



JONES DAY  
**COMMENTARY**

## FAA CLARIFIES 2012 FLIGHT DUTY AND REST FINAL RULE—AREAS OF POTENTIAL ONGOING CONCERN

On March 5, 2013, the Federal Aviation Administration published its response to a set of clarifying questions associated with the agency’s new flight, duty, and rest final rule. 78 Fed. Reg. 14166 (March 5, 2013). While the notice addresses several issues of importance to air carriers, the thorniest questions addressed by the FAA were calculation of reserve periods, the circumstances under which a pilot or navigator (“flight crew member”) may exceed the limitations on flight time and flight duty periods, and the impact of early morning report times on flight duty periods scheduled for more than three consecutive days.

The clarifications apply to the new flight, duty, and rest rules that were published by the FAA on January 4, 2012, and take effect January 4, 2014. 77 Fed. Reg. 330 (January 4, 2012).<sup>1</sup> Those rules impose new limitations on the number of hours flight crew members engaged in passenger operations under 14 CFR Part 121 can work, as well as new requirements on the amount of rest they must receive prior to beginning a new flight duty period, significantly changing how the FAA regulates the working conditions of pilots in the

areas of duty and rest.<sup>2</sup> Because of the scope of the changes, the FAA sought industry input on questions that carriers, unions, or crew members have had on implementing the new rule. 77 Fed. Reg. 20530 (April 5, 2012). The FAA hoped that the agency could issue a comprehensive set of clarifications well before the rule took effect, providing both certainty and an opportunity to make any needed adjustments to the carriers’ implementation plans. The responses issued on March 5, 2013, are the result of that effort.

### THE IMPACT OF EARLY REPORT TIMES

In its clarifications, the FAA addressed the impact of early report times on flight duty periods over consecutive days. As a result, the restrictions on consecutive nighttime operations could have a significant impact on early morning operations. Under the 2012 Final Rule, a carrier may not schedule “consecutive nighttime operations” for more than three consecutive days unless the carrier also provides a two-hour mid-duty rest opportunity for every scheduled nighttime

operation. This provision was drafted to address traditional “back-of-the-clock” operations, i.e., those that begin late at night and are concluded the following morning. Thus, the “mid-duty” rest must be provided between 10 p.m. and 5 a.m. local time and must occur after the first flight segment has been completed. However, the provision also says that the three-night limitation applies to operations that “infringe on the window of circadian low.” The “window of circadian low” is defined as the time “between 0200 and 0559.” Thus, if a pilot has a report time earlier than 6:00 a.m. for more than three consecutive days, he or she must be given a mid-duty rest that commences only after the first segment *and* between the hours of 10 p.m. and 5 a.m. The practical impact of this provision is that pilots will not be allowed to accept early morning flight duty periods for more than three consecutive days because of the practical impossibility of getting a mid-duty rest opportunity. Such a result encourages the use of split-duty flight duty periods, resulting in less effective nighttime sleep and potentially increasing operating costs for carriers. Given this result, it may be worth asking the FAA to consider issuing a technical correction that would permit these operations for more than three consecutive days.

## **EXTENSION OF FLIGHT DUTY PERIODS**

The 2012 Final Rule permits limited extensions for flight duty periods if a carrier knows that it is unlikely a crew member will be able to complete his or her flight duty period within 30 minutes of the maximum allowable time frames.<sup>3</sup> Under the 2012 Final Rule, flight time can be extended only under very limited circumstances.<sup>4</sup> As noted in the clarification notice, there is a critical distinction in both instances between whether the circumstance arises before or after the aircraft becomes airborne. The regulations are stricter when the carrier or flight crew learn of possible delays prior to takeoff. In the case of flight duty periods, the extension is limited to two hours. In the case of flight time, there is no extension permitted if the plane is still on the ground. In contrast, flight time may be extended for circumstances that arise or become knowable only after the airplane is in the air. Extensions of flight duty periods due to post-takeoff circumstances are not limited by the same two-hour extension as in the pre-takeoff scenario. In both post-takeoff instances, the flight crew member may continue to the next destination or alternate airport.

