

Real ID Scorecard: A Tool for Measuring the Adequacy of Federal Regulations Governing the Real ID Act

Since its passage in 2005, the Real ID Act has generated concern across a broad spectrum of individuals and groups. Motor vehicle administrators worry that it would be difficult to implement and result in long lines and service delays. Legislators and governors are concerned about the cost, having concluded that estimates issued when the act was passed were wildly inaccurate, underreporting costs by a factor of 20.

Domestic violence victims and law enforcement fear the act's requirement that principal addresses appear on every card will endanger their safety. Conservatives consider the act an attack on the principles of federalism. Privacy advocates believe Real ID is in fact a National ID system that would enable the tracking and controlling of individual movement. They also fear the act's requirement of large-scale databases and machine-readable cards will make the system insecure, resulting in the loss of personal information and an increased risk of identity theft. Religious leaders fear the act's rigid requirements would require them to take action that is counter to their beliefs. All of these concerns have led to widespread unrest among the states; one (Maine) has already decided to opt out of the system and many others are moving in the same direction.

This debate likely will come to a head with the publication of federal regulations (expected in the coming months), which will detail exactly how states are to implement the Real ID Act. State officials and lawmakers will no longer be grappling with an abstract federal law, but a detailed set of instructions that will remove any doubt about the impact Real ID will have on the lives of Americans.

In order to prepare for the coming federal regulations and assist in the analysis of this complex legislation, the ACLU has prepared the following Real ID Scorecard. It lists all the problems different individuals and groups have articulated regarding Real ID, and whether the federal regulations succeed in fixing those problems. In cases where DHS addresses the problem but does not fix it we list a grade of "incomplete."

Problems with the act have been grouped into four categories: 1) impact on individuals, 2) impact on privacy, 3) impact on states and 4) impact on Constitutional rights. For more information see the documents referenced in italics at the end of many of the items.

Impact on Individuals

PASS FAIL INC

Increased wait time at the Department of Motor Vehicles (“DMV”).

Many state DMVs predict extensive increases in customer wait times resulting from the many new requirements imposed by Real ID. In a survey by the American Association of Motor Vehicle Administrators (AAMVA), states predict that Real ID will bring increased “customer traffic flow and customer wait/visit time in all field offices” and will have a “significant influence on customer service.” (*The Motor Vehicle Administrators Survey on Real ID: An ACLU White Paper*)

PASS FAIL INC

“Full Legal Name” requirement. Wide inconsistency often exists between names even on federal documents, such as a social security card and a passport belonging to the same individual. All these records must be verified and harmonized under REAL ID prior to the issuance of a license. Recently in Alabama tens of thousands of older drivers had difficulty renewing licenses because the names in their DMV records were not consistent with other records such as the Social Security database. Many Americans have records that reflect not only their “legal name”, but also the everyday names they use. James Joseph Johnson Jr. may have documents in the name of Jim Johnson, JJ Johnson, Jim Johnson Jr., Joe Johnson, etc. (*ACLU analysis, “The Alabama Mess: One State Tries to Begin Tackling Real ID”*)

PASS FAIL INC

Individuals with changed names. Individuals whose name on one source document does not match the name on another will find themselves in a bureaucratic bind under Real ID. This is a substantial portion of the population including women who have taken their spouses’ last names and a large percentage of the Asian-American community (whose first and last name may be switched on their source documents). (*National Governors Association (“NGA”), National Conference of State Legislators (“NCSL”), & AAMVA, “The Real ID Act: National Impact Analysis”*)

PASS FAIL INC

Principal address requirement. The act requires, without exception, that compliant IDs contain one’s “principal address.” It is unclear how people without such an address or who live in different places – such as students, those who live in RVs and other mobile homes, and the homeless – will solve this issue. (*See ACLU, “Real Costs: Assessing the Financial Impact of the Real ID Act on the States”*)

PASS FAIL INC

Threat to safety from principal address requirement. A number of states have laws that allow judges, police officers, domestic violence victims, or others at risk of retaliatory criminal violence to use agency addresses or P.O. boxes in lieu of their actual residence address. Yet states cannot keep those laws on the books if they are to comply with Real ID. (*“Motor Vehicle Administrators Survey”*)

PASS FAIL INC

Disproportionate burden on low-income individuals. It is feared poorer people will find it harder not only to absorb higher license-issuance or renewal fees, but also to skip what will sometimes be multiple days of work in order to stand in long queues to prove their identities in order to obtain a Real ID. (*ACLU, "Real Answers: FAQ on Real ID"*)

