



4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 243

[Docket No. FRA-2009-0033, Notice No. 4]

RIN 2130-AC68

Training, Qualification, and Oversight for Safety-Related Railroad Employees

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; delay of implementation dates.

SUMMARY: This document delays the implementation dates in the final rule published November 7, 2014, because model training program developers alerted FRA they will not be able to timely produce model programs that an estimated 1,459 railroads and contractors are expected to use to comply with the rule's program submission requirements.

DATES: This regulation is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Petitions for reconsideration of this delay must be received on or before [INSERT DATE 20 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Petitions for reconsideration will be

posted in the docket for this proceeding. Comments on any submitted petition for reconsideration must be received on or before [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Petitions for reconsideration or comments on such petitions: Any petitions and any comments on petitions related to Docket No. FRA-2009-0033 may be submitted by any of the following methods:

- Online: Comments should be filed at the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Fax: 202-493-2251.
- Mail: Docket Management Facility, U.S. DOT, 1200 New Jersey Avenue, SE, W12-140, Washington, DC 20590.
- Hand Delivery: Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m. Monday through Friday, except federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. All petitions and comments received will be posted without change to <http://www.regulations.gov>; this includes any personal information. Please see the Privacy Act heading in the “Supplementary Information” section of this document for Privacy Act information related to any submitted petitions or materials.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert J. Castiglione, Staff Director – Technical Training, U.S. Department of Transportation, Federal Railroad Administration, 4100 International Plaza, Suite 450, Fort Worth, TX 76109-4820 (telephone: 817-447-2715); or Alan H. Nagler, Senior Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC-10, Mail Stop 10, West Building 3rd Floor, Room W31-309, 1200 New Jersey Avenue, SE, Washington, DC 20590 (telephone: 202-493-6038).

SUPPLEMENTARY INFORMATION: FRA issued a final rule establishing minimum training standards for each category and subcategory of safety-related railroad employees and requiring railroad carriers, contractors, and subcontractors to submit training programs to FRA for FRA approval. The final rule was published November 7, 2014 (79 FR 66459) and was effective on January 6, 2015 (2014 Final Rule). The 2014 Final Rule was required by section 401(a) of the Rail Safety Improvement Act of 2008, Public Law 110-432, 122 Stat. 4883 (Oct. 16, 2008), codified at 49 U.S.C. 20162, and the Secretary of Transportation delegated the authority to conduct this rulemaking and implement the rule to the Federal Railroad Administrator. 49 CFR 1.89(b).

In the preamble to the 2014 Final Rule, FRA noted the importance of establishing implementation dates and providing incentives for the early filing of model programs to improve the efficiency and effectiveness of the review process. FRA recognized it was paramount to give model program developers sufficient time to develop programs and receive FRA approval. FRA also recognized that employers would not use those model programs unless the employers were given a reasonable time to consider using those programs before the employers' deadline for implementation. Consequently, the 2014 Final Rule provided model program developers with an incentive to file all model programs by May 1, 2017—eight months before the first employers would have to submit model programs and two years before smaller employers (i.e., those employers with less than 400,000 total employee work hours annually) would have to submit their model programs. See §§ 243.105(a)(3), and 243.101(a)(1) and (2). The incentive to submit early was a guarantee from FRA that the model program would be considered approved so it could be implemented within 180 days after the date of submission unless FRA identified that all or part of the program did not conform to the rule requirements.

After publishing the 2014 Final Rule, FRA took significant steps to educate the regulated community on its requirements. On May 1, 2015, FRA notified the regulated community it issued an Interim Final Compliance Guide published in the rulemaking docket. The guide illustrates ways to comply with the rule, provides the requirements in a different format to make it quicker and easier to understand, and answers questions FRA believes are likely to be frequently asked. Any sized employer can use this guide as

a quick way to determine if FRA will likely find the employer's training program complies with the 2014 Final Rule. The guide was "Interim Final" because it was effective upon publication and signaled FRA would consider amending the guidance based on comments received. FRA considered all comments received by the June 30, 2015 deadline and considered many late-filed comments, as practicable, before issuing the Final Compliance Guide published in the rulemaking docket May 25, 2016.

