



NEW MEXICO LEGISLATIVE COUNCIL SERVICE

INFORMATION BULLETIN

NUMBER 17

LEGISLATIVE RESEARCH, POLICY AND COMMITTEE SERVICES

JUNE 7, 2011

THE FEDERAL REAL ID ACT OF 2005: IMPLICATIONS FOR NEW MEXICO DRIVER'S LICENSES

SUMMARY

The federal REAL ID Act of 2005 establishes certain standards, procedures and requirements for issuing driver's licenses and identification cards that states must meet by January 15, 2013 in order for the driver's licenses and identification cards to be accepted as identification by the federal government. After January 15, 2013, federal government-approved identification may be required to board airplanes or enter federal buildings. Compliance requires changes to state law and will undoubtedly carry significant fiscal impacts and administrative burdens. This bulletin summarizes the primary requirements of the REAL ID Act, reviews the concerns associated with the act's implementation and presents policy options for the New Mexico Legislature.

THE REAL ID ACT: A CONTROVERSIAL BURDEN ON STATES

On May 11, 2005, the president signed into law the REAL ID Act of 2005 that Congress passed as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act. The REAL ID Act imposes certain uniform standards and requirements for driver's licenses and identification cards. Unless New Mexico complies with the act, state driver's licenses or identification cards will not be accepted by the federal government as valid forms of identification for "any official purpose". The act defines "official purpose" as "accessing federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary [of homeland security] shall determine".

Pursuant to the act, a state must implement minimum design, security and data storage standards and processes for issuing driver's licenses and identification cards. A state must also independently verify all documentation presented by a person to prove that person's identity. These requirements, among many others, have led a number of states and national organizations to argue that it is unreasonable to meet the REAL ID Act requirements.

The federal government has thus far acquiesced to that argument by postponing enforcement of the REAL ID Act. The act provides the U.S. Department of Homeland

Security (DHS) with the authority to issue all regulations and set standards for state compliance as well as the responsibility to determine whether a state is meeting the requirements of the act. The original deadline for compliance of May 2008 was postponed twice until May 2011. Moreover, a final rule issued by the DHS on March 7, 2011 once again postponed the compliance deadline to January 15, 2013.

THE REAL ID ACT: STATE IMPLEMENTATION

Implementation of the REAL ID Act is expected to cost states more than \$11 billion and have significant impacts on the administrative practices of state motor vehicle agencies. Seventy-one percent of the estimated cost, \$8.48 billion, consists of the time and resources needed to re-enroll driver's license and identification card holders.

The following sections briefly summarize the principal provisions of the REAL ID Act and critical concerns for states.

Document Design and Issuance Standards

At a minimum, the REAL ID Act requires that a driver's license or identification card issued by a state bears the person's full legal name, date of birth, gender, driver's license or identification card number, digital photograph, address of principal residence and certain physical security features to prevent tampering, counterfeiting or duplication. The license or card is required to have a common, machine-readable technology.

The REAL ID Act also mandates that states require presentation and verification of certain documents before issuing a driver's license or identification card. A person must present a photo or non-photo identity document that includes the person's full legal name and date of birth; proof of the person's social security number (SSN); and documentation showing the person's name and address of principal residence. Furthermore, states must take a photo of all persons who *apply* for a driver's license or identification card, regardless of whether a license or card is issued.

The design and issuance standards of the REAL ID Act are causes for concern for states. For example, many states

allow address changes without requiring issuance of new driver's licenses. Twenty-five states, including New Mexico, also do not print addresses on the licenses of certain protected classes, such as law enforcement officers. Cost estimates for implementing the residence, name and photo requirements reach almost \$700 million over five years for states. Depending on DHS regulations, uniform technology for the cards' physical security features could cost states \$1.1 billion over five years.

Immigration Requirements

The REAL ID Act establishes a system for temporary driver's licenses and identification cards that can be issued by the states to applicants who are not citizens of the United States but present evidence that they are "lawfully present" in the United States. Thus, non-citizens in the United States who can demonstrate lawful presence in the United States are eligible to apply for and receive driver's licenses and identification cards accepted by the federal government as valid forms of identification for "any official purpose". However, the licenses and cards must be limited in validity commensurate with the time limit on the individual's lawful presence in the United States and must clearly indicate, both on the face and machine-readable zone, that they are temporary or term-limited. New Mexico currently permits the issuance of driver's licenses regardless of immigration status in the United States.

Even with the adoption and implementation of the REAL ID Act, the decision to issue driver's licenses or identification cards to persons regardless of their immigration status remains entirely with the issuing states. The sovereignty of a state to issue non-REAL ID-compliant driver's licenses and identification cards is not altered or preempted. In fact, the REAL ID Act contemplates the issuance of driver's licenses and identification cards by states that are not accepted by the federal government as valid forms of identification for "any official purpose". The REAL ID Act requires only that the non-compliant license or card use a unique color identifier or design to alert officials that the document is not to be accepted by the federal government for any official purpose. Thus, states may opt to issue multiple documents and still be in compliance with the REAL ID Act. For example, a two-tiered system can be developed to issue a driver's license or identification card in compliance with the regulations upon request

and non-compliant driver's licenses and identification cards to those who either did not want a REAL ID-compliant license or card or were not eligible. Such a scheme, while arguably costly and complicated, nevertheless appears to be in full compliance with the REAL ID Act and all other federal laws.

