Driver’s Licenses and Undocumented Immigrants

by Kendra Sena

The Government Law Center’s explainers concisely map out the law that applies to important questions of public policy.

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Introduction

The issuance of driver’s licenses is a state function. Each state is responsible for determining the requirements to acquire a license in that state, including proofs of identity and residency. In June 2019, New York became the 13th state to pass a law granting driver’s licenses to undocumented immigrants. Still, local governments responsible for issuing the licenses have raised significant opposition—some expressing intent to defy the law and sue the state. This explainer will outline the legal basis for extending driving privileges to undocumented immigrants, including the limitations on states imposed by the federal REAL ID Act, and will highlight some of the policy issues raised by state and local lawmakers.

I. Background

Until the 1990s, states did not explicitly prohibit undocumented drivers from getting driver’s licenses. In 1993, California passed the nation’s first law requiring that driver’s license applicants prove their lawful status. Since then, all but 15 jurisdictions have limited driver’s licenses to those with legal status. But the issue remains a contentious one, with advocates on both sides urging state legislatures to act. In light of the federal REAL ID Act of 2005, numerous states across the country are amending their driver’s license laws and regulations. While some state bills propose to permit access to driver’s licenses for undocumented immigrants, others seek to further limit access to driver’s licenses, or to repeal previously enacted legislation permitting undocumented drivers to be licensed by the state.

As states decide how to respond to the reality of undocumented drivers, lawmakers must consider the limits imposed by federal law and the ample room left for the exercise of policy discretion.
II. How does federal law limit states’ control over driver’s licenses?

The REAL ID Act of 2005 set certain standards for state-issued identity documents that are used for federal purposes, such as boarding a plane or entering a military base. The law requires that applicants for identity documents provide paperwork that proves their lawful status in the United States. States must verify that the applicant has lawful status, which can take one of many forms: U.S. citizenship; legal permanent residency (i.e., a “green card”); temporary visitor or work visas; refugee status and asylum; temporary protected status (TPS); and deferred action (e.g., DACA), among others. The REAL ID Act requires that the state-issued cards display specified information about the cardholder and contain security features to prevent tampering, counterfeiting, or duplication.

The law anticipates that some states will choose to implement a multi-tiered system, issuing both REAL ID-compliant and non-compliant IDs. It specifies that non-compliant IDs must be distinguishable from compliant ones, but leaves it up to the states to determine how the IDs will be distinguished.

Policies vary among the states that have adopted measures permitting undocumented drivers to obtain driver’s licenses. In the state of Washington, for example, all drivers are issued the same standard license regardless of immigration status; U.S. citizens may opt for a license that complies with the federal REAL ID Act. In Connecticut, undocumented drivers are eligible for “drive-only licenses,” and must sign an affidavit that they will obtain legal status when they are eligible. In Utah, “driving privilege cards” for undocumented drivers are valid for only one year and cannot be used for identification.

In 2014, the U.S. Department of Homeland Security (DHS) rejected California’s design for its two-tiered driver’s licenses. The state proposed that the REAL ID-compliant cards would display the letters “DL” for “driver’s license,” while the non-compliant cards would display the letters “DP” for “driving privilege,” and include language on the back of the card to indicate that the card was not sufficient for federal purposes. The federal government argued that the markings were insufficient to allow federal agents to quickly distinguish the cards.

The state changed the design; REAL ID-compliant cards now display a grizzly bear and a star on their face, while non-compliant cards display “FEDERAL LIMITS APPLY.”
The federal government has implemented the REAL ID Act incrementally over the last several years. The most visible phase of the plan, in which only REAL ID-compliant identification will be sufficient to board a plane, will be fully implemented in the year 2020. People with non-compliant IDs will have to show other acceptable forms of identification for federal purposes.

Compliance with the REAL ID Act is voluntary. States will not be penalized if they choose not to comply, though residents of those states may not like the extra burden of showing additional identification for federal purposes. As of this writing, DHS has certified 49 states and territories as compliant with REAL ID, and the remaining 7 have been granted extensions for compliance.