PASS FAIL INC

Individuals who lack birth certificates. Over time, many records are lost through natural disasters, such as flood or fire, and by human error. And the births of many, especially older citizens from rural areas, simply were not recorded. Because the birth certificate is likely to be one of the core documents that must be verified (especially to prove citizenship) it is not clear how these problems will be addressed. (*"FAQ"*)

PASS FAIL INC

Foreign-born lawful residents who lack passports. The only foreign document that is acceptable to DMVs under Real ID is an official passport. But that doesn't meet the needs of many legal immigrants, including refugees and dissidents or others who may face hostility or a lack of cooperation from their home governments in obtaining the required documents. (*"FAQ"*)

PASS FAIL INC

Same-day licenses. State DMV officials report that Real ID could largely prevent over-the-counter issuance of some or all IDs, resulting in shifts from relatively instant issuance to having to mail documents to applicants, and an overall process that could range from 2 to 6 weeks pending approval of verified documents. (*"Motor Vehicle Administrators Survey"*)

PASS FAIL INC

Fewer offices. DMV officials in some states also report that the cost increases driven by the act's requirement may force them to close some itinerant field stations and eliminate mobile offices, which can impose considerable burdens on citizens of rural, low-density states. (*"Motor Vehicle Administrators Survey"*)

PASS FAIL INC

Internet or mail transactions. Because of the verification requirements DMV officials report that Real ID could reduce or end mail and Internet address changes and renewals, further straining the resources of DMVs and imposing burdens on drivers and other applicants. (*"Motor Vehicle Administrators Survey"*)

PASS FAIL INC

Change of address. Dealings with the DMV will become more frequent even as they become more difficult. Currently individuals are not required to update their driver's license every time they move. However, the principal address requirement of Real ID (see above) may require people to re-register with the DMV every time they change addresses. This will not only impose substantial inconveniences on individuals, but also raise costs for DMVs. (*NCSL et al, "Impact Analysis"*)

PASS FAIL INC

Disruption in driving caused by verification procedures. Will states be able to issue an interim driver's license for individuals whose source documents cannot be immediately verified or will these individuals be prevented from driving? Will such a temporary ID be acceptable for air travel?

Impact on Privacy

PASS FAIL INC

National ID. Privacy advocates fear the Real ID and its national database will become a national identity registry. The act states that Real IDs shall be required not only for activities like boarding aircraft, but also for “any other purposes that the Secretary [of Homeland Security] shall determine.” This provision allows the Department of Homeland Security to expand unilaterally the scope of identity requirements creating the real possibility of mission creep. Some groups have already suggested that Real ID should become a voter registration card and a border crossing document. (“FAQ”)

PASS FAIL INC

Private-sector piggybacking. The “common machine-readable technology” on Real IDs would allow for easy, computerized transfer of the data on the cards not only to the government but also to private parties. Already, many bars and clubs collect all their customers’ information by swiping driver’s licenses handed over to prove legal drinking age. There is concern that even if the states and federal government successfully protect the data, machine readability will result in a parallel, for-profit database on Americans, free from the limited privacy rules in effect for the government. (“FAQ”)

PASS FAIL INC

A single interlinked database. Will the national database be secure from identity thieves and criminals? Advocates argue that the government’s poor record at information security and at preventing insider fraud and abuse may mean Americans are less secure as a single national database makes their information more vulnerable and available from more sources. (*Center for Democracy and Technology, “Unlicensed Fraud”*)

PASS FAIL INC

Insider fraud. Advocates have also argued that linking databases will give more and more parties “legitimate” access to the data and that information that can be accessed by multiple disparate parties is a recipe for fraud. Fraud by DMV officials is a major cause of identity theft.

PASS FAIL INC

Accountability vacuum. Security experts note that a system is only as secure as its weakest point. There is no mechanism to guarantee that every DMV follows adequate procedures and the linked distributed system makes accountability extremely difficult to enforce. Further, a single breach at a single DMV could compromise the entire system and expose the data of every American who drives.