Verification of Source Documents

The REAL ID Act establishes minimum issuance standards for federal recognition requiring a state to verify with the issuing agency the issuance, validity and completeness of: 1) a photo identification document or a non-photo document containing both the individual's full legal name and date of birth; 2) date of birth; 3) proof of a SSN or verification of the individual's ineligibility for a SSN; and 4) name and address of the individual's principal residence. States must confirm a person's SSN with the U.S. Social Security Administration, verify the person's legal presence status with the secretary of homeland security and verify that a person is not already licensed in another state. Verification of source documents is dependent on states integrating their systems with five national identity verification systems. Each of the five systems is intended to verify separate types of identity documents, including birth records of U.S. citizens born overseas, SSNs and immigration documents.

Few states independently verify the authenticity and validity of each document presented to prove a person's identity. Most states verify a person's SSN through a national identity verification system. Specifically, the New Mexico Motor Vehicle Division (MVD) has signed a memorandum of understanding with the DHS to access the Systematic Alien Verification of Entitlements (SAVE) to verify passports and other documents issued by the DHS to foreign nationals. Unfortunately, there is no reliable way for state motor vehicle agencies to verify the accuracy of foreign passports through any of the five national identity verification systems.

An added concern is the verification of birth certificates issued by agencies, such as vital statistics, from other states. According to a final rule issued by the DHS, the MVD will not be required to verify birth certificates with the issuing agency until an electronic method of verification is created for those types of documents.

Security Standards and Data Storage and Sharing Requirements

The REAL ID Act also requires that states establish fraudulent document recognition training programs for employees who issue driver's licenses and identification cards. Moreover, states must subject persons who are authorized to manufacture or produce the licenses or cards to background checks. Where the licenses and cards are produced or the source documents are stored must also meet certain physical security requirements. With regard to data retention and storage, states are required to employ technology that captures digital images of identity source documents. States must either store paper copies of the source documents for seven years or electronic images of the documents for 10 years. Electronic access to a state's motor vehicle agency database must be accessible by other states. States must store and share applicants' verification information with other states for law enforcement purposes.

The MVD is expected to complete a fraudulent document recognition training program that the DHS will certify as compliant with the REAL ID Act. Legislative authority was granted to conduct necessary background checks in 2007, but the MVD has yet to conduct necessary name-based and fingerprint-based background checks for appropriate employees. Costs of subjecting employees, vendors and suppliers of licenses and cards to background checks are a major concern. The MVD has received a grant to complete background checks of its employees.

THE REAL ID ACT: OPTIONS FOR NEW MEXICO DRIVER'S LICENSES

The major statutory challenges in complying with the REAL ID Act include: 1) limiting identity source documents; 2) verification of lawful status; 3) creation of limited-term driver's licenses; and 4) identification of non-compliant driver's licenses and identification cards if issued. The following sections review policy options and their major challenges, including any needed changes to state law.

1. Comply with the REAL ID Act

The legislature may choose to implement the requirements of the REAL ID Act. This option requires changes to state law and the MVD's internal systems and processes.

The total estimated cost for REAL ID Act

implementation in New Mexico continues to be a major challenge, particularly with continued limited state revenue. The majority of costs derive from the act's document issuance, design and verification requirements. To meet the minimum document requirements, the MVD must upgrade or purchase a new internal system that ensures driver's licenses and identification cards will be REAL ID compliant. Card security features, such as the use of polycarbonate, that fulfill the REAL ID Act requirements may push costs considerably higher.

One of the primary amendments to state law needed for REAL ID Act compliance is a change to New Mexico's lawful presence requirements. New Mexico law currently allows for driver's licenses to be issued to residents regardless of immigration status. Additionally, the MVD is authorized to accept foreign documents other than a passport to prove a foreign national's identity.

To comply with the REAL ID Act, the legislature may choose to eliminate the eligibility of foreign nationals without lawful presence to obtain driver's licenses under state law altogether. However, the legislature will still need to provide statutory creation of limited-term driver's licenses for foreign nationals with lawful presence.

Another alternative is the creation by the legislature of a separate document that would allow individuals, regardless of immigration status, to drive on New Mexico's roads but is not recognized for purposes of the REAL ID Act. Driver's licenses compliant with the REAL ID Act may be issued upon request and for an additional fee to help defray implementation costs. As required by the act, a driver's license that does not conform to the federal requirements must use a unique design or color indicator to alert federal agencies or officials that the license is non-compliant.

2. Reject Compliance with the REAL ID Act

As a second option, the legislature may choose to reject compliance with the REAL ID Act. The legislature may demand that Congress repeal the REAL ID Act altogether or condition its rejection on certain actions by the federal government. For example, New Mexico may refuse to comply with the act unless federal funds are appropriated to assist the state with compliance. Furthermore, the legislature may insist the federal government extend the compliance deadline or provide some flexibility in DHS regulations for existing state

practices. The compliance deadline has been extended several times and may continue to be extended.

Legislatures in 24 states have passed legislation that either prohibits state compliance with the act or urges Congress to amend or repeal the REAL ID Act.

However, rejection of the act may carry significant consequences. New Mexicans may not be able to board airplanes or enter federal facilities without a passport or other federal identification if New Mexico elects not to comply. Thus, the legislature may consider funding outreach efforts to educate the public on the effects of non-compliance with the REAL ID Act.

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