

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, 2005.¹ 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.² According to the act, "official purpose" includes but is not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary [of Homeland Security] shall determine."³

To date, the U.S. Department of Homeland Security (DHS) has defined "official purpose" to include only "accessing Federal facilities, boarding Federally-regulated commercial aircraft, and entering nuclear power plants."⁴

As explained below, 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.

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 a state's licenses meet specific requirements. But the effect has been to compel many states to modify their license issuance requirements in order to comply with the act.

■ What is the REAL ID Modernization Act?

In 2020, Congress passed the REAL ID Modernization Act as part of the Consolidated Appropriations Act of 2021.⁵ It redefines driver's licenses and identification cards to include those "stored or accessed via electronic means, such as mobile or digital driver's licenses [or identification cards], which have been issued in accordance with regulations prescribed by the Secretary." The act also authorizes acceptance of application information through

¹ <https://www.dhs.gov/xlibrary/assets/real-id-act-text.pdf> (hereinafter "REAL ID Act").

² 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.

³ REAL ID Act § 201.

⁴ 6 CFR § 37.3, <https://www.law.cornell.edu/cfr/text/6/37.3> (hyperlink to definition of "federally-regulated commercial aircraft" omitted).

⁵ The REAL ID Modernization Act, Title X, Div. U of the Consolidated Appropriations Act, 2021, Public Law 116-260 (Dec. 27, 2020), <https://www.congress.gov/bill/116th-congress/house-bill/133/text>.

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electronic transmission methods. DHS defines *mobile driver's license* (mDL) as “a digital representation of the information on a state-issued physical DL/ID [that] is stored on, or accessed via, a mobile device.”⁶ DHS has not yet issued regulations implementing the provisions of the act.

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

DHS repeatedly has extended the deadline by which individuals must present REAL ID-compliant cards that are acceptable for certain official federal purposes. On December 5, 2022, DHS announced an extension of the REAL ID compliance deadline to May 7, 2025.⁷ Until that date, people in states that DHS has deemed fully compliant with REAL ID or in states that have been granted extensions for REAL ID compliance may use their licenses as identification for official federal purposes.⁸ But as explained below, the permission to use noncompliant licenses is less sweeping than it appears, and not all agencies will accept a noncompliant license as identification before the new deadline.

■ How many states has DHS certified as compliant with REAL ID requirements?

According to DHS, all 50 states plus the District of Columbia and four out of five territories are now compliant with REAL ID requirements and are issuing REAL ID-compliant licenses.⁹

■ Can states issue licenses and cards that are not acceptable for federal purposes?

Yes. Section 202(d)(11) of the REAL ID Act specifically allows states to issue licenses that do not comply with the act, but provides that these licenses must clearly state on their face that they are not acceptable for official federal purposes and must have a unique design and color (“marked cards”).¹⁰

⁶ Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Mobile Driver's Licenses, 86 Fed. Reg. 20322 (Apr. 19, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-04-19/pdf/2021-07957.pdf>.

⁷ “DHS Announces Extension of REAL ID Full Enforcement Deadline” (U.S. Dept. of Homeland Security press release, Dec. 5, 2022), <https://www.dhs.gov/news/2022/12/05/dhs-announces-extension-real-id-full-enforcement-deadline>. See also “REAL ID: Flying with a REAL ID” (Transportation Security Administration webpage), <https://www.tsa.gov/real-id>. “.

⁸ “REAL ID Frequently Asked Questions” (U.S. Dept. of Homeland Security webpage), <https://www.dhs.gov/real-id/real-id-faqs>.

⁹ DHS press release, *supra* note 7.

¹⁰ REAL ID Act § 202(d)(11); see also 6 CFR § 37.71.

