



Memorandum

December 7, 2018

To Interested Parties
From Matt Burress, Legislative Analyst
Subject REAL ID Act implementation in Minnesota – December 2018 update

This document provides information on federal REAL ID Act legislation and associated activity in Minnesota. It is revised from previous versions (most recently produced January 9, 2017) and is current with information obtained as of December, 2018.

Summary

Overview. The federal REAL ID Act of 2005 and its resulting federal regulations govern various aspects of state-issued driver's licenses and identification cards, including identity verification, security, and access to data.

The key enforcement mechanism of the act is that, when fully instituted, it prohibits federal agencies from accepting noncompliant state-issued licenses and identification cards for some activities that are under federal jurisdiction, namely:

- 1) boarding federally regulated commercial aircraft; and
- 2) accessing federally secured facilities such as military bases and nuclear power plants.

Following a series of shifts in the implementation timeline, the U.S. Department of Homeland Security (DHS)—the federal implementing agency—is using a phase-in schedule for enforcing REAL ID Act requirements. The federal law includes a provision whereby DHS can provide extensions that allow continued federal acceptance of noncompliant licenses and cards while a state or jurisdiction implements REAL ID Act requirements and completes the steps to become compliant. Currently, a REAL ID-compliant license or card, or one issued from a jurisdiction operating under an extension, is required for both boarding aircraft and accessing federally secured facilities.

While several states had initially balked at complying with the federal law, today all states and U.S. territories are either in full compliance or have an extension while working towards meeting its requirements.

Compliance in Minnesota. Minnesota began issuing REAL ID-compliant versions of license and identification cards in October of 2018. (DHS provided a formal notification of full state compliance in November of 2018.) The state also has an extension until March 1, 2019, so that all Minnesota-issued licenses and identification cards continue to be accepted for federal access.

History. Minnesota lawmakers had imposed an implementation ban in 2009. The legislature partially lifted it in 2016, then authorized REAL ID Act compliance in 2017.¹ Among its features, the 2017 legislation:

¹ Minn. Laws 2017, ch. 76.

- established a two-track system providing both REAL ID-compliant and noncompliant options for driver’s licenses and identification cards (so that applicants could choose either option);
- authorized compliance implementation with a deadline of October 1, 2018; and
- limited the authority for the Department of Public Safety to comply with any future federal changes to REAL ID Act provisions.

Driver’s license and identification card options. A number of documents are accepted by federal agencies for access, including federally issued identification, such as a U.S. passport, as well as Minnesota-issued enhanced driver’s licenses and enhanced identification cards. “Enhanced” licenses and identification cards are optional hybrid documents. They are state-issued licenses and cards but also can serve as a substitute for a passport when entering the United States at border crossings in some situations. (Obtaining an enhanced document involves additional verification procedures and security features compared to standard state-issued licenses and identification.)

The table below compares some aspects of driver’s license options in Minnesota (corresponding identification cards are treated the same way except that no driving privileges are conferred).

Driver’s License Comparison

	Standard Driver’s License	REAL ID-Compliant License	Enhanced Driver’s License
Uses			
Driving privileges	Yes	Yes	Yes
General identification	Yes	Yes	Yes
Aircraft boarding	No ⁱ	Yes	Yes
Federally secured facilities access	No ⁱ	Yes	Yes
Border crossings ⁱⁱ	No	No	Yes
Eligibility Requirements			
Lawful U.S. presence	Yes	Yes	Yes
U.S. citizenship	No	No	Yes
Notes			
ⁱ Can be used until Oct. 1, 2020, assuming continued extensions.			
ⁱⁱ Allowed only in limited circumstances.			

Historical Background

Implementation and enforcement of REAL ID Act requirements proceeded over several years.

The federal REAL ID Act of 2005 set federal standards governing identity data verification and security measures for state-issued driver's licenses and identification cards.² (Prior to that, the regulatory framework for driver licensing had primarily been under the purview of states with some state-federal processes and federal laws—particularly around licensing to operate interstate commercial vehicles.) The law can be viewed in the context of federal security and safety responses following the events of September 11, 2001. For instance, setting federal standards for driver's license issuance was one of the recommendations of the 9/11 Commission.³

Over a period of time following passage of the federal legislation (i.e., 2007-2009), a number of states and state associations expressed concerns with the REAL ID Act. Some enacted legislation stating opposition to or barring compliance with the federal mandates. Minnesota was one such state: in 2009 the legislature enacted a REAL ID Act prohibition on both state planning and implementation. The original provision was brief, stating "The commissioner of public safety is prohibited from taking any action to implement or to plan for the implementation by this state of those sections of Public Law 109-13 known as the Real ID Act."⁴

The timeline under the federal legislation originally called for full implementation by 2008, which did not occur. DHS went through rulemaking and in 2008 adopted final federal regulations governing driver's license standards and processes.⁵ Perhaps in response to state-level concerns as well as technical implementation challenges, DHS then issued a series of extensions to the state compliance deadline as well as deferments of agency enforcement mechanisms.

