



U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

1200 New Jersey Avenue,
SE Washington, DC 20590

Waiver for States Concerning Third Party CDL Skills Test Examiners In Response to the COVID-19 Emergency

December 15, 2020

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

ACTION: Grant of waiver.

SUMMARY: FMCSA waives the commercial driver's license (CDL) knowledge test examiner training requirements in 49 CFR 384.228(b)-(c) for certain third-party CDL skills test examiners. This waiver allows State authorized third party-skills test examiners who have maintained a valid CDL test examiner certification and have previously completed a CDL skills test examiner training course that satisfies the requirements of 49 CFR 384.228(d) to administer the CDL knowledge test without completing a CDL knowledge test training course. FMCSA has initiated this action in response to the President's Proclamation Declaring a National Emergency under 42 U.S.C. § 5191(b) (Declaration of National Emergency) concerning the coronavirus disease 2019 (COVID-19) and the President's Executive Order No. 13924, Regulatory Relief to Support Economic Recovery. As explained in greater detail below, the Agency issued waivers on April 9, June 22, and September 18, 2020 providing the same relief.

DATES: This waiver is effective January 1, 2021 and expires either on February 28, 2021, or upon the revocation of the President's Declaration of National Emergency under 42 U.S.C. § 5191(b) concerning the COVID-19 public health emergency, whichever is sooner.

FOR FURTHER INFORMATION CONTACT: Ms. Nikki McDavid, Chief of the Commercial Driver's License Division, Office of Safety Programs, 202-366-0831, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, D.C. 20590-0001.

Legal Basis

The Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107, June 9, 1998) provides the Secretary of Transportation (the Secretary) authority to grant waivers from any of the Federal Motor Carrier Safety Regulations issued under Chapter 313 of Title 49 of the United States Code, 49 U.S.C. § 31136, to a person(s) seeking regulatory relief (49 U.S.C. §§ 31136(e), 31315(a)). The Secretary must make a determination that the waiver is in the public interest and that it is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver. Individual waivers may be

granted for unique events for a period up to three months. TEA-21 authorizes the Secretary to grant waivers without requesting public comment, and without providing public notice.

The FMCSA Administrator has been delegated authority under 49 CFR 1.87(e) and (f) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313, relating to commercial motor vehicle operators, and 49 U.S.C. chapter 311, subchapter I and III, relating to commercial motor vehicle programs and safety regulations.

Background

On March 13, 2020, the President declared a national emergency under 42 U.S.C. § 5191(b) and the Health and Human Services Secretary declared a public health emergency related to COVID-19. On May 19, 2020, the President also issued Executive Order No. 13924, 85 FR 31353 (June 9, 2020) directing agencies to take actions to facilitate economic recovery from the effects of COVID-19. Due to the COVID-19 public health emergency, many States are experiencing greater than normal employee absences, reduced hours of operation, or closed offices of their State Driver Licensing Agencies (SDLA) in response to the guidance from the U.S. Centers for Disease Control and Prevention (CDC), and if applicable, State and local guidance, to use social distancing to reduce the spread of COVID-19. In addition, the current rise in COVID-19 cases in some States has resulted in a resurgence of stay-at-home orders and other emergency measures that may cause further economic and logistical disruptions. The pace of return to normal operations has varied across the country. As a result, some SDLAs may be unable to administer the knowledge tests to commercial learner's permit (CLP) applicants. Given the COVID-19 public health emergency, there is a continued need for immediate transportation of essential supplies, equipment, and persons, which requires an adequate and sustained supply of drivers trained to operate a commercial motor vehicle (CMV). Further, ensuring an adequate supply of trained drivers is vital to economic recovery from the effects of the COVID-19 public health emergency. This waiver provides needed relief from the specified Federal Motor Carrier Safety Regulations (FMCSRs) for States and SDLAs.

This waiver is in response to the unique circumstances resulting from the COVID-19 public health emergency and the immediate risk to public health, safety, and welfare. The waiver FMCSA issued on April 9, 2020, June 22, 2020, and, again on September 18, 2020, waived the requirements in 49 CFR 384.228(b)-(c), for third party CDL skills test examiners who previously completed a CDL skills test examiners training course and have maintained a valid CDL test examiner certification. The September 18 waiver will expire on December 31, 2020. FMCSA hereby issues a new waiver from those requirements, which will expire on February 28, 2021.

FMCSA's Determination and Regulatory Provisions Waived

Consistent with the statutory requirements for waivers, FMCSA has determined that it is in the public interest to issue a waiver, until February 28, 2021, limited in scope and circumstances, that is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.

The regulation at 49 CFR 384.228(b) sets forth the requirement that CDL knowledge and skills test examiners satisfy specific training requirements. The regulation at 49 CFR 384.228(c) requires that all CDL knowledge testers complete a training course covering three specified units

of instruction: Introduction to the CDL Licensing System, Overview of CDL Tests, and Knowledge tests. In response to the COVID-19 public health emergency, FMCSA is waiving the requirements in 49 CFR 384.228(b)-(c), for third party CDL test examiners who previously completed a CDL skills test examiners training course that meets the requirements of 49 CFR 384.228(d) and have maintained a valid CDL test examiner certification. This waiver allows third party CDL skills test examiners previously authorized by the State to administer the CDL skills test to administer the CDL knowledge test as well, without completing a CDL knowledge test training course.