■ **Can you use licenses that are marked as not acceptable for federal purposes at airports in order to clear airport security and board a plane before the May 7, 2025, deadline?**

Yes. The Transportation Security Administration (TSA) and the Department of Homeland Security make clear that the TSA will accept these cards.¹¹

■ **Will other federal agencies continue to accept cards that do not comply with REAL ID before the May 7, 2025, deadline?**

That depends. DHS leaves the determination of whether federal agencies must accept noncompliant cards up to the agencies, warning that “[f]ederal agencies have the authority to set their own minimum security access requirements and, if desired, decide not to accept noncompliant marked cards before the May 7, 2025 deadline. For example, The U.S. Department of Defense (DoD) recently finalized an update to its DoD-Wide installation security policy and is in the process of no longer accepting noncompliant marked cards across all of its facilities and installations. However, DoD will continue to accept state-issued noncompliant unmarked “legacy” cards until the May 7, 2025 deadline. To ensure you have the proper identification, DHS recommends that you contact the federal agency you plan to visit in advance, to obtain information regarding identification requirements.¹² DHS makes a confusing distinction between “legacy cards” and “marked cards.” DHS defines “legacy” cards as those “issued before a state began issuing REAL ID–compliant cards and [that] contain neither the image of a star nor the warning statement.”¹³ DHS points out that some federal agencies, such as the Department of Defense, will continue to accept unmarked “legacy” cards until May 7, 2025, even if they are no longer accepting marked noncompliant cards.¹⁴

The bottom line is that the extension of time for acceptance of noncompliant licenses is not as across-the-board as it appears. It will be important for individuals to check the rules for access to federal buildings, other than airports, before they try to enter them.

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

No. As DHS has made clear, “[T]he REAL ID Act applies when an individual presents a state-issued driver’s license or identification card to a federal agency for an ‘official purpose’ as defined in the Act and regulations, such as boarding a federally regulated commercial aircraft.”¹⁵

DHS describes the circumstances in which a REAL ID license is *not* required in this way: “The Act does not require individuals to present identification where it is not currently required to access a federal facility (such as to enter the public areas of the Smithsonian) nor

¹¹ “REAL ID: Flying with a REAL ID” (Transportation Security Administration webpage), <https://www.tsa.gov/real-id>; REAL ID Frequently Asked Questions (U.S. Dept. of Homeland Security webpage), <https://www.dhs.gov/real-id/real-id-faqs>.

¹² “REAL ID Frequently Asked Questions,” *supra* note 8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

does it prohibit an agency from accepting other forms of identity documents (such as a U.S. passport or passport card).”¹⁶

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. But DHS warns, “Although a REAL ID card may not be necessary for other purposes such as driving, voting, banking, or applying for benefits or employment, we recommend checking with the relevant state, local, or commercial entities regarding their specific identification requirements.”¹⁷

■ How can you tell if your license is REAL ID-compliant?

According to TSA, REAL ID-compliant cards have a star at the top of the card.¹⁸ In addition, Enhanced Driver’s Licenses (EDL) issued by Washington, Michigan, Minnesota, New York, and Vermont are considered acceptable alternatives to REAL ID-compliant cards and will also be accepted for official REAL ID purposes. State issued EDLs do not contain the star marking and this is acceptable.¹⁹

■ Why has DHS postponed the deadline for enforcement of REAL ID’s requirements?

DHS justified the extension as needed in part to “address the lingering impacts of the COVID-19 pandemic on the ability to obtain a REAL ID driver’s license or identification card.”²⁰

■ What does compliance with REAL ID’s requirements mean?

DHS certification of licenses as compliant with REAL ID requires states to meet a wide range of requirements regarding license issuance.²¹ 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.

The consequence for people who do not have REAL ID-compliant licenses is that, when identifying themselves for one of the specific “official” federal purposes, they will need to produce another identity document or be subjected to additional screening.

¹⁶ *Id.* DHS previously more clearly specified the purposes where a REAL ID compliant license is not required to include 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 drive; 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.

¹⁷ *Id.*

¹⁸ “REAL ID: Flying with a REAL ID,” *supra* note 11.

¹⁹ “REAL ID Frequently Asked Questions,” *supra* note 8.

