

The REAL ID Rebellion

The regulations have finally arrived. What's next for states?

BY MATT SUNDEEN

States first began requiring drivers to obtain licenses to operate motor vehicles in 1908. It's an understatement to say there will be no quiet celebration of the driver's license centennial anniversary. May 11, 2008, is the deadline for state compliance with new driver's license standards and procedures in the federal REAL ID Act. If 2007 is any indication, get ready for some driver's license related fireworks in legislatures this year.

States issue approximately 250 million licenses to drivers in the United States. The only official purpose of a driver's license is to prove the ability to operate a motor vehicle. Because it is so common, however, the driver's license is frequently required or offered to prove a person's identity. In the 99-year history of the driver's license, states have been responsible for deciding almost every aspect related to issuing licenses for noncommercial drivers.

The REAL ID Act, which Congress passed with no debate as part of a supplemental war spending and tsunami relief bill in 2005, dramatically alters the established driver's license framework. The act contains new card design requirements, minimum issuance standards, verification requirements for source documents used to prove identification, immigration standards, provisions related to data storage and sharing, and security and fraud prevention criteria.

After the May 11, 2008, deadline, the federal government will not accept a driver's license or identification card from a noncompliant state for an official federal purpose—which includes boarding a commercial aircraft and entering certain federal facilities.

FEDS TOUT SECURITY BENEFIT

Federal officials view REAL ID as necessary for security. "The American public's desire for greater identity protection is undeniable," says U.S. Department of Homeland Security Secretary Michael Chertoff.

"The 9/11 hijackers obtained 30 different driver's licenses and IDs, and used 364 aliases. For an extra \$8 per license, REAL ID will give law enforcement and security officials a powerful advantage against falsified documents, and it will bring some peace of mind to citizens wanting to protect their identity from theft by a criminal or illegal alien," Chertoff says.

It is safe to say that so far not everyone agrees. REAL ID's enactment was roughly analogous to the federal government shoving its figurative hand deep into a hornet's nest. Few federal acts in recent memory have elicited such strong state reaction. Although responses have not been

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uniform, a lot of state REAL ID legislation was negative.

"It smells like a can of worms and it should be rethought," says Oklahoma Senator Constance Johnson, who sponsored legislation that prohibits Oklahoma agencies from complying with REAL ID. "Just the way it passed caused all the problems," she says. "We need to take more time."

MANY STATE CONCERNS

Many critics see REAL ID as a costly burden on states. A joint report issued by the National Conference of State Legislatures, the National Governors Association and the American Association of Motor Vehicle Administrators estimated that the total REAL ID costs for states would start at \$11 billion over five years. So far, the administration has never requested funds to cover state costs, and Congress has appropriated only \$90 million for implementation.

A more significant barrier for REAL ID may be perceptions about its effect on privacy. Many see the database links it requires as essentially creating a national identification card. "My biggest concern was privacy," says Senator Johnson. "But even if you address privacy, you still have cost issues."

Opponents fear that REAL ID will be costly yet ultimately ineffective. The U.S. Secret Service estimates that 16,000 different entities in the United States issue birth certificates. The electronic systems needed to verify the authenticity of those and thousands of other documents used to prove identification at the point of licensure are not yet operational, nor are many of the other electronic database systems contemplated by the law. Moreover, the 1995 bombing in Oklahoma City proved that legitimate driver's license holders can still be terrorists.

STATES REBEL

In 2007, 44 states considered approximately 145 bills or resolutions related to REAL ID. Legislation passed in 25. Twenty-one states passed measures that either prohibited state compliance with the act or urged Congress to amend or repeal it. Maine, Montana, New Hampshire, Oklahoma, South Carolina and Washington passed laws that strictly prohibit state agencies from complying. Idaho appropriated \$0 for its implementation in 2008, and legislative chambers in 15 states passed resolutions or memorials that urged Congress to amend or repeal REAL ID, or indicated the state's intent to not comply.



