

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Part 243**

[Docket No. FRA-2009-0033, Notice No. 6]

RIN 2130-AC70

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

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

ACTION: Final rule.

SUMMARY: In response to a petition for reconsideration of a final rule, FRA is amending its regulations on Training, Qualification, and Oversight for Safety-Related Railroad Employees by delaying the regulations' implementation dates an additional year. FRA previously delayed the regulations' implementation dates for one year in a final rule published May 3, 2017 (May 2017 Final Rule).

DATES: This regulation is effective June 26, 2018.

ADDRESSES: You may send comments, identified by docket number FRA-2009-0033 and RIN 2130-AC70, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments;

- *Mail:* Docket Management Facility, U.S. DOT, 1200 New Jersey Avenue SE, W12-140, Washington, DC 20590;

- *Hand Delivery:* The Docket Management Facility is located in Room W12-140, West Building Ground Floor, U.S. DOT, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- *Fax:* 202-493-2251.

Instructions: All submissions must include the agency name and docket number (Federal Railroad Administration, FRA-2009-0033) or Regulatory Identification Number (RIN) for this rulemaking (2130-AC70). All 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 comments or materials.

Docket: For access to the docket to read background documents, petitions for reconsideration, or comments received, go to <http://www.regulations.gov> and follow the

online instructions for accessing the docket or visit the Docket Management Facility described above.

FOR FURTHER INFORMATION CONTACT: Robert J. Castiglione, Staff Director—Human Performance Division, Federal Railroad Administration, 4100 International Plaza, Suite 450, Fort Worth, TX 76109-4820 (telephone: 817-447-2715); or Alan H. Nagler, Senior Trial Attorney, Federal Railroad Administration, Office of Chief Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: 202-493-6038).

SUPPLEMENTARY INFORMATION: On November 7, 2014, FRA published a final rule (2014 Final Rule) that established minimum training standards for each category and subcategory of safety-related railroad employees and required railroad carriers, contractors, and subcontractors to submit training programs to FRA for approval. *See* 79 FR 66459. The 2014 Final Rule was required by section 401(a) of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110-432, 122 Stat. 4883 (Oct. 16, 2008), codified at 49 U.S.C. 20162. 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 reasonable time to consider 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 been required 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 been required to submit their model programs. *See* 79 FR 66459, 66503-66504. 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's requirements.

After publishing the 2014 Final Rule, FRA took significant steps to educate the regulated community on its requirements and assist with the development of model training plans. For example, 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>.¹ Moreover, when the American Short Line and Regional Railroad Association (ASLRRA) requested FRA's help in developing its model programs for its members, FRA shared training documents it uses to train the agency's personnel on Federal rail safety requirements. FRA then made those same FRA training documents available on FRA's website because others in the regulated community would likely find them useful.

During FRA outreach on the 2014 Final Rule, FRA heard concerns from ASLRRA and the National Railroad Construction and Maintenance Association, Inc. (NRC), which were two of the associations identified in the 2014 Final Rule's 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.² Although ASLRRA had submitted several model training programs to FRA, and had made significant strides towards completing some programs, ASLRRA still had a significant number of training programs left to develop and submit.

Based on ASLRRA's and NRC's concerns about their ability to submit their model training programs by the May 1, 2017, deadline, and the significant impact that not meeting the deadline would have on the costs associated with the rule and FRA's approval process, FRA issued the May 2017 Final Rule extending each of the implementation dates in the 2014 Final Rule by one year.

Petition for Reconsideration

On May 22, 2017, ASLRRA filed a petition for reconsideration of the May 2017 Final Rule. ASLRRA's petition was

¹ Additional details about each of those steps are contained in the May 2017 Final Rule. *See* 82 FR 20549 (May 3, 2017).

² 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.

the only petition FRA received, and FRA did not receive any comments on the May 2017 Final Rule or ASLRRRA's petition.

In the petition, ASLRRRA states that the association will need more than a one-year delay on each of the implementation dates in the 2014 Final Rule and requested that the one-year extension be extended further by another year. In the petition, ASLRRRA states that it represents over 500 Class II and III railroads and has assumed the responsibility for preparing model training programs for its member railroads' use. ASLRRRA asserts that it still has a significant number of model programs left to develop and submit.

ASLRRRA states in its petition that it is utilizing a large group of volunteer safety professionals from the ranks of its Safety and Training Committee to develop the model programs. ASLRRRA is using these volunteers because the association asserts it would not otherwise have the resources to complete the task. With the commitments it received from volunteers, ASLRRRA has mapped out a schedule to complete the model training programs by fall 2018.³ ASLRRRA's estimated completion date would mean that many of its model programs would likely not be completed by the May 1, 2018, deadline afforded by the May 2017 Final Rule.

