



DEPARTMENT OF TRANSPORTATION

4910-EX-P

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2014-0387; FMCSA-2016-0002]

Qualifications of Drivers; Applications for Exemptions; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: The FMCSA announces its response to public comments regarding the granting of exemptions from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). Since February 2013, FMCSA has granted a number of exemptions and published numerous Federal Register notices requesting public comment on additional exemption applications. This notice responds to the substantive comments we received and announces our intention to continue granting additional exemptions.

DATES: This notice is applicable on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may search background documents or comments to the docket for this notice, identified by docket numbers FMCSA-2014-0387 and FMCSA-2016-0002, by visiting the:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the online instructions for reviewing documents and comments. Regulations.gov is available electronically 24 hours each day, 365 days a year; or

- DOT Docket Management Facility (M-30): U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE, West Building, Ground Floor, Room 12–140, Washington, DC 20590–0001.

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, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions about viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the safety regulations if it finds “such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.” The current provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) concerning hearing state that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing

aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

The hearing standard under 49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

On May 25, 2012, FMCSA published a notice requesting public comment on the application from the National Association of the Deaf (NAD) for an exemption from the regulatory requirement in 49 CFR 391.41(b)(11) on behalf of 45 deaf drivers (77 FR 31423). The Agency received 570 comments in response to this notice, and 40 of the 45 applicants were granted exemptions (78 FR 7479). Since that time, FMCSA has granted more than 300 hearing exemptions to individuals who do not meet the hearing standard. In doing so, FMCSA has published numerous Federal Register notices announcing receipt of hearing exemption applications and requesting public comment.

On September 21, 2015, FMCSA published a notice of receipt of applications from 14 individuals requesting an exemption from the hearing requirement to operate a CMV in interstate commerce (80 FR 57043). The Agency requested comments from all interested parties on whether a driver who cannot meet the hearing standard should be permitted to operate a CMV in interstate commerce. Further, the Agency requested comments on whether a driver who cannot meet the hearing standard should be limited to operating only certain types of vehicles in interstate commerce, for example, vehicles without airbrakes. The public comment period ended on October 21, 2015, and four comments were received, two of which were from drivers in support of hearing exemptions. The other two commenters were the Commercial Vehicle Training Association (CVTA) and the President of the Iowa Association of the Deaf.

On August 1, 2016, FMCSA published a notice of receipt of applications from 33 individuals requesting an exemption from the hearing requirement to operate a CMV in interstate commerce (81 FR 50594). The Agency requested comments from all interested parties on whether a driver who cannot meet the hearing standard should be permitted to operate a CMV in interstate commerce. The public comment period ended on August 31, 2016, and one comment was received from the Florida Department of Highway Safety and Motor Vehicles

II. Discussion of Comments Received

Below is a composite discussion of comments received in response to the notices identified above. The CVTA stated that FMCSA should not grant exemptions to hard of hearing and deaf individuals for airbrake-equipped vehicles until more research can be conducted to determine safety outcomes and determine whether safe methods of training can be devised without putting the public and training staff in jeopardy on the open road. They support the granting of exemptions to individuals operating vehicles without airbrakes since the evidence FMCSA relied upon for granting previous hearing exemptions is based on a study of hard of hearing and deaf individuals in non-airbrake vehicles. CVTA's comments focused specifically on safety issues and complications unique to training providers.

CVTA commented that FMCSA did not cite any report, study, or other documentation substantiating that a hard of hearing or deaf individual can safely operate a CMV with airbrakes, or point to a technology or accommodation that would enable operation that is as safe as that of a driver without a hearing impairment. They stated that FMCSA has not examined the relevant data and demonstrated a rational connection between the data and the decision made to grant an exemption. CVTA believes that the Agency has not provided adequate empirical support for granting hearing exemptions based on the "Executive Summary on Hearing, Vestibular Function

and Commercial Motor Driving Safety” (the 2008 Evidence Report), current medical literature, and the applicant’s driving record.