Still, even compliant jurisdictions have chosen not to implement all of the terms of the REAL ID Act. One of the law’s more controversial provisions requires each state to share its driver’s license database with every other state. The law requires states to “provide electronic access to all other States to information contained in the motor vehicle database of the State.” Each state’s database, at a minimum, must include “all data fields printed on drivers’ licenses and identification cards issued by the State” as well as “motor vehicle drivers’ histories, including motor vehicle violations, suspensions, and points on licenses.” At the time of this writing, only 25 out of 56 jurisdictions have chosen to adopt the database-sharing provision.

III. How does New York law operate within the federal framework?

New York began issuing REAL ID-compliant driver’s licenses in 2017. The state employs a multi-tier system, as permitted by federal law, and offers three licenses:

1. the “enhanced” license, which is used for identification, driving, for air travel and entering federal property, and for entering the U.S. from a foreign country. Displayed on its face is a flag;

2. The “REAL ID” license, which is used for identification, driving, and for air travel and entering federal property. Displayed on its face is a star; and

3. the “standard” license, which is used for identification purposes and for driving, but is not REAL ID-compliant. Displayed on its face are the words, “NOT FOR FEDERAL PURPOSES.”
Despite a multi-tiered system that includes non-compliant IDs, undocumented immigrants were not eligible for driver's licenses in New York until a law signed in 2019. While nothing in New York law required legal status in order to obtain a standard driver's license, a 2001 executive order issued by then-Governor George Pataki created a rule that effectively prevented undocumented people from obtaining licenses.

The order, which will be overturned when the 2019 law takes effect later in the year, directs the state's Commissioner of the Department of Motor Vehicles to require that applicants for driver's licenses present either a valid social security number or federally issued documents establishing legal presence. Undocumented immigrants cannot provide either, and thus cannot obtain driver's licenses. The state will issue licenses to New York residents who have social security numbers, including legal permanent residents (i.e., “green card” holders) and those with temporary visitor or work visas.

### IV. Policy Issues: New York

Undocumented immigrants account for a significant number of unlicensed drivers in New York. The Fiscal Policy Institute estimated that there are approximately 752,000 undocumented immigrants over the age of 16 in New York. The majority—70%—live in New York City, where residents have greater access to public transportation and are less likely to need a driver's license. But for undocumented immigrants outside of New York City, the effects of being unable to obtain a license are severe.

Limited public transportation outside of New York City makes driving a daily necessity to access work, school, medical facilities, and other services. And in rural upstate New York, farms and other agribusinesses rely on undocumented workers who often travel long distances to work. The result is a significant number of New York drivers who are unlicensed and uninsured.

In 2007, then-Governor Eliot Spitzer issued an executive order that would allow undocumented immigrants to access driver's licenses. Amid strong backlash, he rescinded the order only two months later.
In subsequent years, state legislators have introduced bills seeking to overturn the Pataki-era rule and codify access to state driver's licenses for undocumented immigrants. The most recent proposal, signed into law in 2019, will make standard driver's licenses available to qualified New York residents without regard to immigration status.\(^{22}\)

The law also aims to protect the privacy of applicants for the licenses by disallowing the agency from recording on its application form what documents were used to prove identity, or whether the applicant is ineligible for a social security number.\(^{23}\) They also specify that the driver's license database employed by the state may not be made available to a third party,\(^{24}\) likely a response to the state-to-state database sharing proposed by the REAL ID Act but which New York has not adopted.

The law does not propose to extend additional rights to undocumented immigrants who obtain a New York driver’s license. The licenses would not, for example, create a right to vote or access public benefits, or grant legal immigration status.

But the policy debate is far from over, and is likely to play out at the local government level. Unlike in most states, where driver’s licenses are issued by state agencies, in New York many Department of Motor Vehicles offices are operated by independently-elected county clerks.\(^{25}\) A number of county clerks have expressed their intent to defy the law and refuse to issue the licenses to newly eligible immigrants.\(^{26}\) As of this writing, one county clerk has filed suit, claiming that the law conflicts with federal immigration law that makes it a crime to conceal, harbor, or shield from detection a person in the United States illegally.\(^{27}\) At least one other county clerk\(^{28}\) and a county executive\(^{29}\) each expressed their intent to sue the state over the law.

