

The REAL ID Act: Questions and Answers

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■ What is the REAL ID Act?

Congress passed the REAL ID Act as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief in 2005 (HR 1268), and President George W. Bush signed it into law on May 11, 2005.

The act provides that, beginning three years after its enactment—i.e., as of May 2008—driver’s licenses and state IDs that do not meet the act’s requirements will not be accepted for any specifically defined “official” federal purpose.¹ However, as explained below, the U.S. Department of Homeland Security (DHS) repeatedly has extended the deadline by which state driver’s licenses must meet the REAL ID Act’s criteria in order to be accepted for these purposes.

On December 29, 2014, DHS extended the compliance deadline until October 1, 2020. Until that date, people in states that have been deemed compliant with REAL ID (even if their licenses are not yet REAL ID-compliant) or in states that have been granted extensions for REAL ID compliance may use their licenses as identification for official federal purposes.

People in states that DHS has deemed noncompliant are subject to a phased enforcement schedule regarding acceptance of their licenses for certain official federal purposes. Earlier this year, the DHS secretary issued a statement saying that, effective Jan. 22, 2018, people with licenses or IDs issued by noncompliant states will not be able to use their state-issued license or ID “to board a commercial domestic flight.”²

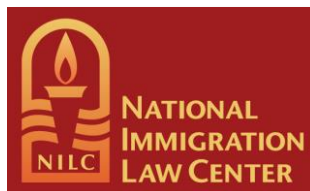
States that seek certification of their licenses as compliant with REAL ID must meet a wide range of requirements regarding issuing licenses.³ These include requiring license applicants to prove (and state agencies to verify) their U.S. citizenship or immigration status, as well as many other benchmarks.

¹ For more details, see *Summary of the Driver’s License Provisions in the REAL ID Act of 2005 as Made Part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief* (National Immigration Law Center, May 2005), www.nilc.org/wp-content/uploads/2015/11/real_id_dl_tbl_051905.pdf.

² “Statement by Secretary Jeh C. Johnson on the Final Phase of REAL ID Act Implementation,” U.S. Dept. of Homeland Security news release, Jan. 8, 2016, www.dhs.gov/news/2016/01/08/statement-secretary-jeh-c-johnson-final-phase-real-id-act-implementation.

³ *Full Compliance Certification Checklist* (American Association of Motor Vehicle Administrators, Oct. 9, 2012), www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3069&libID=3055 (a link to the checklist is also provided on the AAMVA’s “Government Affairs” webpage, www.aamva.org/Government-Affairs/, under the page’s “Legislative Alerts” tab).

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States that choose not to issue licenses that meet REAL ID's criteria will not be penalized financially or in any other way. The only consequence is that people in those states will need to produce another identity document or be subjected to additional screening for any of the specific "official" federal purposes.

■ What is the current deadline for full compliance with REAL ID's requirements?

DHS has repeatedly extended REAL ID's 2008 deadline.⁴ On Dec. 29, 2014, with little fanfare, DHS published a new rule in the Federal Register that states: "On or after October 1, 2020, Federal agencies shall not accept a driver's license or identification card for official purposes from any individual unless such license or card is a REAL ID-compliant driver's license or identification card issued by a State that has been determined by DHS to be in full compliance" with REAL ID.⁵ In contrast to prior deadlines, this latest deadline applies to individuals regardless of when they were born.

■ Are states subject to enforcement of REAL ID requirements before the October 1, 2020, deadline?

States that DHS has deemed noncompliant are subject to a phased enforcement schedule. According to the Dec. 29, 2014, rule's summary, "Nothing in this rule affects the prohibition against federal agencies accepting for official purposes licenses and identification cards issued by noncompliant States, pursuant to the REAL ID Act and in accordance with the phased enforcement schedule."⁶

DHS had released its "phased enforcement schedule" for REAL ID on December 20, 2013, following yet another "temporary deferment" of the previous deadline.⁷ The current enforcement schedule is described more fully below.⁸

■ Which states has DHS determined to be noncompliant?

Since DHS issued the extension to 2020, the agency has updated its *REAL ID Enforcement in Brief* posting several times, listing the states and territories that are not compliant with REAL ID and the states that are either compliant, have received extensions

⁴ See "Statement by Deputy Press Secretary Matt Chandler on DHS' Efforts to Enhance Driver's License Security," U.S. Dept. of Homeland Security (DHS) news release, Dec. 18, 2009, www.dhs.gov/news/2009/12/18/dhs-efforts-enhance-drivers-license-security; and *Minimum Standards for Driver's Licenses and Identifications Acceptable by Federal Agencies for Official Purposes*, 76 Fed. Reg. 12269-71 (Mar. 7, 2011), www.gpo.gov/fdsys/pkg/FR-2011-03-07/html/2011-5002.htm.