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Georgia lawmakers authorized the governor to delay implementation unless certain conditions are met.

State reaction to REAL ID was so strong that U.S. Department of Homeland Security (DHS) officials appealed directly to state lawmakers to ease up until final regulations were released. At NCSL's Fall Forum meeting in November 2007, the U.S. DHS Assistant Secretary for Policy Development, Richard Barth, pleaded with attendees for patience. "Hold your fire until you can actually read the darn thing," said Barth. "We took you seriously. We respected your views. We have acted in good faith with you. Please ride with us a little longer."

DELAYS FRUSTRATE STATES

On Jan., 11, 2008, DHS released the long-awaited final regulations for implementing REAL ID, giving state lawmakers less than 120 days to react before the May 2008 compliance deadline. According to DHS, the final regulations incorporated many of the recommendations made by states. The new rules allow states to apply for compliance extensions and lengthen the re-enrollment period for some drivers to as far off as 2017. DHS officials also assert that the regulations will reduce the cost burden to states to less than \$4 billion and provide secure data sharing mechanisms to protect drivers' privacy.

Despite these assurances, the new rules seem unlikely to quell negative opinions about REAL ID in states that have already opted out. "We would need to look at the regulations, but there is very little they could do to make the act palatable to us," says Maine's Senate Majority Leader Libby Mitchell. "Funding would be nice, but money alone won't resolve the issues around REAL ID."

Washington Senator Mary Margaret Haugen, chair of the Transportation Committee, worries that despite REAL ID's potentially enormous implications, the federal government has given states no time to act.

"It's so frustrating for states," says Haugen. "This is a huge mandate on us with big costs and significant privacy concerns. But the federal government has not worked with the states on this issue. They don't seem to understand that we're not in session all the time like Congress. Our session lasts only 60 days. It's totally unrealistic to expect any changes."

STATES' RESPONSES UNCERTAIN

It is less clear how final regulations will affect deliberations in states that have not yet specifically prohibited compliance. Although much state reaction was negative, it has not been uniformly so. Last year, Indiana and Nevada both enacted laws intended to bring the state into compliance with federal standards. Nevada, Tennessee and Virginia appropriated money for REAL ID implementation, and Ohio lawmakers directed the Department of Public Safety to request an extension. Lawmakers in other states considered proposals



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FINAL RULES: REAL FLEXIBILITY OR REAL MANDATE?

The REAL ID Act of 2005 sailed through Congress and landed on the president's desk as part of the "Emergency Supplemental Appropriation for Defense, the Global War on Terror, and Tsunami Relief, 2005." It was signed into law on May 11, 2005. Nearly three years later, on Jan. 11, 2008, the U.S. Department of Homeland Security (DHS) finally issued the regulations to guide states' implementation of the act. The act takes effect May 1, 2008.

The final rules offer much more flexibility for states than was originally proposed in the draft regulations. Based on this flexibility, DHS has re-estimated the 10-year costs to states at just under \$4 billion, down \$10 billion from DHS's original \$14 billion. In September 2006, NCSL, the National Governors Association and the American Association of Motor Vehicle Administrators estimated the five-year cost of REAL ID to be \$11 billion.

The final rules still require states to ensure that all applicants are legally in the country and to verify applicants' documents using electronic databases, some of which are still under development. States are required to store copies of these documents and to make their department of motor vehicle (DMV) databases available to all other states. States must conduct background checks on certain DMV staff and secure the facilities where licenses are produced and where information and materials are stored.

So then, what flexibility produces a \$10 billion cost savings? The new rules are much less prescriptive, allowing states to develop their own security plans and to self-certify compliance with most of the requirements. Gone are the rigid prescriptions for the security features of the identification card itself, replaced by several options from which states can choose. And, as states ease into issuing REAL IDs, they will now be able to do so over six years, starting with people born after 1964.

