

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 4537**

4 (By Delegates Williams, Perdue, Arvon, Morgan
5 Guthrie, Fleischauer and Campbell)

6 (Originating in the House Committee on Finance)

7
8 [February 21, 2014]

9
10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §16-46-1, §16-46-2,
12 §16-46-3, §16-46-4, §16-46-5, §16-46-6, §16-46-7, §16-46-8,
13 §16-46-9 and §16-46-10, all relating to requiring background
14 checks for individuals who have direct access to residents,
15 members or beneficiaries of covered providers participating in
16 the West Virginia Clearance for Access: Registry and
17 Employment Screening program; providing a short title;
18 defining terms; requiring the Secretary of the Department of
19 Health and Human Resources to develop a plan and a program for
20 conducting background checks; requiring a centralized database
21 to maintain criminal history record information and results;
22 establishing a prescreening process conducted by covered
23 providers; requiring applicants to provide fingerprints and
24 undergo a criminal background check; establishing procedures

1 and criteria for obtaining and reviewing criminal history
2 record information; establishing criteria for approving
3 applicants as covered individuals; authorizing contractors and
4 fees; creating a special revenue account for administrative
5 fees; providing for protests of the secretary's decisions and
6 permitting variances; creating exceptions; authorizing
7 legislative rules; providing monetary penalties; and providing
8 for civil and criminal immunity.

9 *Be it enacted by the Legislature of West Virginia:*

10 That the Code of West Virginia, 1931, as amended, be amended
11 by adding thereto a new article, designated §16-46-1, §16-46-2,
12 §16-46-3, §16-46-4, §16-46-5, §16-46-6, §16-46-7, §16-46-8, §16-46-
13 9 and §16-46-10, all to read as follows:

14 **ARTICLE 46. WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY AND**
15 **EMPLOYMENT SCREENING ACT.**

16 **§16-46-1. Short title.**

17 This article may be cited as the "West Virginia CARES Act."

18 **§16-46-2. Definitions.**

19 As used in this article:

20 "Applicant" means an individual who a covered provider is
21 considering for employment or engagement.

22 "Background check" means a prescreening of registries
23 specified by the secretary by rule, and a fingerprint-based search

1 of state and federal criminal history record information.

2 "Covered Contractor" means an individual or entity, including
3 their employees and subcontractors, that contracts with a covered
4 provider to perform services that include any direct access
5 services.

6 "Covered provider" means any facility or provider required to
7 participate in the West Virginia Clearance for Access: Registry and
8 Employment Screening program as determined by the secretary by
9 rule.

10 "Department" means the Department of Health and Human
11 Resources.

12 "Direct access" means physical contact with a resident,
13 member, beneficiary, or client of a covered provider, or access to
14 their property, personally identifiable information, protected
15 health information, or financial information.

16 "Direct access personnel" means an individual who has direct
17 access by virtue of ownership, employment, engagement, or agreement
18 with a covered provider. Direct access personnel does not include
19 volunteers or students performing irregular or supervised
20 functions, or contractors performing repairs, deliveries,
21 installations or similar services for the covered provider. The
22 secretary shall determine by rule whether the position in question
23 involves direct access.

24 "Disqualifying offense" means:

1 (A) A conviction of any crime described in 42 U.S.C. §1320a-
2 7(a); or

3 (B) A conviction of any other crime specified by the secretary
4 in rule, which shall include crimes against care-dependent or
5 vulnerable individuals, crimes of violence, sexual offenses, and
6 financial crimes.

7 "Negative finding" means a finding in the prescreening that
8 excludes an applicant from direct access personnel positions.

9 "Notice of ineligibility" means a notice pursuant to section
10 four of this article that the secretary's review of the applicant's
11 criminal history record information reveals a disqualifying
12 offense.

13 "Prescreening" means a mandatory search of databases and
14 registries specified by the secretary in rule, for exclusions and
15 licensure status prior to the submission of fingerprints for a
16 criminal history record information check.

17 "Rap back" means the notification to the department when an
18 individual who has undergone a fingerprint-based, state or federal
19 criminal history record information check has a subsequent state or
20 federal criminal history event.