Starting around 2012, DHS seemingly shifted away from setting universal enforcement delays, moving to a system of case-by-case extensions and grace periods for noncompliant jurisdictions. (Extensions are discretionary on the part of DHS.) That shift might have been a factor behind the change in state responses; in the following years more jurisdictions pursued REAL ID Act compliance. This is perhaps evidenced by DHS denial in 2015 of an extension Minnesota requested, which was followed by legislative activity in 2016 and 2017 to implement state compliance.⁶

Overview of the REAL ID Act

The REAL ID Act of 2005 establishes federal standards for state-issued driver's licenses and identification cards.

² REAL ID Act of 2005, Pub. L. No. 109-13 (2005) <<http://www.gpo.gov/fdsys/pkg/PLAW-109publ13/pdf/PLAW-109publ13.pdf>>.

³ National Commission on Terrorist Attacks Upon the United States, "9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States," 2004, p. 390 <<http://govinfo.library.unt.edu/911/report/911Report.pdf>>.

⁴ Minn. Laws 2009, ch. 92, § 1.

⁵ 73 Fed. Reg. 5272 (29 Jan. 2008), codified at 6 C.F.R. Part 37.

⁶ In November 2015, Gov. Dayton requested an extension for Minnesota. This was denied by DHS, which stated in its response that "Minnesota has not provided adequate justification for continued noncompliance with the REAL ID standards." DHS later granted an extension, following passage of 2017 legislation. The letter is available at http://mn.gov/governor/images/2015_12_22_DHS_MN_REAL_ID_Response_and_Enclosure.pdf.

A DHS summary of the act is that it “established minimum security standards for state-issued driver's licenses and identification cards and prohibits federal agencies from accepting for official purposes licenses and identification cards from states that do not meet these standards.”⁷ Regulatory areas within the REAL ID Act and corresponding federal regulations include:

- applicant documentation and verification of identity;
- proof of lawful presence in the United States;
- digital image storage;
- information, design, and security features on a physical card;
- security of card production and storage facilities; and
- use of national electronic data verification systems and sharing of electronic data across the states.⁸

The REAL ID Act does not impose direct penalties on states and U.S. territories that do not comply with its terms. Rather, state compliance is prompted by limits on acceptance by federal agencies of state-issued driver's licenses and identification cards. Following an enforcement phase-in period (discussed below), identification must be found compliant by DHS in order to use it for:

- boarding federally regulated commercial aircraft; and
- entering controlled-access facilities under federal purview (that is, some federal buildings, military bases, and nuclear power plants).

The law covers access for “official purposes,” which essentially applies to federal buildings and facilities where identification must be presented for entrance, rather than mandating identification checks at all federally secured locations. The provision does not extend to unrestricted facilities (like Smithsonian Institution museums) as well as various law enforcement, health, safety, and legal activities (like voting, accessing hospitals and clinics, and receiving federal benefits). The law does not create new cases where compliant documents must be provided, nor does it prevent acceptance of other forms of federal identification such as passports and military ID cards.

Enforcement Phases

DHS is phasing in enforcement of REAL ID Act requirements. REAL ID-compliant identification—or an extension provided by DHS—is now required to board aircraft and access some federally secured facilities.

DHS established four enforcement phases to put the REAL ID Act fully into effect.⁹ Phases one to three address access to various federally restricted and semi-restricted areas. Compliant identification became required over April 2014 to October 2015 for different types of secured facilities. Phase four contains two parts that restrict boarding commercially regulated aircraft.

⁷ U.S. Department of Homeland Security, “REAL ID Frequently Asked Questions for the Public,” Accessed 6 December 2018 <<http://www.dhs.gov/real-id-public-fags>>.

⁸ See 6 C.F.R. §§ 37.13, 37.29.

⁹ U.S. Department of Homeland Security, “REAL ID Federal Enforcement,” Accessed 6 December 2018 <<https://www.dhs.gov/federal-enforcement>>.

Some of the key enforcement milestones are outlined below.

- Since October 10, 2015, entrance to various federally secured facilities (where identification is necessary for access) requires a REAL ID-compliant driver’s license or identification card, or a document issued by a jurisdiction that has an extension.
- Since January 22, 2018, boarding commercial aircraft requires a REAL ID-compliant driver’s license or identification card, or a document issued by a jurisdiction that has an extension.
- Beginning October 1, 2020, only REAL ID-compliant driver’s licenses and identification cards will be accepted for all federal access purposes; DHS has indicated that extensions will no longer be provided at that point.