CVTA believes that until such evidence demonstrating safety is obtained and presented, all non-CDL hard of hearing and deaf individuals seeking an exemption should be restricted to non-airbrake vehicles. In addition, CVTA believes that, in the absence of such evidence, the granting of any exemption involving airbrake vehicles likely would constitute an arbitrary and capricious determination by FMCSA. They argue that, in order for an agency’s assessment to not run afoul of the “arbitrary and capricious” standard for judicial review set forth by the Administrative Procedure Act (APA), the agency must engage in reasoned decision making by examining the relevant data and articulating a satisfactory explanation for its action. Further, there must be a rational connection between the facts found and the choice made. They believe that FMCSA has not satisfied this standard.

CVTA noted several concerns related to the safety and liability of training and testing hard of hearing and deaf individuals. CVTA stated that the limitations and delays that arise when communicating with these drivers are significant and can result in an unsafe training environment. They believe that training hard of hearing and deaf drivers is a safety risk because CVTA member institutions include behind-the-wheel, on-the-road training which requires instantaneous communication while driving, for which in-cab signers or hand signals would be ineffective and unsafe. In addition, they believe that hard of hearing and deaf commercial drivers are unsafe due to their inability to hear sirens, air leaks or other sounds critical to safe operation. CVTA states that this lag time significantly increases risk of harm for the instructor, trainee, signer, and the public because the time required to give, and receive, communication is longer than the appropriate time needed to avert disaster, especially in a split-second emergency. In

addition, requiring a hard of hearing or deaf trainee to avert his/her eyes to receive communication rather than focusing on the road creates an unsafe lag time and distracted driving.

CVTA pointed out the legal liability training organizations face for not accepting hard of hearing and deaf students into their school on the basis that no accommodations exist or the student would be unable to safely and successfully complete the course. Conversely, CVTA also noted the legal liability potentially precipitated by allowing an individual to complete the course, knowing that the individual may be unable to obtain certification due to factors such as the regulatory prohibition of allowing interpreters during certain portions of CDL testing.

Ms. Kathy Miller, President of the Iowa Association of the Deaf, submitted comments in response to CVTA's comments. Ms. Miller stated that all evidence supports the fact that drivers who can satisfy all the physical qualification standards except hearing can safely operate vehicles, including those with airbrakes, and should be granted hearing exemptions. She points out that FMCSA's 2008 Evidence Report concluded that an inability to satisfy the hearing requirement does not result in any increased safety risk and that the actual experiences of hard of hearing and deaf drivers, including many of the exemption applicants, who already operate CMVs in intrastate commerce, confirms the accuracy of the conclusions reached by FMCSA's Evidence Report. Ms. Miller stated that she believes that drivers who are hard of hearing or deaf do not face the same distractions on the road as do many hearing drivers. She provided the example that drivers who are deaf or hard of hearing are not distracted by conversations in the vehicle, the radio, music, and ringing phones, and that when off the road, they can communicate with the dispatcher using smart phone technologies. She points out they have deaf truckers in Iowa with intrastate hearing exemptions that have operated for many years with good driving skills and without any accidents. She mentions that she is deaf and carries a Class D Chauffeur license and has held an intrastate hearing exemption since 2013 without any accidents. Ms.

Miller states that she believes that hard of hearing and deaf drivers should be permitted to operate any vehicle, and that they should not be limited to driving only certain types of vehicles. She points out that DOT has never before restricted drivers to a certain class of vehicle based on a disability and should not do so for hard of hearing and deaf drivers.

