

Senate Bill No. 590

(By Senators Stollings and Palumbo)

[Introduced February 14, 2014; referred to the Committee on the
Judiciary; and then to the Committee on Finance.]

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 and
13 §16-46-9, all relating to requiring background checks for
14 individuals who have direct access to residents, members or
15 beneficiaries of covered providers participating in the West
16 Virginia Clearance for Access: Registry and Employment
17 Screening program; defining terms; requiring the Secretary of
18 the Department of Health and Human Resources to develop a plan
19 and a program for conducting background checks; requiring a
20 centralized database to maintain criminal history record
21 information and results; establishing a prescreening process
22 conducted by covered providers; requiring applicants to
23 provide fingerprints and undergo a criminal background check;

1 establishing procedures and criteria for obtaining and
2 reviewing criminal history record information; establishing
3 criteria for approving applicants as covered individuals;
4 authorizing contractors and fees; creating a special revenue
5 account for administrative fees; providing for protests of the
6 secretary's decisions and permitting variances; creating
7 exceptions; authorizing legislative rules; providing monetary
8 penalties; and providing 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 and
13 §16-46-9, all to read as follows:

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

16 **§16-46-1. Definitions.**

17 As used in this article:

18 (1) "Applicant" means an individual who is seeking employment
19 or engagement with a covered provider.

20 (2) "Background check" means a prescreening of registries
21 specified by the secretary by rule, and a fingerprint-based search
22 of state and federal criminal history record information.

23 (3) "Covered Contractor" means an individual or entity,

1 including their employees and subcontractors, that contracts with
2 a covered provider to perform services that include any direct
3 access services.

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

8 (5) "Department" means the Department of Health and Human
9 Resources.

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

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

22 (8) "Disqualifying offense" means:

23 (A) A conviction of any crime described in 42 U.S.C.

1 §1320a-7(a); or

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

6 (9) "Negative finding" means a finding in the prescreening
7 that excludes an applicant from direct access personnel positions.

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

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

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

20 (13) "Secretary" means the Secretary of the Department of
21 Health and Human Resources.

22 (14) "State Police" means the West Virginia State Police
23 Criminal Identification Bureau.

1 **§16-46-2. 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 program shall include:

8 (1) A centralized internet-based system of registries to allow
9 covered providers to perform a mandatory prescreening of
10 applicants;

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

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

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

21 **§16-46-3. Prescreening and criminal background checks.**

22 (a) Except as otherwise permitted in this article, the covered
23 provider may not employ or engage an applicant prior to completing

1 the background check process.

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

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

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

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

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

19 **§16-46-4. Notice of ineligibility; prohibited participation as**
20 **direct access personnel.**

21 (a) If the secretary's review of the applicant's criminal
22 history record information reveals a disqualifying offense, the
23 secretary shall provide written notice to the covered provider

1 advising that the applicant is ineligible for work. The criminal
2 history record information shall remain confidential.

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

8 **§16-46-5. Variance; appeals.**

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

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

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

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

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

22 (d) The secretary shall mail to the applicant and the provider
23 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 **§16-46-6. Conditional employment pending completion of background**
21 **check.**

22 A covered provider may permit an applicant to work on a
23 conditional basis for not more than sixty days pending notification

1 from the secretary regarding the results of the criminal background
2 check if:

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

6 (2) In a signed statement the applicant:

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

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

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

15 **§16-46-7. Exceptions.**

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

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

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

22 (3) The individual received prior approval from the secretary
23 to work for or with the same type of covered provider; and

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

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

5 **§16-46-8. Fees.**

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

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

12 (2) The secretary may assess a fee to applicants or covered
13 providers for the maintenance of the internet-based system required
14 by this article. The assessment shall be deposited into a special
15 revenue account within the State Treasurer's Office, to be known as
16 the "DHHR Criminal Background Administration Account." The account
17 shall be administered by the secretary and is not a part of the
18 general revenue of the state.

19 **§16-46-9. Rules; penalties; confidentiality; immunity.**

20 (a) The secretary shall propose rules for legislative approval
21 in accordance with the provisions of article three, chapter
22 twenty-nine-a of this code, to implement the provisions of this
23 article. The secretary may promulgate emergency rules, if

1 justified, pursuant to section fifteen, article three, chapter
2 twenty-nine-a of this chapter as may be required.

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

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

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

NOTE: The purpose of this article is to require background checks for individuals who have direct access to residents, members or beneficiaries of covered providers participating in the West Virginia Clearance for Access: Registry and Employment Screening

program. The bill defines terms. The bill requires the Secretary of the Department of Health and Human Resources to develop a plan and a program for conducting background checks. The bill requires a centralized database to maintain criminal history record information and results. The bill establishes a prescreening process conducted by covered providers. The bill requires applicants to provide fingerprints and undergo a criminal background check. The bill establishes procedures and criteria for obtaining and reviewing criminal history record information. The bill establishes criteria for approving applicants as covered individuals. The bill authorizes contractors and fees. The bill creates a special revenue account for administrative fees. The bill provides for protests of the secretary's decisions and permitting variances. The bill creates exceptions. The bill authorizes legislative rules. The bill provides monetary penalties. The bill provides for civil and criminal immunity.

This article is new; therefore strike-throughs and underscoring have been omitted.