PASS FAIL INC

Protecting source documents. Real ID requires all source documents for licenses to be retained either electronically or in storage at the DMV. Protecting these valuable document troves from security breaches will require the devotion of significant resources to new computer hardware and software, systems redesign, security consulting, and staff expansions. It is expected that identity thieves will quickly recognize that the DMV’s records are a central location for obtaining all the documents they need to commit fraud. (“Real Costs”)

PASS FAIL INC

Effect on state privacy laws. States have varied privacy and safety laws governing everything from what information can be collected for the purpose of driver's licensing, to what information can be contained on the machine-readable component of an ID card. It is expected that Real ID will force state legislatures to alter or repeal many of these laws – potentially creating new privacy and security problems. (*See “The Impact of Real ID on Current State Laws,” and accompanying chart prepared by Stanford University Law School*)

Impact on the States

PASS FAIL INC

Unfunded mandate. Real ID requires sweeping changes to state driver's licenses and the systems by which those licenses are administered. A partial cost estimate issued jointly by AAMVA, NGA, and the NCSL estimated the cost of Real ID on the states at \$11 billion. Congress has currently appropriated \$40 million to offset Real ID costs (*NCSL et al, “Impact Analysis”*)

PASS FAIL INC

Effect on DMVs of standardizing data elements. Real ID imposes a requirement for uniform data elements on state IDs. Standardizing these elements will vary in difficulty from state to state, but in many cases will require the reprogramming of multiple interlocking state databases, computer entry screens, communications protocols, and paper forms. (*ACLU analysis, “Real Burdens: the Administrative Problems REAL ID Imposes On The States”*)

PASS FAIL INC

Effect on recent improvements to state IT systems. The NCSL reports that 21 states have invested \$289 million over the last five year to modernize their DMV information systems. Real ID may force much of this work to be thrown out. (*NCSL et al, “Impact Analysis”*)

PASS FAIL INC

Cost of processing new applicants. Real ID's requirement that it be used for a host of federal purposes may force millions of Americans to sign up for driver's licenses or ID cards. This would result in an unplanned wave of new applicants swamping DMVs.

PASS FAIL INC

DMVs will have to reprocess existing licensees. The document verification process will also have to be completed for the entire population of people (approximately 200 million) who already have current licenses and IDs. Motor vehicle administrators have complained that this will significantly strain DMV resources. (*“Real Burdens”*)

PASS FAIL INC

Diversity in licensing systems. States have chosen a variety of methods for issuing licenses. In Kentucky, for example, licenses are handled by court clerk offices, in Alabama by probate judges, in Nebraska by county treasurers, and in Oklahoma by third party vendors. It is unclear whether Real ID regulations will continue to allow states to operate under these different licensing models. (*“Motor Vehicle Administrators Survey”*)

PASS FAIL INC

Appeal process. Mistakes in existing DMV and other databases may result in delays or even inability to get a drivers' license. In light of this high penalty some type of appeal process will have to be created to deal with mistakes and document errors.

PASS FAIL INC

Expertise in immigration law. The act bars states from issuing compliant IDs to any non-citizen who cannot prove their identity and present verified documentary evidence that they are covered by one of an enumerated number of lawful immigration statuses. But the complexity of our immigration laws make it likely that identifying and processing a variety of different immigration documents will be a difficult task. (*"FAQ"*)

PASS FAIL INC

Lawful status not described in the Act. Immigration advocates have complained that there are a number of ways that an immigrant can be in the country lawfully that are not described in the Act. It is not clear if these individuals can qualify for a Real ID.

PASS FAIL INC

"Full Legal Name" particularly onerous. The Act requires that compliant identity papers contain individuals' full legal names. However because a portion of the population possesses extremely long names, the name for licenses is recommended to be at least 100 (some say 126) characters long. For man states this would mean redesign of their entire database structures and program interfaces to standardize how information is entered in each field office and how it is stored centrally. They will also have to revise information and application forms, and train staff to verify legal name. (*"Real Costs"*)

PASS FAIL INC

"Full legal name" requirement reaches beyond DMVs. Legal name changes in DMV systems will impact other, linked systems such as CDLIS (a commercial license database) and PDPS (a problem driver database) as well as serving as the access point for other systems, including law enforcement, insurance companies, and the election registry. (*"Real Costs"*)

PASS FAIL INC

Limited real estate on physical cards. Many states may have to redesign the face of their ID cards – where space is already limited – to include longer names and new data elements such as principal address. (*"Real Costs"*)

PASS FAIL INC

License holders with multiple addresses. If mailing address and principal address differ, states will have to retain both – one for printing on the license and one for correspondence. Some individuals – such as students and those who own multiple homes – reside in more than one state.