⁵ 79 Fed. Reg. 77838 (Dec. 29, 2014), www.gpo.gov/fdsys/pkg/FR-2014-12-29/pdf/2014-30082.pdf.

⁶ *Id.*, p. 77836.

⁷ "DHS Determines 13 States Meet REAL ID Standards," DHS news release, Dec. 20, 2012, www.dhs.gov/news/2012/12/20/dhs-determines-13-states-meet-real-id-standards.

⁸ The current enforcement schedule is published in *Real ID Enforcement in Brief* (DHS, last published date Jan. 8, 2016), www.dhs.gov/real-id-enforcement-brief. Since DHS periodically revises its enforcement schedule and lists of states that fall into different compliance categories, check the DHS website for the most up-to-date information.

for compliance, or are under review for an extension renewal.⁹ Currently, five states and one territory are listed as noncompliant or as having been granted an extension that is about to expire. People with driver's licenses or IDs issued by those states will need to present alternative documents or follow alternative procedures at restricted federal facilities.

Driver's licenses and passports are not the only documents that federal agencies may accept as identification. DHS advises that “[w]hen planning a visit to a Federal facility or military base, visitors should contact the facility to determine what identification will be accepted.”¹⁰ An earlier edition of the REAL ID FAQ published by DHS explained that “[e]ach agency determines whether identification documents are needed for the purpose it oversees and, if applicable, which documents are acceptable. REAL ID only applies if a person is presenting a driver's license or state-issued identification card for official purposes.”¹¹ Even in these cases, people who have noncompliant licenses may be able to use other forms of identification.

■ Which states has DHS determined to be compliant or to have applied for or received extensions from DHS?

DHS has declared the following 23 states to be compliant with REAL ID: Alabama, Colorado, Connecticut, DC, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Maryland, Mississippi, Nebraska, Nevada, Ohio, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.¹² This does not mean that all licenses issued within those states are compliant with REAL ID, since many residents may have obtained licenses under earlier state rules and have not yet been required to renew them. The REAL ID Act allows states to issue compliant licenses for up to 8-year periods, and the new deadline for compliance is designed to allow all residents to obtain a REAL ID-compliant license upon renewal.

Twenty-two states and four territories have been granted extensions, or have extension applications pending, or are in a grace period following the denial of an extension.¹³ Since this list changes periodically, it is important to check the DHS website for the latest, current list.

■ Are states that have received extensions from DHS subject to the current phased enforcement schedule?

No. DHS makes clear that individuals in states that have been deemed compliant or that have been granted extensions “may continue to use [their licenses] as before.”¹⁴

⁹ *Real ID Enforcement in Brief*, *supra* note 8. The list of states in the various compliance categories will likely be revised again. The latest iteration of the list is available at *Real ID Enforcement in Brief* (see note 8) and *Current Status of States/Territories* (DHS, Jan. 8, 2016), www.dhs.gov/current-status-states-territories.

¹⁰ *REAL ID Frequently Asked Questions for the Public* (DHS, Jan. 8, 2016), www.dhs.gov/real-id-public-faqs.

¹¹ *REAL ID Frequently Asked Questions for the Public* (DHS, Nov. 4, 2015), <https://web.archive.org/web/20151122030336/http://www.dhs.gov/real-id-public-faqs>.

¹² *REAL ID Enforcement in Brief*, *supra* note 8; and *Current Status of States/Territories*, *supra* note 9.

¹³ *Id.*

¹⁴ *REAL ID Enforcement in Brief*, *supra* note 8.

■ **What does “phased enforcement schedule” mean?**

The enforcement schedule announced in 2013 (and updated in 2014 and 2016—see table on p. 4) currently applies only to the few states deemed noncompliant. The states deemed compliant or granted extensions may continue to use current licenses, subject to—at least for the moment—an October 1, 2020, deadline.

Currently, DHS enforces REAL ID “state by state,” meaning that if a license-holder is from a compliant state or a state that has received an extension, his/her license will be accepted even if it is not REAL ID-compliant (but see the discussion below regarding marked licenses). After Oct. 1, 2020, enforcement will be “card by card,” meaning that the license itself must be REAL ID-compliant in order to be accepted as proof of identity for official federal purposes.