The Florida Department of Highway Safety and Motor Vehicles (FDHSMV) requested that the 30-day comment period be extended to 60 days, and its comments duplicated most of the comments received from CVTA. The FDHSMV stated that, medically, “deaf” means severe hearing loss with no functional hearing and that, without appropriate medical information on the extent of hearing loss, the FDHSMV has no way to know how to test these individuals. They pointed out that interpreters are prohibited during the skills test under 49 CFR 383.133(c)(5) and that applicants must respond to verbal commands and instructions in English by the skills test examiner. Therefore, a person who is deaf is unable to successfully complete the required skills test in accordance with these regulations. The FDHSMV further noted that, along with other States and the American Association of Motor Vehicle Administrators (AAMVA), the organization has repeatedly sought guidance from FMCSA on testing methodology and that FMCSA’s position has been to not provide such guidance because it would be setting a precedent that is in direct conflict with FMCSA’s regulatory position of providing guidance. FDHSMV requested that, rather than grant ad hoc exemptions, FMCSA should commission a study to determine whether deaf and hard of hearing drivers pose additional risk to the motoring public. If the study demonstrates that these drivers do not pose additional risk, and should be exempted, FMCSA then should provide the States with a methodology and standards for testing these drivers to ensure safety is not compromised.

FDHSMV also specifically mentioned airbrake-equipped vehicles as an area of concern, recommending that FMCSA not entertain applications for exemptions filed by hard of hearing and deaf individuals for purposes of operating airbrake-equipped vehicles.

III. FMCSA Response

FMCSA does not agree with the suggestion to restrict exemption applications from all hard of hearing and deaf individuals to non-airbrake vehicles only, because such a restriction is not necessary. The applicable regulation at 49 CFR 393.51(c) states that a CMV equipped with service brakes activated by compressed air (airbrakes) or a CMV towing a vehicle with service brakes activated by airbrakes must be equipped with a pressure gauge and a warning signal. This regulation also incorporates Federal Motor Vehicle Safety Standards (FMVSS) No. 121 S5.1.5, stating that the warning signal is required to be either: (a) visible within the driver's forward field of view, or (b) both audible and visible. Given that the airbrake warning signal is visible to hard of hearing and deaf individuals, no exemptions from or modifications to section 393.51 are necessary for such individuals.

In reaching the decision to grant hearing exemption requests, FMCSA considers available current scientific information and literature, including the 2008 “Evidence Report: Hearing, Vestibular Function and Commercial Motor Vehicle Driver Safety” (Evidence Report), and its own internal data. The Evidence Report reached two conclusions regarding the matter of hearing loss and CMV driver safety: (1) “No studies that examined the relationship between hearing loss and crash risk exclusively among CMV drivers were identified”; and (2) “Evidence from studies of the private driver license holder population does not support the contention that individuals with hearing impairment are at an increased risk for a crash.”

While a search of the literature still does not reveal any studies analyzing crash risk among deaf and hard of hearing CMV drivers, the FMCSA did review a 2014 doctoral

dissertation by Birgitta Thorslund from the Department of Behavioural Sciences and Learning at Linköping University, Sweden, entitled, “Effects of Hearing Loss on Traffic Safety and Mobility.” Dr. Thorslund concluded that “drivers with (hearing loss) cannot be considered an increased traffic safety risk....” In fact, Dr. Thorslund noted, drivers with hearing loss are more likely to be more cautious and adopt coping strategies such as reducing speed, “using a more comprehensive visual search behavior,” and avoiding distracting activities. This is corroborated, albeit with minimal numbers, by FMCSA’s own internal data. A 2016 Analysis Brief, “Safety Performance of Drivers with Medical Exemptions,” analyzed the records of 218 CDL holders with hearing exemptions. Drivers with hearing exemptions had a lower crash rate than the national average, had a lower violation rate than the control group, and had fewer driver out-of-service violations. FMCSA acknowledges that the numbers involved in the comparison are small and will endeavor to provide updated information as numbers grow.

To further support a decision to grant a hearing exemption, the Agency reviews each applicant’s driving record found in the Commercial Driver’s License Information System (CDLIS), for CDL holders, as well as inspections recorded in the Motor Carrier Management Information System (MCMIS). For non-CDL holders, the Agency reviews the driving records from the State Driver’s Licensing Agency (SDLA). The records for each applicant who has been granted a hearing exemption demonstrate that the driver has a safe driving history. Therefore, based upon the information above, including individual driving histories, the Agency believes that these drivers do not pose a risk to public safety and that granting the exemption achieves a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.