PASS FAIL INC

Creation of interconnected database. Real ID requires that each state provide all other states with electronic access to the information contained in its motor vehicle database. Because state DMVs each have their own IT systems with different level of capability and interoperability DMV officials believe this will be an extraordinarily difficult task. (*"Motor Vehicle Administrators Survey"*)

PASS FAIL INC

Cost of data sharing. A system similar to that mandated by Real ID, the commercial driver's license pointer system (CDLIS), which covers truck drivers and other commercial drivers, costs roughly \$0.08 per month/per record, according to the AAMVA. At the same cost, the price for covering the roughly 200 million current US license holders under Real ID would be \$192 million per year. However, since the Real ID database will include significantly more information than CDLIS, this figure would likely be much higher and it is unclear how this cost burden would be met (and by whom). (*“Real Costs”*)

PASS FAIL INC

Document verification. The Real ID Act includes a requirement that states “shall verify, with the issuing agency, the issuance, validity, and completeness of each document required to be presented” to get a Real ID card. No electronic system or systems currently exist which is capable of performing this task. Particular concerns exist regarding birth certificates because they are issued by over 6,000 separate jurisdictions within the United States and there is no central database of certificates (*“Motor Vehicle Administrators Survey”*)

PASS FAIL INC

Inadequacies in existing verification systems. An additional verification problem is that DMVs report that existing database such as SAVE (for verifying immigration status) would be inadequate for Real ID purposes either because they are expensive, inaccurate, or do not provide a timely response. (*“Motor Vehicle Administrators Survey”*)

PASS FAIL INC

Verification cannot be compelled. The act requires DMVs to authenticate source documents with issuing entities (such as address checks from public utility companies). Because that process will impose substantial burdens on verifying entities it may be met with resistance. However state DMVs have no power to compel or reward compliance.

PASS FAIL INC

Investigations into Social Security Numbers. States are required to verify that an individual has a valid social security number – and requires that “[i]n the event that a social security account number is already registered to or associated with another person . . . the State shall resolve the discrepancy and take appropriate action.” However it is not clear what “appropriate action” entails nor do state officials have the authority to change the Social Security database. (*“Real Burdens,” “Motor Vehicle Administrators Survey”*)

PASS FAIL INC

Document storage. The act requires storage of electronic copies of source documents for 10 years or paper copies for seven years. DMVs lack the equipment and storage space for document retention. DMVs report that this will have a major impact on their operations – requiring additional staff, new equipment, policy changes, training, the remodeling or redesign of offices, and computer software, development, and storage costs. (*“Real Costs,” “Motor Vehicle Administrators Survey”*)

PASS FAIL INC

Standardizing the machine-readable element. Many states have already deployed a variety of machine-readable technologies – such as bar codes and magnetic stripes – on the licenses they issue. Real ID’s standardization mandates will impose substantial costs on the large number of states that will have to replace their existing machine-readable components. (“*Real Costs*”)

PASS FAIL INC

Additional costs for standardization. Police departments will have to be equipped with new readers, at significant cost to taxpayers. During the five-year changeover to full 50-state Real ID compliance, numerous data storage systems and sets of readers will have to be maintained simultaneously. (“*Real Costs*”)

PASS FAIL INC

Facial image capture. The act appears to mandate that image capture must apply not to all license recipients, but to all *applicants*. This will require a new database for pending and failed applications, alterations to the licensing process to change the stage at which an image is captured, and increased personnel and equipment for additional image capture. (“*Real Costs*”)

PASS FAIL INC

Facial recognition technology. The act’s requirements for “facial image capture” may require states to purchase facial recognition technology and begin strictly regulating how photos are taken to correct for variations in lighting, expression, camera type, background, and the exposure of facial characteristics, such as facial hair, glasses, headscarves, etc. Facial recognition technology is often costly, inaccurate and difficult to implement. (“*Real Costs*”)

PASS FAIL INC

Security clearance. Real ID requires that state employees who are authorized to manufacture ID cards must be subject to “appropriate security clearance requirements.” It is not clear what standards states should set in disqualifying employees or hiring new employees. The fact that some states contract with private entities for ID production further complicates this issue. (“*Real Burdens*”)

PASS FAIL INC

Security clearance and labor contracts. Security clearance requirements may run afoul of contract stipulations and union rules. States may need to provide employees disqualified under new regulations with alternative employment or severance. (*NCSL et al, “Impact Analysis”*)

PASS FAIL INC

New training requirements. Under Real ID state employees must undergo “fraudulent document recognition training programs.” It is not clear what these programs entail or the impact on the cost of issuing licenses. (“*Real Burdens*”)