The situations under which driver’s licenses from noncompliant states are not currently accepted include only a few specified “official” purposes, such as access to DHS headquarters, to restricted areas of federal facilities, to nuclear power plants, and to certain semi-restricted areas for most federal facilities. Other federal agencies, including the Transportation Security Administration (TSA), continue to accept driver’s licenses from all states for all purposes.

■ **What is the enforcement schedule applicable to noncompliant states?**

This table summarizes the enforcement schedule for REAL ID applicable to noncompliant states.¹⁵

Phase	Location	Enforcement Date
1	Restricted areas (i.e., areas accessible by agency personnel, contractors, and their guests) for DHS’s Nebraska Ave. complex headquarters.	4/21/14
2	Restricted areas for all federal facilities and nuclear power plants.	7/21/14
3	Semi-restricted areas (i.e., areas available to the general public but subject to ID-based control) for most federal facilities (subject to limitations described below). Access to federal facilities will continue to be allowed for purposes of applying for or receiving federal benefits.	1/19/15
	3a Federal Security Levels 1 and 2 (lower security levels)	1/19/15
	3b Federal Security Levels 3, 4, and 5 (higher security levels)	10/10/15
4	Boarding federally regulated commercial aircraft. A driver’s license or identification card from a noncompliant state may be used only in conjunction with an acceptable second form of ID for boarding federally regulated commercial aircraft.	1/22/18

¹⁵ Sources of information in this table: *Real ID Enforcement in Brief*, *supra* note 8; *Current Status of States/Territories*, *supra* note 9; and *REAL ID Frequently Asked Questions for the Public* (Jan. 8, 2016), *supra* note 10.

■ **Do REAL ID's requirements apply to all interactions with federal agents or to enter all federal buildings?**

No. Under the REAL ID regulations, official purposes “means accessing Federal facilities, boarding Federally-regulated commercial aircraft, and entering nuclear power plants.”¹⁶

As DHS has made clear, “The Act’s prohibitions do not affect other uses of driver’s licenses or identification cards—including licenses and cards from noncompliant states—unrelated to official purposes as defined in the Act.”¹⁷

These include:¹⁸

- entering federal facilities that do not require a person to present identification
- voting or registering to vote
- applying for or receiving federal benefits
- being licensed by a state to drive¹⁹
- accessing health or life preserving services (including hospitals and health clinics), law enforcement, or constitutionally protected activities (including a defendant’s access to court proceedings)
- participating in law enforcement proceedings or investigations

REAL ID allows federal facilities to decide which alternative documents to accept and to establish admission procedures for people who do not have acceptable identification.²⁰

REAL ID does not apply to state or local purposes and does not prevent states or localities from accepting any form of license as identification.

The REAL ID Act, regulations, and policy statements limit what constitutes an official federal purpose for which a REAL ID–compliant license is required. However, a federal agency may decide to limit the types of documents it accepts based on considerations unrelated to REAL ID. For example, an agency may decide, in its discretion, to accept only a passport for certain purposes.

■ **Does the current enforcement schedule require people to present REAL ID–compliant licenses in order to board an airplane?**

According to DHS’s most recent schedule,²¹ people from states that have been declared *noncompliant* with REAL ID will not be able to use their driver’s licenses or state-issued IDs to board airplanes for commercial domestic flights starting Jan. 22, 2018. For people with

¹⁶ 6 CFR § 37.3.

¹⁷ *Real ID Enforcement in Brief*, *supra* note 8.

¹⁸ *REAL ID Frequently Asked Questions for the Public* (Jan. 8, 2016), *supra* note 10.

¹⁹ In other words, REAL ID restrictions do not prevent states from issuing driver’s licenses to individuals who aren’t eligible for a REAL ID license.

²⁰ Philip A. McNamara, “What You Need to Know about Effects of REAL ID Act,” *Albuquerque Journal*, Nov. 20, 2015, www.abqjournal.com/679095/opinion/what-you-need-to-know-about-effects-of-real-id-act.html. (McNamara is the assistant secretary for intergovernmental affairs at the U.S. Dept. of Homeland Security.)

²¹ “Statement by Secretary Jeh C. Johnson on the Final Phase of REAL ID Act Implementation,” *supra* note 2.

licenses or IDs from states that have been declared compliant or that have been granted a compliance extension, that enforcement date is Oct. 1, 2020. But even if passengers don't have proper ID, Transportation Security Administration rules clarify that they may be allowed to fly, although they may need to complete a form with their name and current address or be asked additional questions to confirm their identity.²² TSA can also confirm a person's identity through means such as publicly available databases.²³

According to the Nov. 4, 2015, edition of the REAL ID FAQ, people traveling by air will be allowed to present licenses that do *not* meet the REAL ID criteria, as long as they present them "in conjunction with a second form of ID."²⁴

■ **Under the current enforcement schedule, can people with licenses marked "not for official federal purposes" or similar language use those licenses as proof of identity for those purposes?**

DHS has not specifically addressed this issue and is reportedly studying it. But DHS did not exempt such licenses from its statement that states deemed compliant or granted extensions "may continue to use [their licenses] as before."²⁵ Nor are any states yet subject to requirements regarding acceptance of licenses to board airplanes.