As described above, most of CVTA’s comments focused specifically on safety issues and complications unique to CDL training providers. The lack of any technology or accommodations

that would enable CVTA's member institutions to train hard of hearing and deaf drivers is not evidence that FMCSA should no longer grant hearing exemptions or limit these drivers to non-airbrake vehicles. As previously mentioned, FMCSA is not aware of any report, study, or other documentation substantiating that hard of hearing or deaf individuals are at an increased risk of a crash and does not believe that any additional studies are necessary.

There are several States that currently conduct CDL skills testing on hard of hearing and deaf drivers, each utilizing different methods. In an effort to make this information available to others, FMCSA is working with the AAMVA to develop a resource guide for administering the CDL skills test to hard of hearing and deaf drivers.

In response to CVTA's legal liability concerns, both public and private CDL training organizations and SDLAs should understand the requirements and prohibitions placed upon them by the Americans with Disabilities Act and the Rehabilitation Act of 1973 pertaining to hard of hearing and deaf individuals who have been granted an exemption by FMCSA. Further, any entity receiving Federal funding from FMCSA is required to comply with these laws under the terms of the grant agreement. These entities are advised to consult with private counsel in addressing their legal responsibilities and concerns.

While most of the FDHSMV's comments mirrored those of the CVTA, they note two additional arguments as to why exemptions should not be granted: first, that skills testing deaf and hard of hearing drivers cannot be completed without violating the regulation prohibiting the use of interpreters; and, second, that FMCSA should provide States with a methodology and standards for skills testing deaf and hard of hearing drivers. As noted, 49 C.F.R. 383.133 prohibits interpreters during the administration of the skills test and requires applicants to understand and respond to verbal direction. This does not mean, however, that a skills test cannot be accomplished with a deaf or hard of hearing individual. Generally, FMCSA has addressed this

issue in formal guidance, which is found at Question 7 to 49 CFR 391.11(b)(2) (published on October 1, 2014 at 79 FR 59139). The guidance is premised on the position that the term “speak,” as used with the associated rule, should not be construed so narrowly as to find a deaf driver who does not use oral communication in violation of that regulation. Similarly, the term “verbal” in 49 CFR 383.133 should not be construed so narrowly when examiners are administering skills tests to applicants with a hearing exemption, and should be applied to permit communication in forms other than verbal. If the actual skills tests are administered without the aid of an interpreter, the State is in compliance with 49 CFR 383.133(c)(5). Additionally, as noted above, there are no prohibitions against the use of an interpreter prior to the skills test generally or in between the three segments of the test. Use of a skills test examiner who is capable of communicating via American Sign Language is also an option.

Beyond the current regulations pertaining to skills testing CDL applicants, it is not appropriate for FMCSA to mandate additional standards or strict methodology. A State must, under 49 CFR 383.73(b)(1), require the applicant to pass a skills test in accordance with subparts F, G, and H of 49 CFR part 383. These standards remain the same for any CDL applicant, regardless of exemptions that may have been granted by the agency. As to a specific

methodology that would apply to all States and all applicants, the FMCSA declines to apply a “one size fits all” solution. The question of reasonable accommodation for a deaf or hard of

hearing applicant is highly fact specific, for both the applicant and the examining entity. The FMCSA remains committed to its partnerships with AAMVA, the FDHSMV, and other states working toward the development of best practices related to the skills testing of deaf and hard of hearing drivers.

IV. Conclusion

FMCSA has considered the available current medical information and literature and is not aware of any data to support the contention that hard of hearing and deaf individuals are at an increased risk for a crash. In addition, the comments discussed above do not include any evidence that FMCSA should no longer grant hearing exemptions or limit exempted drivers to non-airbrake vehicles. The Agency therefore will continue to consider each application for a hearing exemption on an individual basis and will continue exempting those drivers who do not pose a risk to public safety when granting the exemption achieves a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.

Issued on: December 20, 2017

Cathy F. Gautreaux
Deputy Administrator

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