FRA personnel also conducted significant outreach to the regulated community; making presentations at association conferences; participating in association-sponsored webinars; and having numerous meetings, conference calls, and other exchanges of information in which FRA answered questions as they arose. FRA included many of the questions and answers with broad industry scope in the Final Compliance Guide.

On March 20, 2017, FRA added information to its website to more broadly disseminate information about the 2014 Final Rule's requirements. See <https://www.fra.dot.gov/Page/P1023>. The information on FRA's website provides quick links to FRA's Final Compliance Guide, Frequently Asked Questions (FAQs), the portal for submitting training programs, and an electronic Shareholder Training Matrix (Matrix). The Matrix allows individuals to search general job categories and titles to determine whether training is required for a particular rule and what kind of training is required (i.e., formal or on-the-job training, or a briefing only). Anyone can use the Matrix to determine what regulatory provisions must be included in a training program.

During FRA’s outreach on the 2014 Final Rule, FRA heard concerns from the American Short Line and Regional Railroad Association (ASLRRA) and National Railroad Construction and Maintenance Association, Inc. (NRC), two of the associations identified in the Regulatory Impact Analysis (RIA) as likely model program developers. These two associations represent most of the 1,459 employers FRA projected would adopt model training programs rather than develop their own.¹ ASLRRA requested FRA’s help in developing its model programs for its members, and FRA provided training documents FRA uses to train the agency’s personnel on federal rail safety requirements. In December 2016, FRA completed sharing the last of those documents with ASLRRA. Because the training materials FRA made available to ASLRRA may be useful for others in the regulated community, FRA will also make them available on FRA’s website. ASLRRA has submitted several model training programs to FRA and has made significant strides towards completing some programs. However, ASLRRA still has a significant number of training programs left to develop and submit.

Similarly, NRC informed FRA it found certain aspects of the rule confusing to implement and difficult for contractors to apply in practice. Despite FRA’s efforts since

¹ The RIA for the 2014 Final Rule provided the estimated costs and benefits, and explained FRA based this analysis on the premise that “most small railroads and contractors will use consortiums or model training programs developed by industry associations . . . thereby minimizing costs.” RIA at 15. In the RIA, FRA estimated that 1,459 railroads and contractors would use model programs.

2015 to explain the regulatory requirements to NRC and its members through multiple webinars, conference calls, and other outreach, NRC informed FRA it needs more time to develop and submit model training programs the 2014 Final Rule requires.

The fact that both ASLRRA and NRC have notified FRA they cannot submit most or all of their model training programs by the May 1, 2017 deadline significantly impacts the costs associated with the rule and complicates the approval process. The 1,459 employers would bear significantly higher costs developing personalized training programs, rather than adopting model programs that are generic enough to apply to any size railroad or contractor. Further, FRA's resources would be stretched thin reviewing up to 1,459 individual employer programs, rather than a relatively small number of model programs. In addition, if FRA gives the associations additional time to produce model programs, FRA expects the quality of those model programs will be much better than those separately prepared by a large number of individual small or medium employers.

The additional time to implement the rule should also help model training program developers and other regulated entities comply with the final rule. Nevertheless, any individual employer, model training program developer, or other regulated person that finds these revised implementation deadlines difficult to comply with may file a waiver requesting additional time as permitted by 49 CFR part 211, subpart C for FRA approval. FRA would appreciate receiving any such request for additional time to comply with the implementation dates no earlier than four months before the relevant implementation deadline.

Of course, nothing in this rule affects the ability of any regulated entity from complying with the requirements in advance of any deadline.

In consideration of the foregoing, FRA delays each of the implementation dates in the 2014 Final Rule by one year.

Section-by-Section Analysis

Subpart B – Program Components and Approval Process

Section 243.101 Employer program required

The implementation dates in this section are delayed by one year so all employers will have an additional year to develop and submit training programs. Specifically, in paragraphs (a)(1) and (b), the January 1, 2018 implementation dates are changed to January 1, 2019.

In paragraph (a)(2), the implementation date in the 2014 Final Rule was dependent on the date FRA issued the Interim Final Compliance Guide published May 1, 2015. Because that date has passed, and FRA can now calculate the specific implementation date in paragraph (a)(2), FRA calculated that implementation date and added an additional year. Consequently, the May 1, 2019 implementation date is changed to May 1, 2020. It is also no longer necessary to reference the Interim Final Compliance Guide.

