have held that such ordinances and regulations prohibiting or limiting the size of airports, airstrips, or heliports in certain zones are enforceable and are not federally preempted.¹⁰ While courts have yet to address this issue with regard to drones, it is possible that restaurants seeking to engage in drone delivery could be subject to municipal land use and zoning law. As a result, operators may even be required to obtain use variances for drone delivery operations if they are located in districts not zoned for aircraft takeoffs and landings and drone takeoffs and landings are not determined to be permissible accessory uses to restaurants.

Commercial drone operators, such as restaurants, that are not using drones for First Amendment protected activities such as newsgathering, must comply with the provisions of the FAA Reauthorization Act of 2018 governing the privacy practices of commercial drone operators. The law states that it is the sense of Congress that commercial drone operators should develop and implement publicly available privacy policies governing the collection, use,

⁶ 14 C.F.R. Part 135.

⁷ 14 C.F.R. Part 107.

⁸ 18 U.S.C. § 39B

⁹ See, Singer v. City of Newton, 284 F.Supp.3d 125 (D. Mass. 2017).

¹⁰ See, e.g. Hoagland v. Town of Clear Lake Indiana, 344 F. Supp.2d 1150 (N.D. Ind. 2004), aff'd 415 F.3d 693 (7th Cir. 2005), cert. denied, 547 U.S. 1004 (2006) ((citing Condor Corp. v. City of St. Paul, 912 F.2d 215, 219 (8th Cir. 1990); Broadbent v. Allison, 155 F.Supp.2d 520, 524 (W.D.N.C. 2001); City of Cleveland v. City of Brook Park, Ohio, 893 F.Supp. 742 (N.D. Oh. 1995); Faux-Burhans v. County Comm'rs of Frederic County, 674 F.Supp. 1172, 1173-1174 (D. Md. 1987), aff'd, 859 F.2d 149 (4th Cir. 1988); People ex. rel. Birkett v. City of Chicago, 329 Ill.App.3d 477 (Ill. Ct. App. 2nd Dist. 2002); Tanis v. Township of Hampton, 306 N.J. Super. 588 (N.J. 1997); In re Commercial Airfield, 170 Vt. 595 (Vt. 2000); Garden State Farms, Inc. v. Bay, 77 N.J. 439 (N.J. 1978)); Riggs v. Burson, 941 S.W.2d 44 (Tenn. 1997); Guillot v. Brooks, 651 So.2d 345 (La. Ct. App. 2nd Cir. 1995); Wright v. City of Winnebago, 73 Ill.App.3d 337 (Ill. Ct. App. 2nd Dist. 1979); Skydive Oregon v. Clackamas County, 857 P.2d 879, 882 (Or. App. 1993); Gustafson v. City of Lake Angelus, 76 F.3d 778, 787 (6th Cir. 1996).

retention, and deletion of data collected by its drones that protects and respects individual privacy consistent with federal, state, and local law.¹¹ Violations of such privacy policies constitute unfair trade practices subject to Federal Trade Commission (FTC) enforcement.¹² The FTC is currently taking the position that the Act “only does not require such persons to have privacy policies, though it states that the ‘sense of Congress’ is that such persons should have” such privacy policies. However, federal courts have yet to address whether the Act requires or simply recommends the adoption of such privacy policies and it remains to be seen whether the FTC will continue to take its current position.¹³

A restaurants’ drone use could potentially be subject to the rapidly expanding patchwork of state information privacy and security laws since courts have yet to address whether such laws are federally preempted as applied to drones. However, courts have held that state information privacy statute are preempted as applied to airlines by the Airline Deregulation Act of 1978.¹⁴

On February 20, 2020, California Assemblyman Edwin Chau (D) introduced Assembly Bill 2787. The bill, which is currently pending before the California Assembly Privacy and Consumer Protection Committee would provide that drones used to deliver consumer products including food in California may only collect, use or retain audio, geolocation or visual information when reasonably necessary and proportionate to achieve the delivery purposes for which such information was collected or processed.¹⁵ The legislation would also require that all such information be destroyed as soon as the delivery is completed unless federal law requires that it be retained.¹⁶

¹¹ P.L. 115-254 § 357, § 375, § 378 (2018); <https://www.ftc.gov/enforcement/statutes/faa-reauthorization-act-2018>

¹² P.L. 115-254 § 375 (2018).

¹³ <https://www.ftc.gov/enforcement/statutes/faa-reauthorization-act-2018>

¹⁴ *People ex. rel. Harris v. Delta Air Lines, Inc.*, 247 Cal.App.4th 844 (Cal. Ct. App. 1st Dist. 2016).

¹⁵ California A.B. 2787 (2020), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2787

¹⁶ *Id.*