State Compliance

Jurisdictions are now either compliant or under an extension granted by DHS.

A summary of the latest status of states and U.S. territories is below.

Compliance Statuses¹⁰

Status	# of Jurisdictions
Compliant	37
Under an extension ⁱ	19
Noncompliant	0
Notes	
ⁱ Current extensions are to various dates (ranging from Jan. 10, 2019, to Oct. 10, 2019).	

Implementation in Minnesota

2017 legislation directed REAL ID Act conformity in Minnesota, reversing a 2009 ban (which had been loosened in 2016).

As previously noted, in 2009 the Minnesota Legislature enacted a prohibition on state compliance with REAL ID Act provisions. The ban remained in effect until it was partially lifted in a 2016 law that allowed planning but not actual implementation or REAL ID-related administrative rulemaking.¹¹ A legislative report on implementation steps and costs was also mandated in the 2016 legislation, which the Department of Public Safety produced in April of that year. The legislature contemplated authorizing further implementation steps, but did not reach an agreement that session.

¹⁰ Statuses are as of December 6, 2018. U.S. Department of Homeland Security, “REAL ID Compliance Extensions Update,” Accessed 6 December 2018 <<https://www.dhs.gov/news/2018/10/19/real-id-compliance-extensions-update>>.

¹¹ Minn. Laws 2016, ch. 83.

Subsequently, the 2017 Legislature enacted legislation that provides for full compliance implementation.¹² The following highlights some core elements of the act.

- **Implementation authority.** The 2009 prohibition was reversed, repealing that law and directing the Department of Public Safety to offer driver’s licenses and identification cards that are compliant with federal REAL ID requirements. The legislation also set a timeline, directing the department to begin issuing compliant documents by October 1, 2018. (Many of the legislative changes applied on and after the starting date for issuing REAL ID-compliant documents, which had the effect of providing time for the department to undertake various administrative implementation steps.)
- **Compliant and noncompliant options.** Both REAL ID-compliant and noncompliant offerings are available. An applicant has the option of seeking either version (or an enhanced driver’s license or identification card).¹³
- **Ban on implementing future federal changes.** The department is prohibited from taking steps to comply with any federal changes to the REAL ID law (including federal regulations, processes, data practices, and card standards), and must notify the legislature regarding any impending changes at the federal level.¹⁴ In effect, state compliance is pegged to the version of federal provisions in effect as of May 19, 2017. Further, a contingent repealer directs the Department of Public Safety to stop issuing compliant documents following federal additions or modification in the “official purposes” where REAL ID-compliant documents are necessary.¹⁵
- **Eligibility.** Documentation of identity, date of birth, principal residence in Minnesota, a social security number or equivalent information, and lawful presence is necessary in order to obtain a REAL ID-compliant license or identification card. (This follows from requirements under the federal law in order for a state-issued document to be considered REAL ID-compliant.) Statutory listings identify the accepted forms of evidence.¹⁶
- **Compliance implementation provisions.** The act covered a variety of implementation details, including provisions on mandatory staff background checks; card design inscriptions and features; expiration dates; information technology auditing and security; birth certificate recordkeeping; data dissemination limitations; and extended expiration dates for early license and identification card renewals. The fees for REAL ID-compliant licenses were set at the same level as corresponding noncompliant ones (fee amounts vary across license classes and types). The act also made a onetime \$3.27 million appropriation for implementation costs.

¹² Minn. Laws 2017, ch. 76.

¹³ Minn. Stat. § 171.019, subd. 2.

¹⁴ Minn. Stat. § 171.019, subds. 3 & 4.

¹⁵ Laws 2017, ch. 76, § 27.

¹⁶ Minn. Stat. § 171.0605.

Enhanced Licenses and Identification Cards

Minnesota offers enhanced driver's licenses and enhanced identification cards that are also accepted for federal access.

Minnesota is among a handful of states that offer enhanced driver's licenses and enhanced identification cards as an alternative to the standard and REAL ID-compliant ones. The enhanced documents are part of a federal initiative on border security and verifying traveler identity and citizenship at U.S. border crossings. It resulted from federal legislation.¹⁷ In essence, the enhanced versions (1) function the same way as other driver's licenses and Minnesota identification cards, and (2) are also accepted documentation to enter the United States at some land and sea ports of entry (analogous to a passport).

In comparison to regular licenses and identification cards, they contain additional security and technology features, such as a radio frequency identification (RFID) chip, and involve more stringent documentation to obtain.¹⁸ The cost in Minnesota for an enhanced driver's license is \$15 higher than a corresponding driver's license or permit.¹⁹ The enhanced documents are only available to U.S. citizens and there is not an exceptions process for unusual documentation situations.