²⁰ DHS Announces Extension of REAL ID Full Enforcement Deadline” (U.S. Dept. of Homeland Security press release, Dec. 5, 2022), <https://www.dhs.gov/news/2022/12/05/dhs-announces-extension-real-id-full-enforcement-deadline>.

²¹ REAL ID - American Association of Motor Vehicle Administrators - AAMVA, <https://aamva.org/topics/real-id/#?wst=4a3b89462cc2eff2cbe0c7accde57421>.

■ What is the difference between state-based enforcement and card-based enforcement?

DHS distinguishes between state-based enforcement and card-based enforcement, explaining that:

Until full enforcement of REAL ID begins on May 7, 2025, DHS and its component agencies, including TSA at its airport security checkpoints, will continue to accept for identification purposes all state-issued driver's licenses and identification cards issued by compliant states, as well as noncompliant states with a valid extension ("state-based enforcement").²²

Because DHS has certified all states as REAL ID-compliant, their drivers will not be subject to "card-based enforcement" until May 7, 2025, and may continue to use noncompliant licenses until then (though, as described above, the situation is less clear for "marked" cards used as proof of identity in federal buildings other than airports). If a state were to be declared noncompliant or not be granted an extension of time for compliance, its drivers would be subject to card-based enforcement.²³

■ What documents other than a REAL ID-compliant card will be acceptable as proof of identity when enforcement begins?

According to DHS, individuals may present "another acceptable form of identification, for accessing federal facilities, entering nuclear power plants, and boarding commercial aircraft."²⁴ As mentioned above, individuals should check with federal facilities regarding the types of identification that will be accepted.

The TSA website lists a variety of domestic and foreign documents that may be used as proof of identity.²⁵ It will be important to check the TSA website for updates to the list.

■ What happens if you arrive at the airport without identification?

Even if passengers don't have proper ID, TSA 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.²⁶ TSA can also confirm a person's identity through means such as publicly available databases.²⁷

■ What steps is DHS taking to regulate acceptance of mobile or digital driver's licenses?

DHS has not yet issued regulations implementing the provisions of the REAL ID Modernization Act. But on April 19, 2021, DHS issued a request for information (RFI) "to inform an upcoming rulemaking that would address security standards and requirements for

²² "REAL ID FAQs," *supra* note 8.

²³ *Id.*

²⁴ *Id.*

²⁵ "Identification" (Transportation Security Administration webpage), <https://www.tsa.gov/travel/security-screening/identification>.

²⁶ *Id.*

²⁷ "Frequently Asked Questions" (Transportation Security Administration webpage), <https://www.tsa.gov/travel/frequently-asked-questions>.

the issuance of mobile or digital driver's licenses [mDLs] to enable Federal agencies to accept these credentials for official purposes as defined in the REAL ID Act and regulation.”²⁸

■ What does the DHS request for information say about how verification of mDLs for REAL ID purposes might work?

DHS's mDL model as explained in the RFI requires three players — the mobile device user (i.e., mDL-holder or licensed driver), the state department of motor vehicles (DMV) or state equivalent that “would be responsible for issuing an mDL” onto the mobile device, and the verifying federal agency that is empowered to retrieve and verify mDL data for identification and other official federal purposes.²⁹ An mDL uses cryptographic technology to securely transfer a driver's mDL information to a verifying party (such as a TSA agent or U.S. Immigrations and Customs Enforcement officer) via offline and online data transfer modes,³⁰ in lieu of presenting a physical driver's license card.

Under DHS's envisioned mDL model, a federal agency may retrieve mDL data from either an mDL holder's mobile device (offline data transfer) or directly from the DMV (online data transfer). Under the offline mode, mDL data would be transferred without a live connection to the internet. The offline mode would allow the verifying party to authenticate the mDL data on a driver's phone and confirm that the data was in fact issued by a particular DMV, without actually notifying the DMV of the driver's identity.³¹ In the offline mode, the DMV is not involved in the actual transaction during which an mDL-holder presents their license to a verifying party.