States and SDLAs are covered under this waiver without further action.¹ FMCSA will not issue a finding or a determination of substantial noncompliance under 49 CFR part 384 against States for action or inaction consistent with this waiver.

Public Interest

FMCSA finds that granting this waiver is in the public interest because CDL and CLP holders play a critical role in delivering necessary passengers and property, including shipments of essential supplies, in response to the COVID-19 public health emergency. This waiver is in the public interest because it would allow States and SDLAs to use third-party CDL skills test examiners to continue administering CDL knowledge tests while SDLAs remain closed, are unable to administer CDL knowledge tests, or are operating at a diminished capacity. The continued availability of CDL knowledge testing will help maintain an adequate and sustained supply of trained CMV drivers to deliver essential supplies and persons across State lines to not only address the public health emergency, but also support economic recovery from the effects of the COVID-19 public health emergency and help prevent a possible shortage of CMV drivers. This waiver will also reduce the administrative burden on States and SDLAs during this public health emergency.

Safety Equivalency

Due to the limited scope of this waiver and the ample precautions that remain in place, FMCSA has determined that the waiver is likely to achieve a level of safety that is equivalent to the level of safety that would be obtained absent the waiver. The waiver of a particular regulation should not be viewed in isolation but rather as part of the whole of all regulations governing the safety of drivers. Waiver determinations are made holistically, taking all relevant factors into account. *See International Bhd of Teamsters v. DOT*, 724 F.3d 206 (D.C. Cir. 2013).

FMCSA has determined that waiving the CDL knowledge test examiner training requirements for third-party CDL skills test examiners who previously completed a CDL skills test examiners training course will not negatively impact safety. Due to an overlap in training topics, such examiners would have already taken a CDL skills test examiner training course that complies with 49 CFR 384.228(d) and would have already received training on two of the three required

¹ FMCSA Guidance Q1 to 49 CFR 383.75 states that a third party may not administer the CDL knowledge test unless an SDLA employee is present. That guidance assumes normal SDLA operating conditions, however, and does not apply under this waiver. Moreover, FMCSA is in the process of revising that guidance.

<https://www.fmcsa.dot.gov/regulations/title49/section/383.75>

units of instruction for the CDL knowledge test examiner training. The only unit required under 49 CFR 384.228(c) not covered by that training is the knowledge test unit. To ensure that third-party CDL skills test examiners will receive all the necessary information and training required by 49 CFR 384.228(c) prior to administering a knowledge test, the State must provide them with access to the written training/instructional materials for the knowledge test unit referenced in 49 CFR 384.228(c)(3). States may provide these materials electronically or through other means. Under this waiver, the State is not required to provide third-party CDL skills test examiners with formal in person or online training.

In addition, this waiver will not impact safety negatively because the CDL knowledge tests are easier to administer than the skills tests. The CDL knowledge test examiner has minimal direct involvement in administering the tests. The knowledge tests require the administration of written multiple choice tests and approximately four hours of CDL test examiner training. In contrast, the CDL skills test examiner has substantial direct involvement in the administration of the tests. The skills tests require the observation and scoring of demonstrated driving maneuvers and several days of examiner training. For these reasons, trained skills test examiners would be capable of administering the knowledge tests without first taking a CDL knowledge test training course. Moreover, FMCSA's April 9, June 22, and September 18 waivers have not adversely affected safety.

The measures listed below under Terms, Conditions, and Restrictions, taken collectively, provide the assurance needed to meet the legal standard that granting the waiver is likely to achieve an "equivalent level of safety." Therefore, FMCSA has determined that a waiver from the regulations noted above during the period of the waiver is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver. The remaining requirements for CDL test examiners continue to apply.

Unique Circumstances

The COVID-19 public health emergency led to widespread closures of State and Federal government offices, reduction of government services, and disruption of transportation systems, including possible driver shortages and related interruption of supply chains, which are heavily dependent on continued CMV operations. FMCSA finds that the circumstances surrounding this waiver are unique because such government operations are not providing their usual level of service.

For the reasons above, FMCSA grants a waiver as provided above, subject to the terms, conditions, and restrictions below.

Terms, Conditions, and Restrictions of the Waiver

This waiver covers States and qualifying third-party CDL skills testers for the period beginning at 12:00 a.m. on January 1, 2021, and continuing through 11:59 p.m. on February 28, 2021, or the revocation of the President's Declaration of National Emergency under 42 U.S.C. § 5191(b) concerning the COVID-19 public health emergency, whichever is sooner.

- (1) Under this waiver, the State must provide third-party CDL skills test examiners with access to written training/instructional materials for the knowledge test training

referenced in 49 CFR 384.228(c)(3) regarding the general and specialized knowledge tests, administration of the knowledge test, and the selection of the appropriate tests and test forms. States may provide these materials electronically or through other means. The State is not, however, required to provide these examiners with formal in person or online training in administering the CDL knowledge tests.

- (2) This waiver applies only to third-party CDL skills test examiners who have maintained their CDL test examiner certification. Third-party CDL skills test examiners who have not maintained their CDL test examiner certification by taking the required refresher training course and examination every four years, as required under 49 CFR 384.228(f), or have an expired CDL test examiner certification, are not covered under this waiver.

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James Wiley Deck
Deputy Administrator