States can request an extension of the May 11, 2008, deadline, which will be valid through Dec. 31, 2009. If a state takes steps toward complying, a second extension can be requested, which will run through May 10, 2011. During these periods, licenses from states with extensions will be accepted by DHS for official federal purposes such as passing through airport security and entering federal buildings and nuclear power plants. States must begin issuing REAL IDs on May 11, 2011, and are expected to have enrolled everyone born after 1964 by 2014, completing the entire enrollment process by Dec. 1, 2017.

Cost remains a major concern. The administration and the Department of Homeland Security have never requested funding for states' costs in the president's budgets. Congress has appropriated only \$90 million since FY 2006, leaving states to absorb the difference or pass on the cost to residents. REAL ID represents "federal standards, and they deserve federal dollars," says William Pound, NCSL's executive director.

Find out more about REAL ID and NCSL's analysis of the final rules at www.ncsl.org/realid.

—Jeremy Meadows, NCSL

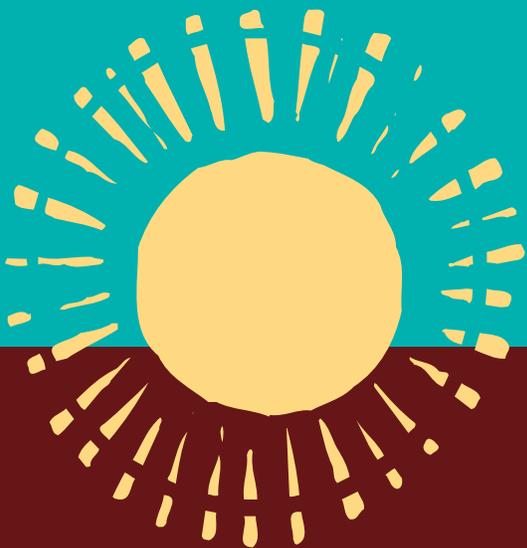
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to develop multi-tiered licensing systems or even subsidize the use of alternative forms of identification, such as the U.S. passport, which the final regulations note will serve the same purpose as a REAL ID. Altogether, legislators in 25 states proposed compliance legislation or alternative REAL ID bills in 2007.

Many state lawmakers have waited for the final federal regulations before deciding an appropriate state response to the law. Federal delays in issuing the new rules, however, mean that some legislatures have no way to react officially to REAL ID before the May 11 deadline. This year, only 43 legislatures meet before May, and sessions in many of them are significantly limited in length or scope.

In some states, legislative activity might not be needed to move toward compliance. Some motor vehicle administrators are already acting to comply with REAL ID. But opinions differ about the scope of agencies' administrative authority, and it's difficult to generalize whether all states can comply without legislative approval.

BEYOND REAL ID

It is important to note that state concern about the driver's license has not been limited to REAL ID. Another DHS program, the Western Hemisphere Travel Initiative (WHTI), allows states to develop enhanced driver's licenses (EDLs) that permit holders to travel across certain international borders without a passport. So far Arizona, Vermont and Washington have announced intent to issue such documents.

Some states are also trying their own approaches to driver's license security. "It's not a federal job," says Arizona Representative Russell Pearce, chair of the House Appropriations Committee.

"It's the states' responsibility. But states need to recognize the threat to national security of an unsecured driver's license. We have an inherent



**REPRESENTATIVE
RUSSELL PEARCE
ARIZONA**

responsibility to make sure the driver's license is secure." Pearce is sponsoring legislation that will prevent Arizona agencies from recognizing a driver's license from any state that does not require proof of lawful presence during the application process.

The only post-REAL ID regulation certainty is that in 2008, the state-issued driver's license for noncommercial drivers will be scrutinized more closely than at any other moment in its history. As of mid-January, legislators in eight states had already pre-filed or introduced bills related to REAL ID or driver's license security. That number will surely climb as more legislatures come into session and more lawmakers distill the contents on the REAL ID regulations.

"I am for a secure ID," says Arizona's Representative Pearce. "We just need good processes to guarantee it."

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