In contrast, the online mode “would require establishing a secure network connection between a Federal agency and a DMV” in which a “federal agency would receive mDL Data [sic] directly from a DMV instead of from a mobile device.”³² Under the online mode, a federal agent or officer attempt to verify a person's identity would alert the DMV when an mDL is being used and what data is being shared.

²⁸ Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Mobile Driver's Licenses, 96 Fed. Reg. 20320 (Apr. 19, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-04-19/pdf/2021-07957.pdf> (hereinafter “Request for Comment”).

²⁹ *Id.* at 20323.

³⁰ *Id.* at 20326.

³¹ *Id.* at 20324 (“A Federal agency confirms the integrity of the mDL data by obtaining the DMV's public key to verify the digital signature.”). Specifically, the offline mode uses the asymmetric cryptographic technique of the public key infrastructure (PKI). Under the PKI, when a DMV places a mDL on a driver's phone, it digitally signs that file using a *private* digital key, which is held and only held by the DMV. When a verifying party requests mDL information, they verify the authenticity of the mDL by using a corresponding *public* key, which confirms that the mDL was digitally signed with the DMV's private key (and therefore unaltered and original). See also *Identity Crisis: What Digital Driver's Licenses Could Mean for Privacy, Equity, and Freedom* (ACLU, 2021), https://www.aclu.org/sites/default/files/field_document/20210517-digitallicense.pdf (hereinafter *Identity Crisis*).

³² Request for Comment, *supra* note 28, at 20324. Under the online mode, a mDL holder's device would not actually hold any driver's license data. Rather, the mDL holder's mobile device would first pass a digital token to the verifying party, which would then use the token to retrieve mDL data, over the internet, from the DMV. See also *Identity Crisis*, *supra* note 31.

■ What are some potential concerns about verification of mDLs for REAL ID purposes?

A shift to offline or online verification raises serious privacy concerns and implications for U.S. citizens and immigrants.³³ These include DHS's direct access to DMV databases, the possibility that marked noncompliant licenses may be identified through the verification process, outsourcing of the verification process that limits transparency and accountability, and the possibility that information will be used for immigration enforcement and other purposes.

But the DHS request for information does not seek consideration of several key protections that are necessary to ensure drivers' data privacy as well as their physical and digital safety, including transparency and accountability measures, safeguards against impermissible information-sharing (such as for immigration enforcement or other unintended purposes), and protections against discrimination or other harm that is likely to occur in the mDL context.

It will be critical to remain informed about measures that your state is taking to issue mDLs and about regulations that DHS proposes for REAL ID verification of mDLs.

■ What can you do now about DHS's use of mDL's to verify identity for REAL ID purposes?

Here are some steps you can take:

- Find out if your state is issuing or planning to issue mDLs.
- Through administrative advocacy or legislation, work to ensure that your state does not allow the REAL ID verification system to serve as a mechanism for driver's license information to be used or shared with U.S. Immigration and Customs Enforcement for immigration enforcement purposes.
- Comment on proposed mDL regulations when they are issued, to help ensure that privacy rights of drivers are protected.
- Encourage your state to advocate with DHS for regulations that protect the privacy of driver's license information.

■ How has REAL ID's requirement that states provide access to their driver's licenses databases to other states been implemented?

Under REAL ID Act sec. 202(d)(12), states must "[p]rovide electronic access to all other States to information contained in the motor vehicle database of the State." Under sec. 202(d)(6), states must "[r]efuse to issue a driver's license or identification card to a person holding a driver's license issued by another State without confirmation that the person is terminating or has terminated the driver's license."

DHS has interpreted these requirements in 6 CFR sec. 37.29 to require states to check with all other states to ensure that a driver holds only one driver's license and only one REAL ID credential (whether a driver's license or an identification card).³⁴

³³ For additional information, see *Identity Crisis* (*supra* note 31).

³⁴ 6 CFR § 37.29, <https://www.law.cornell.edu/cfr/text/6/37.29>.

The American Association of Motor Vehicle Administrators (AAMVA) has developed the State-to-State (S2S) Verification Service to comply with these requirements. The platform that supports S2S is called the State Pointer Exchange Services (SPEXS).³⁵

■ What are some problems with or questions about S2S?