Further, ASLRRRA's petition states that extending the one-year delay will allow adequate time to comply with FRA's review and approval process and thereby assure its members that its model programs have been approved by FRA. According to ASLRRRA the additional one-year extension will also allow each railroad adequate time to consider how it will implement each of the model programs it will adopt and whether it will need to adapt the programs to address any unique aspects of its operations.

FRA's Response

In response to ASLRRRA's petition, FRA published a notice of proposed rulemaking on December 20, 2017. *See* 82 FR 60355. In that notice, FRA proposed to delay each of the implementation dates in the May 2017 Final Rule by an additional year, thereby delaying each of the implementation dates in the 2014 Final Rule by a total of two years. FRA provided a 30-day period for filing written comments; however, the only comment received during the comment

period was from ASLRRRA in support of its petition and the proposed rule. No adverse comments were received.

In the proposed rule, FRA's response to ASLRRRA's petition explained how delaying each of the implementation dates would improve compliance, reduce significant cost impacts associated with the rule, and prevent complicating the approval process. The basis for the proposed rule is the same basis for this final rule.

In sum, the additional one-year delay of the implementation dates should allow all model training program developers and other regulated entities to meet the rule's deadlines. FRA understands that many regulated entities were on schedule to meet the original deadlines in the 2014 Final Rule, or were preparing to meet the deadlines delayed by the May 2017 Final Rule. For those regulated entities that are prepared to move forward in advance of any deadline, there is certainly no prohibition against doing so and implementing a more robust training program should benefit the overall safety of those employers who are early adopters.

In consideration of the foregoing, FRA delays each of the implementation dates in the May 2017 Final Rule by an additional year, thereby delaying each of the implementation dates in the 2014 Final Rule by a total of two years.

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 a total of two years from the 2014 Final Rule so all employers have additional time to develop and submit training programs. Specifically, in paragraphs (a)(1) and (b) the implementation dates are changed to January 1, 2020, and likewise, in paragraph (a)(2) the implementation date is changed to May 1, 2021. This final rule thereby delays each implementation date an additional year from the May 2017 Final Rule.

Section 243.105 Optional Model Program Development

The implementation date in paragraph (a)(3) of this section is delayed by a total of two years from the 2014 Final Rule so that all model program developers have additional time to submit model programs, while also potentially benefiting from an expedited FRA review process. As amended, each model program submitted to FRA before May 1, 2019,

is considered approved and may be implemented 180 days after the date of the submission, unless FRA otherwise advises that all or part of the program does not conform to the rule's requirements. This final rule thereby delays the implementation date an additional year from the May 2017 Final Rule.

Section 243.111 Approval of Programs Filed by Training Organizations or Learning Institutions

FRA is amending paragraph (b) of this section so that each training organization or learning institution that has provided training services to employers covered by this part has in total an additional two years from the 2014 Final Rule to continue to offer such training services without FRA approval. As amended, a training organization or learning institution that has provided training services to employers covered by this part before January 1, 2019, may continue to offer such training services without FRA approval until January 1, 2020. This final rule thereby delays both dates an additional year from the May 2017 Final Rule.

Subpart C—Program Implementation and Oversight Requirements

Section 243.201 Employee Qualification Requirements

The implementation dates in this section are delayed by a total of two years from the 2014 Final Rule so all employers have additional time 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 such occupational category or subcategory.

In paragraph (a)(1), the implementation date is changed to September 1, 2020, and likewise, in paragraph (a)(2) the implementation date is changed to January 1, 2022. This final rule thereby delays each implementation date an additional year from the May 2017 Final Rule. Further, the dates used for referencing total employee work hours for purposes of applying each paragraph are modified accordingly by adding an additional year from the May 2017 Final Rule.

In paragraph (b), the implementation date is changed to January 1, 2020—an additional year from the May 2017 Final Rule.

In paragraphs (e)(1) and (2), the implementation dates for refresher training are also delayed by a total of two years from the 2014 Final Rule. Thus, the implementation date in

³ Interested parties can view that schedule at <https://www.regulations.gov/document?D=FRA-2009-0033-0039>.

paragraph (e)(1) is changed to January 1, 2022, and the completion of that refresher training for each employee is required no later than December 31, 2024. In paragraph (e)(2), each employer with less than 400,000 total employee work hours annually is required to implement a refresher training program by May 1, 2023, and complete that refresher training for each employee by no later than December 31, 2025. This final rule thereby delays each implementation date in this paragraph an additional year from the May 2017 Final Rule.

Regulatory Impact and Notices

Executive Orders 12866, 13563, 13771, and DOT Regulatory Policies and Procedures

This final rule is a non-significant regulatory action within the meaning of Executive Order 12866 and DOT policies and procedures. See 44 FR 11034 (Feb. 26, 1979). The final rule also follows the direction of Executive Order 13563, which emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Finally, the final rule follows the guidance of Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”), which directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.” FRA identified this final rule as a deregulatory effort to

comply with E.O. 13771. For more information on Executive Order 13771, see the Office of Management and Budget’s (OMB) April 5, 2017 “Memorandum: Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs.’”

