

## Questions and Answers about Driver's Licenses Now That Final REAL ID Regulations Have Been Issued

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### INTRODUCTION

Congress passed the REAL ID Act as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (HR 1268), and it was signed into law by the president on May 11, 2005. It provides that beginning three years after REAL ID's enactment (May 2008), driver's licenses cannot be accepted by federal agencies for any "official" purpose unless they meet the requirements of the act.

The law has a particular impact on immigrants — both documented and undocumented — because it requires proof of citizenship or lawful immigration status and imposes special licensing rules on them. But its terms and ramifications go far beyond this, covering all aspects of driver's license issuance: the information on the license; technology; acceptable documentation to obtain a license; and storage and sharing of personal information.<sup>1</sup>

In 2007, 17 states passed laws or resolutions rejecting the REAL ID Act, arguing that it imposes a huge unfunded mandate and burdensome requirements.<sup>2</sup> And immigrants themselves, both before and after the law passed, have been engaged in an ongoing struggle to maintain or expand their access to licenses.<sup>3</sup>

The law required that the U.S. Department of Homeland Security (DHS) issue implementing regulations. DHS issued proposed regulations in March 2007 and invited comments from the public. The final regulations were published in the Federal Register on January 29, 2008.<sup>4</sup>

The ACLU has issued a scorecard on the regulations giving DHS a failing grade in their impact on individuals, privacy, the states and Constitutional rights.<sup>5</sup>

Apparently taking into account state opposition to strict driver's license requirements, the final regulations give states considerably more flexibility in implementing REAL ID than the terms of the law provide, and extend the time for compliance. But the rules do not give states flexibility in implementing the provisions that pertain to immigrants' eligibility for REAL ID-compliant driver's licenses. The following questions and answers take an in-depth look at the provisions that particularly affect immigrants.

<sup>1</sup> For a summary of the REAL ID Act's driver's license requirements, *see* [www.nilc.org/immspbs/DLs/real\\_id\\_dl\\_tbl\\_051905.pdf](http://www.nilc.org/immspbs/DLs/real_id_dl_tbl_051905.pdf).

<sup>2</sup> For information on state opposition, *see* [www.realnightmare.org](http://www.realnightmare.org).

<sup>3</sup> For a resource guide on immigrant access to licenses, *see* [www.nilc.org/immspbs/DLs/resrc\\_guide/index.htm](http://www.nilc.org/immspbs/DLs/resrc_guide/index.htm).

<sup>4</sup> For a copy of the comments that NILC submitted in response to the proposed regulations, *see* [www.nilc.org/immspbs/DLs/real\\_id\\_comments\\_nilc\\_2007-05-02.pdf](http://www.nilc.org/immspbs/DLs/real_id_comments_nilc_2007-05-02.pdf). For a copy of the final regulations, *see* <http://a257.g.akamaitech.net/7/257/2422/29jan20081800/edocket.access.gpo.gov/2008/08-140.htm>.

<sup>5</sup> *See* <http://realnightmare.org/images/File/Real%20ID%20Scorecard%20-%20Fed%20Reg%20page%20numbers.pdf>.



NATIONAL  
IMMIGRATION  
LAW CENTER  
[www.nilc.org](http://www.nilc.org)

#### LOS ANGELES (Headquarters)

3435 Wilshire Boulevard  
Suite 2850  
Los Angeles, CA 90010  
213 639-3900  
213 639-3911 fax

#### WASHINGTON, DC

1444 Eye Street, NW  
Suite 1110  
Washington, DC 20005  
202 216-0261  
202 216-0266 fax

## TIMELINE AND STATE OPTIONS

### ■ What timetable do the regulations set?

- States must fully comply with REAL ID requirements by May 11, 2008, or request an extension of time to comply for their licenses to be accepted by federal agencies as identification. States have until March 31, 2008, to apply for an extension of time to comply. That extension lasts until December 31, 2009.
- States may obtain a second extension of time until May 10, 2011, to comply if they have taken steps to comply with the rule (“material compliance”). They must apply for that extension by October 11, 2009. Appendix A to the final rule sets out the checklist for material compliance.
- People who live in states that have been granted the extensions will be able to use their old licenses for all federal purposes until 2014 or — for those over the age of 50 as of December 1, 2014 (born before December 1, 1964) — until 2017.

### ■ Are states required to implement the REAL ID Act and its regulations?

- States may choose not to have their driver's license meet the REAL ID Act's requirements, for reasons of public safety, cost, privacy, or other public policy reasons. Their residents may present alternative documents, such as a passport or military ID, for federal official purposes.
- Thus far, 17 states have passed laws or resolutions opposing the REAL ID Act.
- If a state issues a driver's license that does not satisfy the REAL ID Act's requirements, the license must say on its face that it cannot be accepted by the federal government as ID, and it must have a unique design and color.