**Conclusion**

Driver's licenses remain within the purview of the states, but with the widespread adoption of the REAL ID Act, the federal government has imposed significant restrictions on states that choose to adopt it. But as New York and other states are rolling out new driver’s license schemes to incorporate the REAL ID Act, they retain significant policy discretion in the implementation—including whether to issue licenses to undocumented residents and how the state will store and share the information of the drivers it licenses.

**Resources**

For a useful guide to deferred action, DACA, TPS, and other discretionary statuses, see:


For a comparison of the policy choices made by jurisdictions that currently license undocumented drivers, see:
A Note on DACA

Recipients of the Deferred Action for Childhood Arrivals (DACA) program are eligible for driver’s licenses in every state.

The REAL ID Act itself lists deferred action as a lawful status that makes a person eligible for a REAL ID-compliant identity document. (REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231; 49 U.S.C. s. 30301, Sec. 202, note (c)(2)(B) (defining “lawful status”). And every state either expressly offers licenses to DACA recipients, or effectively does so by making licenses available to those with employment authorization and social security numbers, for which DACA recipients are eligible.

Two states, Arizona and Nebraska, attempted to exclude DACA recipients from accessing driver’s licenses in those states. But in 2014, the Ninth Circuit upheld the lower court’s ruling striking down Arizona’s policy of denying licenses to DACA recipients (Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053, 1059 (9th Cir. 2014)), and in 2015, with litigation pending against the state, the Nebraska state legislature passed a law—overriding a veto from the governor—that superseded that state’s exclusionary policy (L.B. 623, 140th Leg., 1st Sess. (Neb. 2015)).

Although DACA recipients are currently eligible for REAL ID-compliant driver’s licenses in all states, there is increasing uncertainty that the DACA program will survive. If that class of people falls out of eligibility for compliant licenses, it will be up to the states to decide whether it will issue non-compliant licenses to them.

Endnotes

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Id. at note (b)(establishing minimum document requirements).

Id. at note (d)(11)(establishing guidelines for state-issued IDs that do not comply with the REAL ID Act).


For an annotated visual comparison of California’s cards, see https://www.dmv.ca.gov/portal/wcm/connect/0fb99220-0204-4967-8eb3-a101e5ad0464/DLID_Redesign.pdf?MOD=AIPERES.


Supra note 4, at note (d).

Id.

The American Association of Motor Vehicle Administrators (AAMVA) maintains a list of jurisdictions that participate in the “State-to-State (S2S) Verification System,” which is the only system currently operating that meets the requirements of the REAL ID Act, available at https://www.aamva.org/State-to-State/. For more information about S2S, see Joan Friedland, National Immigration Law Center, “Updates on REAL ID and Increased Information Sharing by Departments of Motor Vehicles,” January 2018, available at: https://www.nilc.org/news/the-torch/1-04-18/.
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18 The rule survived a legal challenge in 2006, when the New York Court of Appeals ruled that the Commissioner has an “undisputed” right to insist on the specified documents. *Cubas v. Martinez*, 870 N.E.2d 133, 136 (N.Y. 2007). The rule also survived a political challenge in 2007 when then-Governor Eliot Spitzer proposed to undo it by executive order, only to step back from the position after a political firestorm. See Danny Hakim, “Spitzer dropping his driver’s license plan,” THE NEW YORK TIMES, Nov. 14, 2007.


20 *Id.* The Fiscal Policy Institute calculated that of the eligible New York City residents, about 57% get driver’s licenses.


22 *Supra* note 17.

23 *Id.*

24 *Id.*

25 In 51 of the state’s 62 counties, the county clerk serves as an agent of the Commissioner of Motor Vehicles and is responsible for operating the Department of Motor Vehicles office and issuing driver’s licenses. *See N.Y.S. Vehicle and Traffic Law s. 205.* Excepted are the clerks of the counties of Rockland, Albany, Westchester, Suffolk, Nassau, Onondaga, Bronx, Kings, Queens, Richmond and New York.