The mere fact that a license says it may not be used as identification for federal purposes, or that it contains similar language, is not dispositive, because only the federal government, and not the states, can determine what identification the federal government will accept.

■ **If a person has a license marked "not acceptable for official federal purposes," does this mean that the license-holder is an unauthorized immigrant?**

No. DHS has clarified that no conclusions about a person's citizenship or immigration status may be drawn based on the type of license a person has. Having a non-REAL ID or a "marked" license does not indicate that the license-holder is not lawfully present. Some states (e.g., Vermont) explicitly allow citizens to obtain such licenses, and some (e.g., Colorado) even require some lawfully present immigrants to obtain them.

Under REAL ID, states have great latitude in deciding who can obtain a license that is not acceptable for official federal purposes. They can offer the same noncompliant license to U.S. citizens and lawfully present immigrants as they offer to people who cannot prove that they are lawfully present in the U.S. As DHS makes clear:

DHS cautions against assuming that possession of a noncompliant card indicates the holder is an undocumented individual, given that several states issue noncompliant licenses for reasons unrelated to lawful presence.²⁶

²² *Security Screening: Identification* (Transportation Security Administration, undated webpage last accessed Jan. 15, 2016), <https://www.tsa.gov/travel/security-screening/identification>.

²³ *Travel: Frequently Asked Questions* (Transportation Security Administration, undated webpage last accessed Jan. 15, 2016), <https://www.tsa.gov/travel/frequently-asked-questions>.

²⁴ *REAL ID Frequently Asked Questions for the Public* (Nov. 4, 2015), *supra* note 11.

²⁵ *Real ID Enforcement in Brief*, *supra* note 8.

²⁶ *REAL ID Frequently Asked Questions for the Public* (Jan. 8, 2016), *supra* note 10.

And an earlier edition of DHS’s REAL ID FAQ explained:

A “Not for Federal Identification” or a similar mark means that the issuing state offers its residents the option to obtain a driver’s license or identity card which is not compliant with REAL ID and that the license holder has chosen to exercise that option. A variety of reasons may underlie that choice, including personal preference, religious conviction, or the inability or decision not to provide original documents needed to verify identity, citizenship, or lawful status in the United States.²⁷

Nevertheless, given the uncertainty about whether federal agencies will accept these licenses under the phased enforcement schedule, and the potential risks for undocumented people, we suggest that people who are not lawfully present *refrain* from presenting these licenses for any of the listed federal purposes, particularly for boarding airplanes.

■ **Are states that impose immigration restrictions on access to driver’s licenses necessarily in compliance with REAL ID?**

No. States cannot comply with REAL ID simply by imposing immigration restrictions, and they do not become compliant simply by identifying or marking licenses of certain immigrants. Only DHS—not any state—may certify that a state’s driver’s license procedures and requirements are in compliance with REAL ID.

■ **Are states required to implement REAL ID’s requirements?**

No. REAL ID is not a mandate. Since DHS has extended the compliance date and few states have been deemed noncompliant, the act has had no practical effect to date regarding acceptance for federal purposes.

The REAL ID Act’s scope is limited to setting requirements for documents that may be accepted for certain *federal* purposes, because the federal government cannot lawfully commandeer the states’ driver’s license–issuing authority and resources in order to mandate that the licenses states issue meet specific requirements.

Even with respect to those specific federal purposes, the federal government recognizes that people who have no identification documents at all may be allowed to board commercial flights²⁸ or enter federal buildings, although they may be subject to additional screening.

■ **Are states required to deny licenses to immigrants who are ineligible for a REAL ID–compliant license?**

No. REAL ID does not prevent states from issuing licenses to anyone. It simply provides that if states would like the federal government to recognize their licenses for certain *official federal purposes*, the licenses must meet specific requirements.

²⁷ *REAL ID Frequently Asked Questions for the Public* (Nov. 4, 2015), *supra* note 11.

²⁸ *Security Screening: Identification*, *supra* note 22.