While similar to a passport, there are limitations in using enhanced licenses and identification cards at border crossings. In particular, the enhanced documents:

- Are valid only for crossings at sea and land ports, and not for entry to the United States via international air travel; and
- Can only be used for entry from Canada, Mexico, the Caribbean, and Bermuda.

Although use is constrained for border crossings, Minnesota's enhanced licenses and identification cards are accepted by DHS as a form of identification for access purposes under the REAL ID Act. That is, Minnesota enhanced driver's licenses and identification cards can be used to board commercial aircraft and enter federally secured facilities.

Legislative History

This section provides some further details on state legislative activity around REAL ID Act compliance.

2007-09. The original Minnesota prohibition was enacted after a couple of years of deliberations. Multiple bills in the 2007 and 2008 legislative sessions proposed prohibitions on implementation related

¹⁷ The program is known as the Western Hemisphere Travel Initiative (WHTI), created in response to some requirements of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). The initiative can be viewed in the context of addressing what, at the time, was a new requirement to use a passport when entering the U.S. from Canada; the enhanced license provides for an alternative form of identification instead of a passport.

¹⁸ See <https://dps.mn.gov/divisions/dvs/forms-documents/Documents/EDL-EID-Identification-Requirements.pdf>.

¹⁹ Minn. Stat. § 171.06, subd. 2.

to REAL ID. Language was included in a 2008 transportation policy omnibus bill,²⁰ H.F. 1351 (Hornstein) / S.F. 1971 (Murphy), which contained various REAL ID implementation conditions and requirements but arguably also allowed some administrative flexibility.²¹ The bill was passed by the legislature but vetoed by Gov. Pawlenty over objections to the policy approach taken with respect to REAL ID.²² Later in the 2008 session, the legislature passed a stand-alone bill containing a broader prohibition, H.F. 3807 (Mariani) / S.F. 3494 (Moua).²³ It too was vetoed by the governor.²⁴

Also of note, in the final days of the 2008 session (and just one day after vetoing the second proposal), the governor issued an executive order that in effect (1) temporarily barred the Department of Public Safety from implementing the REAL ID Act (until June 1, 2009), (2) permitted the agency to take steps and receive federal funds towards enhancing driver's license security, and (3) limited the agency in any multistate agreement to store or share driver's license data.²⁵

A year later, H.F. 988 (Mariani) / S.F. 738 (Limmer) passed unanimously in the House and with just one opposing vote in the Senate. It was enrolled as Laws 2009, chapter 92, and was signed by the governor.

Some areas of policy concern expressed at the time included:

- Federal intrusion in an area historically under state jurisdiction;
- De facto creation of a national ID card;
- Civil liberties;
- Data privacy;
- Security, control, and oversight of state data, as well as mandatory electronic data sharing with the federal government and across states; and
- Unfunded state implementation costs.

2016. The legislature in 2016 considered several REAL ID-related proposals. Following a series of working group meetings, a partial lift of the ban was enacted near the beginning of the legislative session.²⁶ The legislation, S.F. 1646 (Dibble) / H.F. 1732 (Smith), was generally characterized as a “phase I” step towards potentially authorizing REAL ID compliance in Minnesota. Its provisions included removing the ban on state planning while retaining an implementation ban, along with legislative planning and reporting requirements designed to provide information for the legislature to act further during the 2016 legislative session.

²⁰ This omnibus bill first went into conference committee in 2007, but did not produce a conference report and a subsequent conference committee met the following year. See <https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF1351&ssn=0&y=2007>.

²¹ H.F. 1531, Conference Committee Report, art. 1, § 117 <https://www.revisor.mn.gov/bills/text.php?number=HF1351&version=D&session=ls85&session_year=2007&session_number=0&type=ccr>.

²² Minn. Laws 2008, ch. 239. The veto letter is available at http://www.leg.state.mn.us/archive/vetoes/2008veto_ch239.pdf.

²³ Minn. Laws 2008, ch. 334.

²⁴ The veto letter is available at http://www.leg.state.mn.us/archive/vetoes/2008veto_ch334.pdf.

²⁵ The executive order is available at <http://www.leg.mn/archive/execorders/08-08.pdf>.

²⁶ Laws 2016, ch. 83.

Following passage of the “phase I” law relatively early in the legislative session, proposals centering on implementation were considered. H.F. 3959 (Smith) / S.F. 3589 (Dibble) moved through the legislative process to conference committee. However, session ultimately concluded without an agreement by the committee. (Eligibility requirements for noncompliant driver’s licenses was one source of contention.)

2017. The legislature continued to consider REAL ID Act compliance legislation throughout the 2017 session. Ultimately, H.F. 3 (Smith) / S.F. 166 (Pratt) was enacted and signed by Gov. Dayton, becoming Laws 2017, chapter 76. The language was substantially similar to the provisions discussed the previous year.