## IMMIGRANT ELIGIBILITY FOR LICENSES

### ■ Do the regulations address the fact that many lawful immigrants are not eligible for a REAL ID license?

- No. The REAL ID Act lists the immigration statuses that render a person eligible for a REAL ID-compliant license. Neither the proposed nor the final rules address the fact that many lawful immigration statuses are excluded from this list.
- Under the REAL ID Act, the only noncitizens who are eligible for a REAL ID-compliant license are persons who:
  - o are lawfully admitted for permanent or temporary residence;
  - o have conditional permanent resident status, or are an asylee or refugee;
  - o have a valid, unexpired nonimmigrant visa or nonimmigrant visa status;
  - o have a pending asylum application;
  - o have a pending or approved application for temporary protected status (TPS);
  - o have deferred action status; or
  - o have a pending application for adjustment of status to lawful permanent residence.
- That leaves out:
  - o persons granted withholding of removal or withholding of deportation;
  - o persons paroled into the U.S.;
  - o applicants for nonimmigrant visas (including as victims of trafficking or other crimes);

- o Cuban/Haitian entrants (the subcategory of those paroled into the U.S., at least until they have been in the U.S. for one year and can apply for adjustment);
  - o battered spouses and their children, and battered children and their parents (unless and until they can apply for adjustment of status or unless they are granted deferred action);
  - o persons granted Family Unity status;
  - o persons granted deferred enforced departure (DED) status;
  - o applicants for suspension of deportation or cancellation of removal; and
  - o persons under an order of supervision
- DHS, which administers and enforces immigration law, could have analogized the missing categories to the categories listed in the statute. For example, the rules could have concluded that “withholding of removal” is the equivalent of asylum, or that “deferred enforced departure” or “deferral of removal” are the equivalent of “deferred action.” It did not do so.

■ **What kind of licenses can immigrants get under REAL ID?**

- Lawful permanent residents, asylees, and refugees are eligible for the same kind of REAL ID-compliant license as citizens.
- A noncitizen in the nonimmigrant, asylum applicant, TPS, deferred action, and adjustment applicant categories may only receive a temporary license. The temporary license is valid only for the period of the applicant’s authorized stay in the U.S. or one year if there is no definite end to the authorized stay. The license must also state that it is “temporary” and state the expiration date.

■ **What documents can be presented to prove identity, citizenship, and immigration status?**

- The regulations recognize that many U.S. citizens do not have birth certificates or other evidence of citizenship, and that birth certificates often cannot be electronically verified.
- They allow states to establish an “exceptions process” for persons who, for reasons beyond their control, are unable to present the required documents to prove identity or date of birth.
- But the regulations specifically provide that alternative documents will only be allowed to prove U.S. citizenship, not immigration status.
- The proposed rules created a narrow list of documents that immigrants could provide to prove their identity and immigration status: an unexpired permanent resident card (I-551), unexpired employment authorization document (EAD), or unexpired passport accompanied by a valid U.S. visa.
- This limitation was not required by the REAL ID Act and was intended to simplify the process for department of motor vehicle (DMV) employees who would only have to recognize a limited list of immigration documents. This very limited list, however, has the potential to prevent many lawfully present noncitizens, including those listed specifically in the statute, from obtaining licenses.
- The final rules still limit the documents that may be presented to prove identity, with an additional requirement that an unexpired passport with valid visa must also be accompanied by an I-94 showing the most recent admission to the U.S.

- However, they do recognize that immigration status can be proved by a variety of documents issued by DHS or other federal agencies, and so such proof is not limited to the documents required to prove identity. This change was motivated by the fact that whatever immigration document was presented would have to be verified through the Systematic Alien Verification for Entitlements (SAVE) system.

■ **Do the regulations resolve the limitations and deficiencies of the SAVE system?**

- No. SAVE is an automated, Internet-based system for federal, state and local government agencies to verify the immigration status of noncitizens.
- Both the REAL ID Act and the final rules presume the reliability and functionality of the SAVE system in accurately verifying immigration status. But the system has not been independently evaluated, nor is a mechanism in place to monitor and ensure compliance with its rules. This is of critical importance because the accuracy of immigration records and the reliability of immigration processes are continuing problems.
- SAVE users themselves are well aware of the program's deficiencies. In a survey conducted by the American Association of Motor Vehicle Administrators, state DMV current users were critical of delays, the need for staff to make additional contacts with U.S. Citizenship and Immigration Services, and unavailability and unreliability of data.
- The Social Security Administration (SSA), which must verify immigration status before issuing Social Security numbers (SSNs) to noncitizens, has complained that it often experiences significant delays in verifying immigration status through SAVE and sometimes receives no response at all.
- The final rules provide no due process protection for applicants who are injured by mistakes or delays resulting from the use of the SAVE system.
  - o They do not acknowledge that the verification process can be delayed, do not set a time limit during which verification must be completed, and do not require issuance of a driver's license during the verification process.
  - o They do not provide for reasonable access to immigration records to review them for errors, a mechanism to correct immigration records, or an appeal if verification is wrongly denied.
  - o They do not require an appeals process for errors in immigration determinations by the DMV.
  - o They also take no steps to ensure that SSA and DHS actions that delay issuance of an SSN do not also cause denial or delay issuance of a license.

