

Clarifying the Facts and the Law

Last week, Governor Spitzer and DMV Commissioner Swarts announced that DMV would issue an administrative policy change to its offices and county clerk agents regarding how licenses may be issued – both to expand access and increase security. Some responses to this announcement represent fundamental misunderstandings of the facts and of the law.

Federal Requirements

First, New Yorkers *can* still use their driver licenses to board planes until at least May 2013, when a federal mandate – the REAL ID Act – will require that every airline traveler have either a federally-approved license or passport to board a plane.

It is important to note that even before DMV's latest policy change, New York State licenses would not have met the new federal requirements. In fact, no state license in the country currently meets federal requirements.

For example, before our recent announcement, our license did not meet the following Real ID requirements:

- mandatory in-person re-licensing/re-credentialing of all drivers;
- laser engraving and variable information that is specific to the bearer;
- a series of check digit numbers or letters printed on the document;
- retention of copies of all proof of ID documents submitted;
- residence address must be printed on the document (we currently print mailing address);
- serialized card stock; and
- document must contain full legal name with a standard of 39 characters, instead of the 20 DMV currently has;
- the use of covert taggants and or markers on documents.

As a result of the many concerns with the REAL ID Act, including cost, privacy and effectiveness, seven states (NH, SC, GA, OK, MT, WA, ME) have already “opted out” of REAL ID, which means their DMVs will not offer a federally-approved license to their citizens even after May 2013. As a result, their residents will need a passport to board a plane.

As for New York's final determination on implementing REAL ID, it is too premature to make a final determination one way or the other given that the final regulations from DHS still have not yet come out (have been delayed by DHS for months now). New York has until January 1, 2010 to make that determination and be equipped to issue a federally-approved license. Again, the actual REAL ID travel requirements do not go into effect until May 11, 2013.

If New York does decide to implement Real ID, DMV would offer a second license, one that is federally approved, prior to the 2013 deadline so New Yorkers have the option of the State-approved license that DMV currently issues or a federally-approved license. The Real ID Act contemplates and allows for the issuing of two different licenses.

Legal Authority to Make Change

Second, some have asserted that the policy change is unlawful, interpreting a 1995 statute to preclude the issuance of licenses to anyone who does not hold a social security number (“SSN”). They conclude that this change can only be made through a law passed by the Legislature and signed by the Governor. This conclusion represents a fundamental misunderstanding of the law and subsequent interpretations held up by New York’s highest court.

In 1995, Vehicle and Traffic Law § 502 was amended as part of a nationwide movement to condition federal child support funding on a state’s collection of SSNs, which were linked to tracking parents who failed to pay child support. The legislative history of this change speaks only of child support collection, not banning applicants who lack a SSN. DMV has never interpreted the law to preclude issuing licenses to applicants without SSNs, and hundreds of thousands of such applicants hold licenses now (for example, Canadian citizens lawfully residing in New York can receive New York licenses). In fact, this interpretation has been memorialized as recently as this year by the Court of Appeals (Cubas v. Martinez, 8 N.Y.3d 611, 617 (2007) – holding that the DMV Commissioner “concedes that people who do not have SSNs – i.e., people without authorization to work in the United States – may be entitled to driver’s licenses.”).

Voter Registration

Third, it has been suggested that this policy will somehow impact voter registration. Again, this simply is not the case and ignores the facts and the law. Our State Constitution properly requires that voters be citizens, and the Election Law provides that citizenship is demonstrated by an applicant swearing or affirming that they are a citizen under penalty of up to 4 years in jail and a \$5,000 fine. No change in DMV procedures will, or could, change that.

The Board of Elections utilizes DMV data only to confirm a voter’s identity, not their citizenship. DMV has never tracked an applicant’s citizenship even before this recent change, and, even if it did, the Board of Elections could not lawfully rely on the DMV to perform a citizenship test for voting eligibility. Notably, however, the changes announced last week will improve DMV’s identification of applicants, and thus reduce voter fraud, particularly by using software to compare all license holders’ and new applicants’ photos with existing DMV records to preclude someone from assuming multiple identities.

County Clerks

Fourth, at least a couple of county clerks who issue licenses have suggested that they will refuse to follow the DMV Commissioner’s policy change, and will instead issue licenses in ways that they personally deem appropriate. Such action would be in flagrant violation of State law.

According to State law, county clerks serve as the statutory “agent” of the DMV Commissioner (Vehicle & Traffic Law § 205(1) – the clerks of such counties “shall act as the agent of the commissioner.”). Because the DMV has offices only in New York City, Albany, Buffalo,

Rockland, Westchester, Onondaga, Suffolk and Nassau counties, elsewhere throughout the State, licenses may be obtained through county clerks. As the agents of DMV, the clerks issue licenses as the DMV Commissioner instructs, not as they may wish. Notably, a county clerk is deemed to be a State officer when performing functions on behalf of the State government (1969 Attorney General Opinion No. 25 – when a clerk is performing DMV functions, “there is a separation of his duties in that he is a direct agent of the State rather than the county government.”).

Accordingly, performing DMV functions as directed by the DMV Commissioner is a basic function of a clerk’s public office, and turning away an otherwise eligible license applicant raises serious equal protection and civil rights issues. Thus, a county clerk who turns away an eligible applicant in derogation of the Commissioner’s policies would violate his or her oath of office. County clerks who put themselves in such a position would be subject to suit by the State and license applicants. Moreover, losing DMV functions would cost a county all associated revenue.