The distinction between pre-flight and post-takeoff circumstances is particularly relevant because while flight time is generally defined as beginning once the airplane moves under its own power, the ability to extend is based on when the airplane actually takes flight. Thus, pilots are expected to return to the gate if a circumstance arises after push-back but prior to actual flight that would cause a flight crew member to exceed the maximum allowable flight time. Likewise, the broader extensions to the flight duty periods due to circumstances that arise after the plane has taken off will not be available if the circumstance causing the delay occurs while the plane is taxiing or has otherwise left the gate under its own power but has yet to actually lift off. Thus, carriers should consider holding at the gate if it appears that there is a reasonable potential for delay between the time the airplane would ordinarily push back from the gate and the time it would become airborne. Since airport delays are typically a function of adverse weather events or heavy air traffic, active communication with the tower should reduce the likelihood of a post-pushback delay prior to takeoff. Carriers should specifically ask about the potential for a ground delay since such delays are often the result of congestion and delays elsewhere in the national airspace system and may not be readily apparent to either the flight crew or local air traffic control personnel.

## **CALCULATION OF RESERVE DUTY PERIODS**

The FAA notice also clarified the question of how to handle calculation of duty periods for reserve pilots. Reserve questions are particularly difficult because prior to the 2012 Final Rule, the FAA had never regulated reserve periods. The FAA has clarified that there are no limits on how long a pilot can be placed in a reserve status (other than airport reserve that is considered part of a flight duty period). However, the interplay between reserve and flight duty periods for short-call reserve and the obligation to provide a legal rest for long-call reserve impose practical limitations. Likewise, the obligation to provide a legal rest period prior to placing a flight crew member in a reserve status prevents carriers from releasing pilots from reserve obligations and then calling them back to a reserve status without an intervening rest period or placing a pilot who would otherwise have been released from all duty in a reserve status at the end of a flight duty period.

The clarifications were in response to two types of questions: those directly related to the new reserve requirements and those developed in response to questions about whether carriers could utilize pilots who would otherwise be in a rest status. The first category of clarification is not surprising; the second has practical implications that may require some carriers to rethink the impact of adding additional flight segments or otherwise changing a scheduled flight duty period. If not handled with a full understanding of the rule, a carrier may find its flexibility to handle last-minute schedule changes limited.

The 2012 Final Rule initially failed to account for the need for an extension when a pilot shifted from reserve status to a flight duty period. Under the rule, a pilot could be in a combined reserve/flight duty period for up to four hours plus the maximum allowable flight duty period. The regulatory text was silent on whether extensions to the flight duty period were permitted. As a result, the rule was more stringent for reserve pilots than for lineholders. Because this oversight could not be corrected merely through legal interpretation, the FAA corrected this error through the publication of a technical amendment on March 6, 2013. 78 Fed. Reg. 8361 (March 6, 2013). The FAA also clarified that the allowable time frame that a pilot could be in a reserve/flight duty period status without an extension was based on when the pilot reported for the flight duty period within the up-to-four-hour reserve period then added to that maximum allowable time.

There are two instances where a flight crew member could be eligible to fly but the interaction between reserve and rest requirements complicate the carrier's options. In the first, a carrier may want to use a pilot who has been given a rest period longer than what is legally required. In this circumstance, the carrier must place the pilot in reserve status (using whatever contractual requirements exist to do so) before assigning the flight. However, a pilot may voluntarily pick up a flight without being in a reserve status as long as he or she is cognizant of the obligation to report to work fit for duty. In the second, a carrier may wish to use a pilot who has started a flight duty period but still has sufficient time

available to add additional flight segments. In this instance, a carrier is free to add flight segments even after the flight duty period has begun as long as it does not exceed the applicable flight duty period as amended by the addition or deletion of segments. However, the carrier is not allowed to place the pilot on reserve in anticipation of potentially needing the pilot after the flight duty period has begun because the crew member will not have been provided with the legal rest necessary to place him or her on reserve status.

The carrier's rights may be further limited by contractually negotiated limitations on its ability to place a pilot on reserve status. While the potential effect of contractually negotiated limitations must be evaluated on a case-by-case basis, the FAA requirements generally would not supersede more restrictive rules that exist under a carrier's collective bargaining agreements as long as those rules were not in conflict with an FAA requirement.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

### Tom Jerman

Washington

+1.202.879.3603

[tjerman@jonesday.com](mailto:tjerman@jonesday.com)

### Rebecca MacPherson

Washington

+1.202.879.4645

[rmacpherson@jonesday.com](mailto:rmacpherson@jonesday.com)

## ENDNOTES

- 1 The regulatory provisions are contained in a new part 117. Because the new part will not be published in the Code of Federal Regulations until the rule becomes effective, readers should refer to 77 Fed. Reg. 330 to review those provisions.
- 2 Cargo operators are permitted to operate under the new rule, but they are not required to do so.
- 3 See section 117.19, as amended by the March 6, 2013 technical amendment, 78 Fed. Reg. 8361 (March 6, 2013).
- 4 See section 117.11.