■ **Do the regulations address the fact that a passport is the only acceptable foreign document that can be accepted by state driver's license agencies?**

- No. The REAL ID Act provides that the only foreign document that may be used to meet the act's documentation requirements (including full legal name, date of birth, or gender) is a foreign passport.
- Many immigrants who are eligible for a driver's license (such as applicants for asylum or TPS) do not have a foreign passport and will not yet have one of the listed documents. They will be unable to use other foreign documents, such as a birth certificate, marriage certificate, school records or the like, to meet the act's requirements, although these same foreign documents are regularly used to prove identity for the purpose of obtaining immigration status in the U.S.

- The final rules do not make any allowances for the act's documentation limits affecting immigrants.
- In contrast, the rules give states discretion or allow them to put in place an exceptions process for what appear to be core documentation requirements on nonimmigration issues, such as proof of citizenship, identity, date of birth, SSN, and address. This flexibility is not mentioned in the act and would undercut the aim of uniform, strict requirements. It is, however a practical solution to the act's deficiencies

■ **Do the regulations resolve the REAL ID Act's ambiguity about how long a temporary license is valid?**

- The REAL ID Act limits the duration of a temporary license for which certain categories of noncitizens are eligible to the period of the authorized stay in the U.S. or, if there is no expiration date, for a period of one year. "Period of authorized stay" could mean the period until the expiration date on the visa, or it could mean the period specified on an I-94 issued upon admission to the U.S.
- Neither the proposed nor the final rule resolves this issue. The final rule simply repeats the statutory provision, with no explanation of what "authorized stay" means.
- As a result, DMVs may choose their own interpretation of when a period of authorized stay ends.

■ **Do the regulations address the fact that it will be impossible for many people to meet the requirement to provide proof of their "full legal name"?**

- The REAL ID Act requires proof of "full legal name," but does not define what this means. The final rule defines "full legal name" as "an individual's first name, middle name(s), and last name or surname, without use of initials or nicknames." This name must appear on the face of the driver's license, and it must match the name on documents used to prove identity.
- This requirement is slightly different from the proposed rules, which made "family name" an alternative to "middle name" and did not refer to surnames.
- The "full legal name" requirement conflicts with the common law in effect in states under which individuals may choose a name other than the name given to them at birth, provided that there is no fraudulent, criminal or wrongful purpose for doing this. While states have by statute established procedures for individuals to change their names, the common law rule remains in effect.
- The final rule allows a license to be issued in a name other than the name in source documents (for example, when there is a name change through marriage or adoption) but nonetheless requires that name change to be established through documents issued by a court, governmental body, or other entity. But it does not allow for name changes through other lawful means.
- The act's and regulations' full legal name requirement will result in denial of licenses for those who have established identities that do not match the exact structure mandated by the regulation's definition. For example, the name on their current identity documents or on their credit cards or bank accounts or utility bills may not match the name they will be required to put on their license because they have dropped a middle name or second last name or by using an initial or a nickname.
- For immigrants, the situation is particularly complicated. In some countries, the family name precedes the individual's given name; in others the mother's and father's last name may both appear as last names; or — for a married woman — the mother's last

name may be dropped and her husband's family name added after the father's last name. Others may have changed their family name for ease of pronunciation when they came to the U.S., or may hyphenate or drop one of their family names. As a result, the names on various documents will not match.

- The final rules leave open the possibility that foreign documents other than a passport may be used to track a name change, despite the act's requirement that a passport is the only foreign document that can be used to prove full legal name. But it does this in the preamble to the rule, not in the rule itself. This leaves open the possibility that state DMVs will choose their own rules.
- Moreover, the rule does not explain how different documents that reflect different versions of a name will be reconciled to meet the rule's requirements.

## ADVOCACY

### ■ Is there more that advocates interested in driver's license issues can do?

- Absolutely. Many in Congress did not recognize the irrationality and complexity of implementation of the REAL ID Act's requirements.
- States have now realized the cost, complexity, and burden of complying with REAL ID. For this reason, at least 17 states have passed laws or resolutions opposing it.
- Advocates need to continue to join forces with others, such as privacy advocates, states' rights advocates, and civil rights advocates, who will be affected by the new requirements.
- Advocates need to continue to make the case that driver's license restrictions for immigrants simply make the roads less safe for everyone, increase uninsurance rates and the number of unlicensed drivers, and undermine effective law enforcement.
- Advocates can support The Identification Security Enhancement Act of 2007, which was introduced in the U.S. Senate (S. 717) and the House of Representatives (HR 1117). These bills would repeal the REAL ID Act's licensing and identification provisions.

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### FOR MORE INFORMATION, CONTACT

Joan Friedland, immigration policy director | [friedland@nilc.org](mailto:friedland@nilc.org) | 202.216.0261

Tyler Moran, employment policy director | [moran@nilc.org](mailto:moran@nilc.org) | 208.333.1424