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OPINION NO. 2014-04

DEPARTMENT OF MOTOR VEHICLES;
DRIVER'S LICENSES; IDENTIFICATION:
The DMV has the authority under Nevada law to issue driver's licenses that do not comply with the Real ID Act of 2005.

Troy Dillard, Director
Nevada Department of Motor Vehicles
555 Wright Way
Carson City, Nevada 89711

Dear Mr. Dillard:

The Nevada Department of Motor Vehicles (the DMV) has requested an opinion as to whether it has the authority to issue Nevada driver's licenses that are not in compliance with the provisions of Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 202(a), 49 U.S.C. § 30301 note (Real ID Act of 2005), which was enacted by the United States Congress to set nationwide standards for state-issued driver's licenses and identification. The short answer to the DMV's question is "yes."

The DMV has the authority to issue non-Real ID Act-compliant Nevada driver's licenses under Nevada law and the Real ID Act does not prohibit it from doing so, provided that the noncompliant driver's license is properly identified pursuant to requirements of the Act. The analysis in reaching this conclusion is set forth below.

QUESTION

Does the DMV have the authority under Nevada law to issue driver's licenses that do not comply with the Real ID Act of 2005?

ANALYSIS

To answer the above question, it is necessary to examine both the authority of the DMV to issue driver's licenses under Nevada law and whether there are any prohibitions within the Real ID Act of 2005 that may prevent the DMV from issuing a non-compliant license.

As a threshold matter, it is important to note that the issuance of a driver's license is "a function traditionally exercised by the individual state governments," *Gray v. North Dakota Game and Fish Dept.*, 706 N.W.2d 614, 622 (N.D. 2005) (quoting *Koterba v. Commonwealth*, 736 A.2d 761, 765-66 (Pa. Cmmw. Ct. 1999), *cert denied*, 531 U.S. 816 (2000)), including Nevada.

Nevada statutes governing the issuance of driver's licenses by the DMV are set forth in Chapter 483 of the Nevada Revised Statutes (NRS). Within that chapter, numerous provisions expressly govern the DMV's authority to issue driver's licenses: NRS 483.230 (license required to operate motor vehicle); NRS 483.245 (issuance of license required when person becomes Nevada resident); NRS 483.290 (contents of application and acceptable documents for license); NRS 438.330 (license examination); NRS 483.340 (contents of license); NRS 483.347 (shape of license); NRS 483.382-.386 (renewal of license).

Reading these several statutory provisions together, the legislative grant of authority to the DMV over driver's licenses is broad, see NRS 483.908, and traditionally unencumbered by federal proscription absent clear congressional intent. See, e.g., *State Dep't Mtr. Vehicles v. Lovett*, 110 Nev. 473, 479-80, 874 P.2d 1247, 1251 (1994).

However, in response to nationwide identification and security concerns following the terrorist attacks on September 11, 2001, the United States Congress enacted the Real ID Act of 2005, Public Law 109-13, which established "minimum standards for State-issued driver's licenses and identification cards the Federal agencies would accept for official purposes on or after May 11, 2008." 6 C.F.R Part 37, Summary (2008); see Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 202(a), 49 U.S.C. § 30301 note. An "official purpose" under the Act includes accessing federal facilities, boarding commercial airplanes, and other purposes determined by the Secretary of Homeland Security. Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 201(3). Therefore, only those people who hold a state-

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issued driver's license that complies with the Act's requirements may be allowed access to certain federally-controlled facilities.

Nevada, along with seventeen other states, has been granted a renewable extension by the Secretary of Homeland Security to achieve full compliance with the Act. The extension is currently set to expire on October 10, 2014, but can be renewed. Memorandum from United States Department Of Homeland Security, "Real ID Enforcement In Brief," (December 20, 2013).

The analysis turns upon whether the Act overrides or preempts the DMV's traditional and statutory authority to issue Nevada driver's licenses that are not in compliance with the Act. It does not.

Nowhere is it expressly stated in Nevada law that the DMV is limited to issuing *only* Real ID Act-compliant licenses. To the contrary, Nevada law already provides that the DMV has the authority to issue non-Real ID Act-compliant driver's licenses in the form of a driver authorization card, so long as the authorization card is obtained in accordance with section 202(d)(11) of the Act. See NRS 483.291(5).

Section 202(d)(11) of the Act expressly contemplates instances in which a state may issue a driver's license that is not in compliance with the Act when the following two conditions are satisfied. First, the license must clearly state "on its face that it may not be accepted by any [f]ederal agency for federal identification or any other official purpose." Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 202(d)(11)(A). Second, the license must use "a unique design or color indicator to alert [f]ederal agency and other law enforcement personnel that it may not be accepted for any such purpose." *Id.* at § 202(d)(11)(B).

Based upon the foregoing analysis, including the absence of any Nevada law prohibiting the DMV from issuing a non-compliant Real ID Act driver's license, and express language of the Act permitting such a license to be issued, it is the opinion of this Office that the Act does not abrogate the DMV's authority to issue a standard Nevada driver's license. Rather, the DMV retains its traditional authority to issue a non-Real ID Act-compliant driver's license, so long as the two conditions set forth in Section 202(d)(11) of the Act are met.¹

This conclusion is further supported by the opinion of the United States Department of Homeland Security's own interpretation of the Act, in which it posits the following question and answer:

¹ In doing so, it may be necessary for the DMV to review and amend any regulations that conflict with Section 202(d)(11) of the Act.

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[Question] Can jurisdictions meeting the standards of REAL ID continue issuing non-compliant REAL ID driver's licenses and identification cards?

[Answer] Yes. REAL ID allows jurisdictions to issue identification cards and driver's licenses that are not in compliance with the requirements of the Act. Those licenses and identification cards, however, must clearly state on their face and in the machine readable zone that the card is not acceptable for official purposes.

See Real ID Frequently Asked Questions for States Compliance Procedure, <http://www.dhs.gov/real-id-faqs-states> (last visited June 27, 2014).

While this opinion does not address the policy implications of the DMV offering a non-compliant Nevada driver's license under the Act, neither the current Nevada law nor the Act appear to prohibit the DMV from doing so.

CONCLUSION

The DMV has the authority under Nevada law to issue driver's licenses that do not comply with the Real ID Act of 2005.

Sincerely,

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