21 "Secretary" means the Secretary of the West Virginia
22 Department of Health and Human Resources.

23 "State Police" means the West Virginia State Police Criminal
24 Identification Bureau.

1 **§16-46-3. Background check program for covered providers.**

2 (a) The secretary shall create and implement a background
3 check program to facilitate the processing and analysis of the
4 criminal history and background of applicants to covered providers
5 with direct access. This program shall be called the West Virginia
6 Clearance for Access: Registry and Employment Screening.

7 (b) The purpose of the program is to protect West Virginia's
8 vulnerable populations by requiring criminal background checks for
9 all direct access personnel of covered providers.

10 (c) The program shall include:

11 (1) A centralized Internet-based system of registries to allow
12 covered providers to perform a mandatory prescreening of
13 applicants;

14 (2) Fingerprint-based state and federal criminal background
15 checks on all direct access personnel; and

16 (3) An integrated rap back program with the State Police to
17 allow retention of fingerprints and updates of state and federal
18 criminal information on all direct access personnel until such time
19 as the individual is no longer employed or engaged by the provider.

20 (c) The department shall notify applicants subject to a
21 criminal history record check that their fingerprints shall be
22 retained by the State Police Criminal Identification Bureau and the
23 Federal Bureau of Investigation.

24 **§16-46-4. Prescreening and criminal background checks.**

1 (a) Except as otherwise permitted in this article, the covered
2 provider may not employ or engage an applicant prior to completing
3 the background check process.

4 (b) If the applicant has a negative finding on any required
5 prescreening registry or database, the provider shall notify the
6 individual of such finding.

7 (c) If the applicant has a negative finding on any required
8 prescreening registry or database, that individual may not
9 immediately be engaged by a covered provider. However, that
10 individual or the provider may apply for a variance pursuant to
11 section six of this article.

12 (d) If the applicant does not have a negative finding in the
13 prescreening process, the applicant shall submit to fingerprinting
14 for a state and federal criminal history record information check.

15 (e) The State Police shall notify the secretary of the results
16 of the criminal history record information check.

17 (f) If the secretary's review of the criminal history record
18 information reveals that the applicant does not have a
19 disqualifying offense, the secretary shall provide written notice
20 to the covered provider that the individual may be engaged.

21 **§16-46-5. Notice of ineligibility; prohibited participation as**
22 **direct access personnel.**

23 (a) If the secretary's review of the applicant's criminal
24 history record information reveals a disqualifying offense, the

1 secretary shall provide written notice to the covered provider
2 advising that the applicant is ineligible for work. The secretary
3 may not disseminate the criminal history record information.

4 (b) The covered provider may not engage an applicant with a
5 disqualifying offense as direct access personnel. If the applicant
6 has been conditionally employed pursuant to section six of this
7 article, the provider shall terminate the conditional employment
8 upon receipt of the notice.

9 **§16-46-6. Variance; appeals.**

10 (a) If the prescreening process reveals a negative finding, or
11 if the secretary issues a notice of ineligibility, the applicant,
12 or the provider on the applicant's behalf, may file a written
13 request for a variance with the secretary not later than thirty
14 days after the date of the notice required by section three or
15 section four of this article.

16 (b) The secretary may grant a variance if:

17 (1) Mitigating circumstances surrounding the negative finding
18 or disqualifying offense is provided; and

19 (2) The secretary finds that the individual will not pose a
20 danger or threat to residents, members, and their property.

21 (c) The secretary shall establish in rule factors that qualify
22 as mitigating circumstances.

23 (d) The secretary shall mail to the applicant and the provider
24 a written decision within ninety days of receipt of the request

1 indicating whether a variance has been granted or denied.

2 (e) If an applicant believes that their criminal history
3 record information within this state is incorrect or incomplete,
4 they may challenge the accuracy of such information by writing to
5 the State Police for a personal review. However, if the
6 discrepancies are at the charge or final disposition level, the
7 applicant must address this with the court or arresting agency that
8 submitted the record to the State Police.