AAMVA is a nonprofit organization that describes itself as follows:

“... AAMVA represents the state, provincial, and territorial officials in the United States and Canada who administer and enforce motor vehicle laws. AAMVA’s programs encourage uniformity and reciprocity among the states and provinces. The association also serves as a liaison with other levels of government and the private sector. Its development and research activities provide guidelines for more effective public service. AAMVA’s membership includes associations, organizations and businesses that share an interest in the association’s goals.³⁶

Although S2S implements an inherently governmental function, it is unclear whether it is subject to federal Freedom of Information Act (FOIA) requests or state public records requests.

AAMVA is a membership organization, and many of its documents are available only to members. In informal conversations, AAMVA has revealed that its S2S information exchange system includes a central database that contains personal information about drivers, including the last five digits of their Social Security numbers and whether they have a REAL ID–compliant license. This raises concerns for states that seek to limit disclosure of drivers’ personal information and have attempted to restrict DHS’s access to their driver’s license databases.

■ 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.³⁷ This list fails to encompass all lawfully present non–U.S. citizens. 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, Arizona, which has been certified by DHS as REAL ID–compliant, issues licenses to

³⁵ “State-to-State (S2S) Verification Services” (American Association of Motor Vehicle Administrators webpage), <https://www.aamva.org/State-to-State/>.

³⁶ “About AAMVA” (American Association of Motor Vehicle Administrators webpage), <https://www.aamva.org/about>.

³⁷ Under section 202(b)(B) of the act, only the following immigration statuses are listed as ones whose possessors are 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 have applied for or been granted temporary protected status, people granted deferred action, and people who have applied to adjust to lawful permanent residence. The Extending Government Funding and Delivering Emergency Assistance Act made certain Afghan nationals paroled into the U.S. eligible for REAL ID compliant driver’s licenses and ID cards. Pub. L. 117-43, Div. C, Title V, § 2502 (Sept. 30, 2021). The REAL ID Act Modification for Freely Associated States Act, Pub. L. 115-323 (Dec. 17, 2018) authorizes states to issue *full-term* REAL ID driver’s licenses and ID cards to citizens of the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands who were admitted to the US pursuant to a Compact of Free Association.

people with statuses listed in section 202(b)(B) of the REAL ID Act, as well as to other individuals with federally authorized presence, including individuals with work authorization.³⁸

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.

■ **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. Many states (e.g., California, New Jersey, New York, Vermont, and others) explicitly allow U.S. citizens to obtain such licenses, and some (e.g., Colorado, Connecticut, Washington) require some lawfully present immigrants to obtain them.

Currently, 18 states plus the District of Columbia and Puerto Rico issue or will soon issue licenses to otherwise-eligible state residents regardless of immigration status.³⁹ They 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.

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 individuals may obtain noncompliant cards for many reasons unrelated to lawful presence.⁴⁰

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

³⁸ See [Arizona Travel DL/ID Requirements \(Arizona Department of Transportation webpage\)](https://azdot.gov/motor-vehicles/driver-services/driver-license-information) <https://azdot.gov/motor-vehicles/driver-services/driver-license-information> and <https://apps.azdot.gov/files/mvd/mvd-forms-lib/40-5144.pdf>.

³⁹ *State Laws Providing Access to Driver’s Licenses or Cards, Regardless of Immigration Status* (National Immigration Law Center, Sept. 2022), <https://www.nilc.org/issues/drivers-licenses/state-laws-providing-dl-access/>.

⁴⁰ “REAL ID Frequently Asked Questions,” *supra* note 8.

original documents needed to verify identity, citizenship, or lawful status in the United States.⁴¹

Nevertheless, given the uncertainty about whether federal agencies will accept these licenses under a 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.

⁴¹ “REAL ID Frequently Asked Questions for the Public” (archived U.S. Dept. of Homeland Security webpage, Nov. 4, 2015), <https://web.archive.org/web/20151122030336/http://www.dhs.gov/real-id-public-faqs>.