In 2014, FRA published a Final Rule which established minimum training standards for each category and subcategory of safety-related railroad employee, as required by section 401(a) of the RSIA. FRA believes that by delaying the implementation dates of the 2014 Final Rule, this final rule will reduce the regulatory burden on the railroad industry. In May 2017, FRA issued a Final Rule which delayed each of the implementation dates in the 2014 Final Rule by one year. This final rule will extend the implementation deadlines by a total of two years from the 2014 Final Rule, one year of which has already been granted in the May 2017 Final Rule. This final rule will be beneficial for regulated entities by granting additional time to comply with the 2014 Final Rule.

The costs arising from part 243 over the 20-year period evaluated include: The costs of revising training programs to include “hands-on” training where appropriate, as well as the costs of creating entirely new training programs for any employer that does not have one already; the costs of customizing model training programs for those employers that choose to adopt a model program rather than create a new program; the costs of annual data review and analysis required in order to refine training programs; the costs of revising programs

in later years; the costs of additional time new employees may have to spend in initial training; the costs of additional periodic oversight tests and inspections; the costs of additional qualification tests; and the costs of additional time all safety-related railroad employees may have to spend in refresher training.

FRA believes that additional hands-on and refresher training found in the 2014 Final Rule will reduce the frequency and severity of some future accidents and incidents. Expected safety benefits were calculated using full accident costs, which are based on past accident history, the values of preventing future fatalities and injuries sustained, and the cost of property damage. (Full accident costs are determined by the number of fatalities and injuries multiplied by their respective prevention valuations, and the cost of property damage.)

By delaying the implementation dates of the 2014 Final Rule a total of two years, railroads and other entities subject to the rule will realize a cost savings. These entities will not incur costs during the first two years of this analysis. Also, costs incurred in future years will be discounted an extra two years, which will decrease the present value burden. The present value of costs will be less than if these entities were required to adhere to the original implementation dates. FRA has estimated this cost savings to be approximately \$40.6 million, at a 3-percent discount rate, and \$37.2 million, at a 7-percent discount rate. The table below shows the costs estimated at the 2014 Final Rule stage as well as the costs with the two-year implementation delay.

	Present value (3%)	Present value (7%)
Total costs (2-year delay)	\$250,309,438	\$169,902,295
2014 Final Rule costs	290,932,418	207,068,184
Two-year-delay cost savings	40,622,980	37,165,889

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

FRA has determined 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 final rule 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 final rule, it provides relief by extending all of the implementation dates in the 2014 Final Rule, as amended by the May 2017 Final

Rule. Thus, the economic impact of this final rule is not significant because it provides only additional time for all entities to comply with the 2014 Final Rule.

This final rule has 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 recordkeeping and reporting requirements already contained in the 2014 Final Rule have been approved by OMB. The OMB approval number is OMB No. 2130–0597. Thus, FRA is not required to seek additional OMB approval under the Paperwork Reduction Act.

Federalism Implications

This final 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 final 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 (Pub. L. 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 evaluated this final rule in accordance with Executive Order 13211, and determined that this regulatory action is not a "significant energy action" within the meaning of the Executive Order.

Executive Order 13783, "Promoting Energy Independence and Economic Growth," requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. 82 FR 16093 (March 31, 2017). FRA determined this final rule will not burden the development or use of domestically produced energy resources.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to www.regulations.gov, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.dot.gov/privacy. In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

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 is amending 49 CFR part 243 as follows:

PART 243—TRAINING, QUALIFICATION, AND OVERSIGHT FOR SAFETY-RELATED RAILROAD EMPLOYEES [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. In § 243.101, revise paragraphs (a) and (b) to read as follows:

§ 243.101 Employer program required.

(a)(1) Effective January 1, 2020, 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, 2021, 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, 2020, 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. In § 243.105, revise paragraph (a)(3) to read as follows:

§ 243.105 Optional model program development.

(a) * * *

(3) Each model training program submitted to FRA before May 1, 2019, 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. In § 243.111, revise paragraph (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, 2019, may continue to offer such training services without FRA approval until January 1, 2020. 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. In § 243.201, revise paragraphs (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, 2020, each employer with 400,000 total employee work hours annually or more 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.

(2) By no later than January 1, 2022, each employer with less than 400,000 total employee work hours annually in operation as of January 1, 2021, 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, 2020, 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, 2022, 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, 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.

(2) Beginning May 1, 2023, 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, 2025. 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.

Juan D. Reyes, III,
Chief Counsel.

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