9 (f) If an applicant believes that their criminal history
10 record information outside this state is incorrect or incomplete,
11 they may appeal the accuracy of such information by contacting the
12 Federal Bureau of Investigation for instructions.

13 (g) If any changes, corrections, or updates are made in the
14 criminal history record information, the State Police shall notify
15 the secretary that the applicant has appealed the accuracy of the
16 criminal history records and provide the secretary with the updated
17 results of the criminal history record information check, which the
18 secretary shall review de novo in accordance with the provisions of
19 this article.

20 **§16-46-7. Conditional employment pending completion of background**
21 **check.**

22 (a) A covered provider may permit an applicant to work on a
23 conditional basis for not more than sixty days pending notification
24 from the secretary regarding the results of the criminal background

1 check if:

2 (1) The applicant is subject to direct on-site supervision, as
3 specified in rule by the secretary, during the course of the
4 conditional period; and

5 (2) In a signed statement the applicant:

6 (A) Affirms that he or she has not committed a disqualifying
7 offense;

8 (B) Acknowledges that a disqualifying offense reported in the
9 required criminal history record information check shall constitute
10 good cause for termination; and

11 (C) Acknowledges that the covered provider may terminate the
12 individual if a disqualifying offense is reported in the background
13 check.

14 (b) A covered provider may continue to employ an applicant if
15 an applicant applies for a variance of his or her fitness
16 determination until the variance is resolved.

17 **§16-46-8. Exceptions.**

18 (a) An applicant is not required to submit to fingerprinting
19 and a criminal background check if:

20 (1) The individual previously submitted to fingerprinting and
21 a full criminal background check as required by this article;

22 (2) The prior criminal background check confirmed that the
23 individual did not have a disqualifying offense;

24 (3) The individual received prior approval from the secretary

1 to work for or with the same type of covered provider; and

2 (4) The rap back program has not identified any criminal
3 activity that constitutes a disqualifying offense.

4 (b) The secretary shall provide notice of prior clearance for
5 direct access status upon request by a subsequent covered provider.

6 **§16-46-9. Fees.**

7 (a) In order to enforce the requirements and intent of this
8 article, the following fees may be charged:

9 (1) The State Police may assess a fee to applicants or covered
10 providers for conducting the criminal background check and for
11 collecting and retaining fingerprints for rap back as authorized
12 under this article.

13 (2) The secretary may assess a fee to applicants or covered
14 providers for the maintenance of the Internet-based system required
15 by this article. The assessment shall be deposited into a special
16 revenue account within the State Treasurer's Office, to be known as
17 the "DHHR Criminal Background Administration Account." Expenditures
18 from the account shall be made by the secretary for purposes set
19 forth in this article, and are authorized from collections. The
20 account shall be administered by the secretary and may not be
21 deemed a part of the general revenue of the state.

22 **§16-46-10. Rules; penalties; confidentiality; immunity.**

23 (a) The secretary shall propose rules for legislative approval
24 in accordance with article three, chapter twenty-nine-a of this

1 code, to implement the provisions of this article. The secretary
2 may promulgate emergency rules, if justified, pursuant to section
3 fifteen, article three, chapter twenty-nine-a of this chapter as
4 may be required.

5 (b) Failure of a provider to ensure proper completion of the
6 background check process for each individual may result in the
7 imposition of monetary civil penalties. In addition, engaging
8 individuals knowing that they are ineligible to work may subject
9 the provider to monetary civil penalties.

10 (c) The secretary shall treat and maintain any criminal
11 background search information obtained under this article as
12 confidential. The secretary shall limit the use of records solely
13 to the purposes authorized in this article. The criminal history
14 record information in the custody of the secretary are not subject
15 to subpoena, other than one issued in a criminal action or
16 investigation; are confidential by law and privileged; and are not
17 subject to discovery or admissible in evidence in any private civil
18 action.

19 (d) The secretary, the department and its employees are immune
20 from liability, civil or criminal, that might otherwise be incurred
21 or imposed, for good faith conduct in determining eligibility or
22 granting variances permitted by this article.