Constitutional Impact

A. Burdens on constitutional rights of the states.

PASS FAIL INC

Federalism and the Tenth Amendment. States have always been the exclusive regulator of driver licensing. Each state has developed an extensive statutory and regulatory framework in this area, and each state employs workers to carry out that statutory and regulatory scheme. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively” The REAL ID Act seizes the power reserved for the states by federalizing drivers licensing. Real ID was vigorously opposed by the organizations representing the states and seems to violate the Tenth Amendment. (*See ACLU analysis, “Constitutional Problems with the REAL ID Act of 2005”*)

PASS FAIL INC

The Anti-Commandeering Doctrine and the Tenth Amendment. The REAL ID Act requires states driver’s licensing officials to perform two exclusively Federal functions: enforcing immigration laws and creating a federal ID card. Constitutional and statutory schemes governing immigration law make clear that immigration enforcement is entirely a Federal function. Additionally the Real ID Act turns state drivers’ licenses into Federal identity documents, necessary for official purposes like entering a Federal facility. According to the Supreme Court’s anti-commandeering doctrine, if the Federal government wants to conduct interior immigration enforcement or create Federal identity cards it must hire and pay Federal government employees to do so, rather than forcing states’ licensing employees to carry out this activity. (*“Constitutional Problems with the REAL ID Act”*)

B. Burdens on constitutional rights of individuals.

PASS FAIL INC

Free exercise of religion and the photo requirement. Real ID requires, without exemption, that a digital photograph appear on each ID. This requirement violates the religious beliefs of Amish Christians, Muslim women and others and impacts the free exercise of their religion. (*“Constitutional Problems with the REAL ID Act”*)

PASS FAIL INC

Free exercise of religion and Social Security numbers. Some Christian sects believe that “the enumeration” of individuals is tantamount to stamping them with the Mark of the Beast referred to in the Biblical Book of Revelations. Therefore due to these religious beliefs, certain citizens may not have the Social Security Number or Social Security Card necessary to gain a Real ID. (*“Constitutional Problems with the REAL ID Act”*)

PASS FAIL INC

Gender designation requirement. Real ID requires inclusion of each person’s gender on his or her license. Many states and municipalities recognize the unique difficulties faced by issuing identity licenses to the transgendered, and, accordingly, provide for exceptions to gender-listing requirements. The act would preempt those exceptions and may violate of the Constitution’s Equal Protection Clause for both pre- and post-therapy or operative transgendered individuals. The gender classification will also lead to data inconsistencies within the databases that will “red flag” the transgendered when their licenses are scanned by government officials. (“*Constitutional Problems with the REAL ID Act*”)

PASS FAIL INC

Burdens on right to travel. The U.S. Supreme Court has repeatedly recognized a constitutionally protected right to travel. By ruling a state out of compliance the federal government may keep a state’s residents from boarding a plane and possibly other modes of transportation, which would likely burden their First Amendment-protected right to travel. The situation is particularly acute for residents of Hawaii or Alaska who often have no choice but to fly or travel via federally regulated modes of travel such as plane or ship. (“*Constitutional Problems with the REAL ID Act*”)

PASS FAIL INC

Burdens on right of assembly. The First Amendment protects “the right of the people to peaceably assemble.” Blocking individuals from non-compliant states from using their licenses to enter federal buildings seems to burden that right. (“*Constitutional Problems with the REAL ID Act*”)

PASS FAIL INC

Burdens on right of petition. The First Amendment also guarantees the right to “petition the government for a redress of their grievances.” Lack of a Real ID compliant license would bar a citizen from a face-to-face meeting with his or her elected or appointed government representatives. In fact, many statutory and regulatory schemes *require* individuals to at times present themselves before elected or appointed officials to raise their grievances. Blocking individuals from entering their representatives’ offices, Federal agencies or courthouses would be burden on the right to petition the government for redress. (“*Constitutional Problems with the REAL ID Act*”)

PASS FAIL INC

Lack of procedural or substantive due process. The REAL ID Act fails to provide for a system for individuals to access government records about them, challenge inconsistencies and correct data errors concerning their files. The REAL ID Act’s failure to include a procedure whereby individuals can quickly, efficiently and permanently reverse data errors is likely to impact a number of substantive rights – such as receiving government benefits or boarding a plane – and violates the Constitution’s guarantees of both procedural and substantive Due Process found in the Fifth and Fourteenth Amendments. (“*Constitutional Problems with the REAL ID Act*”)