Section 202(d)(11) of REAL ID allows states to issue licenses that do not satisfy REAL ID's requirements, provided that the licenses state that they are not acceptable for official federal purposes and are visually distinguishable from REAL ID certified licenses.²⁹

In 2013, eight states, the District of Columbia, and Puerto Rico passed laws expanding access to licenses for immigrants, by making distinguishable licenses available to state residents, including those who are not eligible for REAL ID-compliant licenses.³⁰ In 2015, two more states, Hawaii and Delaware, passed similar laws. New Mexico and Washington already provided driver's licenses to eligible applicants regardless of their immigration status, and Utah provides a driver's privilege card to individuals who cannot provide evidence of lawful presence in the U.S.

Many states have passed laws or resolutions opposing the imposition of REAL ID's requirements,³¹ basing their opposition, in large part, on the "lack of funding for state implementation; privacy concerns regarding the collection and use of individuals' information; and uncertainty regarding the availability, development and cost of electronic databases."³²

■ Why has DHS postponed the deadline for states to comply with REAL ID's requirements?

DHS acknowledges that its prior deadlines created burdens for states and their residents. DHS explains the current extension as necessary because many drivers in states deemed REAL ID-compliant have licenses that were issued prior to compliance and would have to renew their licenses early. Also, the previous dates would complicate the enforcement plan and interfere with DHS's plans to evaluate phased enforcement.³³

■ Does the REAL ID Act make all lawfully present immigrants eligible for a REAL ID-compliant license?

The REAL ID Act lists specific categories of immigrants eligible for a license that will be recognized for official federal purposes.³⁴ This list fails to capture all lawfully present

²⁹ 6 CFR § 37.71.

³⁰ *Inclusive Policies Advance Dramatically in the States: Immigrants' Access to Drivers' Licenses, Higher Education, Workers' Rights, and Community Policing* (National Immigration Law Center, Oct. 2013), www.nilc.org/wp-content/uploads/2016/02/inclusive-policies-advance-in-states-2013-10-28.pdf, p. 3. In November 2013, Oregon's law was repealed by referendum.

³¹ *State Legislative Activity in Opposition to the Real ID* (National Conference of State Legislatures, Jan. 2014), www.ncsl.org/documents/standcomm/sctran/REALIDComplianceReport.pdf.

³² Statement of David Quam, Director of Federal Relations, National Governors Association, before the Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, hearing titled "Secure Identification: The REAL ID Act's Minimum Standards for Driver's Licenses and Identification Cards," Mar. 21, 2102, <http://judiciary.house.gov/files/hearings/Hearings%202012/Quam%2003212012.pdf>.

³³ 79 Fed. Reg. 77836-38 (Dec. 29, 2014).

³⁴ Under Section 202(b)(B) of the act, people with only the following immigration statuses are listed as eligible for a license that complies with REAL ID's requirements: lawful permanent residents, lawful temporary residents, conditional residents, asylees, refugees, nonimmigrants, asylum applicants, people who

immigrants. As a practical matter, however, DHS has certified as REAL ID–compliant states that issue driver’s licenses to a broader group of lawfully present noncitizens. For example, Florida, which has been certified by DHS as REAL ID–compliant, issues licenses to people with statuses listed in section 202(b)(B) of the REAL ID Act, as well as to other lawfully present individuals, including: people granted withholding of removal/deportation; individuals paroled into the U.S.; certain applicants for visas as survivors of trafficking or other serious crimes; individuals who have applied for cancellation of removal allowed to stay in the U.S. as a matter of prosecutorial discretion and whose cases have been administratively closed; and people who are under an order of supervision.³⁵

DHS appears to be concerned with ensuring that states verify the lawful presence of applicants for REAL ID–compliant licenses rather than with insisting that applicants fall within the arbitrarily limited categories listed in the REAL ID Act.

■ Do states have an interest in issuing driver’s licenses to all eligible drivers?

Yes. States have a compelling interest in ensuring that all drivers have an opportunity to obtain a driver’s license. Ensuring that drivers can be licensed is a matter of public safety. To get a license, drivers are tested to ensure that they know the rules of the road. And if drivers can get a license, they have greater access to car insurance.

Unlicensed and uninsured drivers make police officers’ jobs more difficult, less efficient, and more risky. Stopping, arresting, jailing, and prosecuting unlicensed drivers burdens the criminal justice system and diverts law enforcement resources from other critical functions.

have applied for or been granted temporary protected status, people granted deferred action, and people who have applied to adjust to lawful permanent residence.

³⁵ See *Acceptable Document Table* (Florida Dept. of Highway Safety and Motor Vehicles, Jan. 21, 2016), www.flhsmv.gov/ddl/aila/acceptabledocuments.pdf.