Section 243.105 Optional model program development

The implementation date in paragraph (a)(3) of this section is delayed by one year. Consequently, model program developers will have an additional year to submit

model programs. Instead of a May 1, 2017 implementation date, model program developers will have until May 1, 2018, for their programs to be considered approved by FRA and can be implemented 180 days after the date of submission.

Section 243.111 Approval of programs filed by training organizations or learning institutions

Each training organization or learning institution that has provided training services to employers this part covers will have an extra year to continue to offer such training services without FRA approval. The 2014 Final Rule specified that a training organization or learning institution that has provided training services to employers covered by this part before January 1, 2017, may continue to offer such training services without FRA approval until January 1, 2018. FRA amends paragraph (b) of this section so that both dates are delayed by one year. That requirement now reads that a training organization or learning institution that has provided training services to employers covered by this part before January 1, 2018, may continue to offer such training services without FRA approval until January 1, 2019.

Subpart C – Program Implementation and Oversight Requirements

Section 243.201 Employee qualification requirements

The implementation dates in this section are delayed by one year so all employers have an additional year to designate each of their existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory.

In paragraph (a)(1), the September 1, 2018 implementation date is changed to September 1, 2019.

In paragraph (a)(2), the implementation date in the 2014 Final Rule was dependent on the date FRA issued the Interim Final Compliance Guide published May 1, 2015. Because that date has passed, and FRA can now calculate the specific implementation date in paragraph (a)(2), FRA calculated that implementation date and added an additional year. Consequently, the May 1, 2019 implementation date is changed to January 1, 2021. It also is no longer necessary to reference the Interim Final Compliance Guide.

In paragraph (b), the January 1, 2018 implementation date is changed to January 1, 2019.

In paragraphs (e)(1) and (2), the implementation dates for refresher training are also delayed by one year. Thus, the January 1, 2020 implementation date in paragraph (e)(1) is changed to January 1, 2021, and completion of that refresher training for each employee must be completed by no later than December 31, 2023, instead of the 2014 Final Rule requirement of December 31, 2022. In paragraph (e)(2), each employer with less than 400,000 total employee work hours annually must implement a refresher training program by May 1, 2022, rather than the 2014 Final Rule requirement of May 1, 2021, and complete that refresher training for each employee by no later than December 31, 2024, instead of the 2014 Final Rule requirement of December 31, 2023.

Public Proceedings

The Administrative Procedure Act generally requires agencies to provide the public with notice of proposed rulemaking and an opportunity to comment prior to publication of a substantive rule. However, 5 U.S.C. 553(b)(3)(B) authorizes agencies to dispense with notice and comment “when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” FRA finds that providing notice and an opportunity to comment would be impracticable and contrary to the public interest. The first of several implementation deadlines for the regulated community is forthcoming on May 1, 2017. Providing notice and an opportunity to comment would likely preclude FRA from delaying the implementation dates before this important deadline passes. Delaying the implementation dates is necessary to ensure model programs have a chance to succeed. If FRA does not delay the implementation dates, costs to the regulated community and FRA are expected to escalate, and the quality of training programs is expected to decrease, which would be contrary to the public interest.

Regulatory Impact and Notices

Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing regulatory policies and procedures and is considered to be nonsignificant under both Executive Orders 12866 and 13563 and DOT policies and procedures. See 44 FR 11034, Feb. 26, 1979. This rule is beneficial for regulated entities by adding time to comply with the 2014 Final Rule and imposing no costs. Because any regulated entity may file according to the 2014 Final

Rule's schedule or the extended schedule in this final rule, there are no specific costs associated with this rule.

Regulatory Flexibility Act and Executive Order 13272; Final Regulatory Flexibility Assessment

FRA determines and certifies that this final rule is not expected to have a significant impact on a substantial number of small entities. The requirements of this rule will apply to employers of safety-related railroad employees, whether the employers are railroads, contractors, or subcontractors. Although a substantial number of small entities are subject to this rule, the rule provides relief by extending all of the implementation dates in the 2014 Final Rule. Thus, the economic impact of this rule will not be significant because it will only provide additional time for all entities to comply.

This final rule will have no direct impact on small units of government, businesses, or other organizations. State rail agencies are not required to participate in this program. State owned railroads will receive a positive impact by having additional time to comply.

Paperwork Reduction Act

There are no new collection of information requirements contained in this final rule and, in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., the record keeping and reporting requirements already contained in this rule have been approved by the Office of Management and Budget. The OMB approval number is

OMB No. 2130-0597. The information collection requirements of this rule became effective when they were approved by OMB.

Federalism Implications

This rule will not have a substantial effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus in accordance with Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), preparation of a Federalism Assessment is not warranted.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This final rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

Environmental Impact

FRA has evaluated this rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental

statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. See 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this final rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice

of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in such an expenditure, and thus preparation of such a statement is not required.

Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). FRA has evaluated this final rule in accordance with Executive Order 13211, and has determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of DOT’s dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement published in the Federal Register on April 11, 2000 (Volume 65, Number 70, Pages 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

List of Subjects in 49 CFR Part 243

Administrative practice and procedure, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 243—[AMENDED]

1. The authority citation for part 243 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20131-20155, 20162, 20301-20306, 20701-20702, 21301-21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

Subpart B – Program Components and Approval Process—[AMENDED]

2. Revise 243.101(a) and (b) to read as follows:

§ 243.101 Employer program required.

(a)(1) Effective January 1, 2019, each employer conducting operations subject to this part with 400,000 total employee work hours annually or more shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(2) Effective May 1, 2020, each employer conducting operations subject to this part with less than 400,000 total employee work hours annually shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(b) Except for an employer subject to the requirement in paragraph (a)(2) of this section, an employer commencing operations subject to this part after January 1, 2019, shall submit a training program for its safety-related railroad employees before commencing operations. Upon commencing operations, the employer shall adopt and comply with the training program.

* * * * *

3. Revise 243.105(a)(3) to read as follows:

§ 243.105 Optional model program development.

(a) * * *

(3) Each model training program submitted to FRA before May 1, 2018, is considered approved and may be implemented 180 days after the date of submission unless the Associate Administrator advises the organization, business, or association that developed and submitted the program that all or part of the program does not conform.

* * * * *

4. Revise 243.111(b) to read as follows:

§ 243.111 Approval of programs filed by training organizations or learning institutions.

* * * * *

(b) A training organization or learning institution that has provided training services to employers covered by this part before January 1, 2018, may continue to offer such training services without FRA approval until January 1, 2019. The Associate Administrator may extend this period at any time based on a written request. Such written requests for an extension of time to submit a program should contain any factors the training organization or learning institution wants the Associate Administrator to consider before approving or disapproving the extension.

* * * * *

Subpart C – Program Implementation and Oversight Requirements—[AMENDED]

5. Revise 243.201(a)(1) and (2), (b), and (e)(1) and (2) to read as follows:

§ 243.201 Employee qualification requirements.

(a) * * *

(1) By no later than September 1, 2019, each employer with 400,000 total employee work hours annually or more in operation as of January 1, 2019, shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory. The Associate Administrator may extend this period based on a written request.

(2) By no later than January 1, 2021, each employer with less than 400,000 total employee work hours annually in operation as of January 1, 2020, shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory. The Associate Administrator may extend this period based on a written request.

(b) Except for an employer subject to the requirement in paragraph (a)(2) of this section, an employer commencing operations after January 1, 2019 shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory before beginning operations, and only permit designated employees to perform safety-related service in that category or subcategory. Any person

designated shall have met the requirements for newly hired employees or those assigned new safety-related duties in accordance with paragraph (c) of this section.

* * * * *

(e) * * *

(1) Beginning January 1, 2021, each employer with 400,000 total employee work hours annually or more shall deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. If the last training event occurs before FRA's approval of the employer's training program, the employer shall provide refresher training either within 3 calendar years from that prior training event or no later than December 31, 2023. Each employer shall ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

(2) Beginning May 1, 2022, each employer with less than 400,000 total employee work hours annually shall deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. If the last training event occurs before FRA's approval of the employer's training program, the employer shall provide refresher training either within 3 calendar years from that prior

training event or no later than December 31, 2024. Each employer shall ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

Patrick T. Warren,
Acting Administrator.

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