

COMMITTEE SUBSTITUTE

FOR

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Senate Bill No. 88

(By Senators Stollings and Plymale)

[Originating in the Committee on Finance;
reported February 20, 2015.]

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

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record information; establishing criteria for approving applicants for employment; authorizing contractors and fees; creating special revenue account for administrative fees; providing for protests of the secretary’s decisions and permitting variances; creating exceptions; authorizing legislative rules; providing monetary penalties; and providing for civil and criminal immunity.

Be it enacted by the Legislature of West Virginia:

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

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

§16-46-1. Definitions.

1 As used in this article:

2 (1) “Applicant” means an individual who is being considered for employment or engagement
3 with a covered provider or covered contractor.

4 (2) “Background check” means a prescreening of registries specified by the secretary by rule
5 and a fingerprint-based search of state and federal criminal history record information.

6 (3) “Covered contractor” means an individual or entity, including their employees and
7 subcontractors, that contracts with a covered provider to perform services that include any direct
8 access services.

9 (4) “Covered provider” means the following facilities or providers:

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- 1 (i) A skilled nursing facility;
- 2 (ii) A nursing facility;
- 3 (iii) A home health agency;
- 4 (iv) A provider of hospice care;
- 5 (v) A long-term care hospital;
- 6 (vi) A provider of personal care services;
- 7 (vii) A provider of adult day care;
- 8 (viii) A residential care provider that arranges for, or directly provides, long-term care
- 9 services, including an assisted living facility;
- 10 (ix) An intermediate care facility for individuals with intellectual disabilities; and
- 11 (x) Any other facility or provider required to participate in the West Virginia Clearance for
- 12 Access: Registry and Employment Screening program as determined by the secretary by legislative
- 13 rule.
- 14 (5) “Department” means the Department of Health and Human Resources.
- 15 (6) “Direct access” means physical contact with a resident, member, beneficiary or client of
- 16 a covered provider, or access to their property, personally identifiable information, protected health
- 17 information or financial information.
- 18 (7) “Direct access personnel” means an individual who has direct access by virtue of
- 19 ownership, employment, engagement or agreement with a covered provider or covered contractor.
- 20 Direct access personnel does not include volunteers or students performing irregular or supervised
- 21 functions, or contractors performing repairs, deliveries, installations or similar services for the

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1 covered provider. The secretary shall determine by legislative rule whether the position in question
2 involves direct access.

3 (8) “Disqualifying offense” means:

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

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

8 (9) “Negative finding” means a finding in the prescreening that excludes an applicant from
9 direct access personnel positions.

10 (10) “Notice of ineligibility” means a notice pursuant to section three of this article that the
11 secretary’s review of the applicant’s criminal history record information reveals a disqualifying
12 offense.

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

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

19 (13) “Secretary” means the Secretary of the West Virginia Department of Health and Human
20 Resources, or his or her designee.

21 (14) “State Police” means the West Virginia State Police Criminal Identification Bureau.

1 **§16-46-2. Background check program for covered providers and covered contractors.**

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

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

9 (c) The program shall include:

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

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

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

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

20 **§16-46-3. Prescreening and criminal background checks.**

21 (a) Except as otherwise permitted in this article, the covered provider or covered contractor

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1 may not employ or engage an applicant prior to completing the background check process.

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

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

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

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

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

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

17 (a) If the secretary's review of the applicant's criminal history record information reveals
18 a disqualifying offense, the secretary shall provide written notice to the covered provider or covered
19 contractor advising that the applicant is ineligible for work. The secretary may not disseminate the
20 criminal history record information.

21 (b) The covered provider or covered contractor may not engage an applicant with a

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1 disqualifying offense as direct access personnel. If the applicant has been provisionally employed
2 pursuant to section seven of this article, the employer shall terminate the provisional employment
3 upon receipt of the notice.

4 **§16-46-5. Variance; appeals.**

5 (a) If the prescreening process reveals a negative finding, or if the secretary issues a notice
6 of ineligibility, the applicant, or the employer on the applicant's behalf, may file a written request
7 for a variance with the secretary not later than thirty days after the date of the notice required by
8 section three or section three of this article.

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

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

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

14 (c) The secretary shall establish in legislative rule factors that qualify as mitigating
15 circumstances.

16 (d) The secretary shall mail to the applicant and the covered provider or covered contractor
17 a written decision within ninety days of receipt of the request indicating whether a variance has been
18 granted or denied.

19 (e) If an applicant believes that their criminal history record information within this state is
20 incorrect or incomplete, they may challenge the accuracy of such information by writing to the State
21 Police for a personal review. However, if the discrepancies are at the charge or final disposition

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1 level, the applicant must address this with the court or arresting agency that submitted the record to
2 the State Police.

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

6 (g) If any changes, corrections, or updates are made in the criminal history record
7 information, the State Police shall notify the secretary that the applicant has appealed the accuracy
8 of the criminal history records and provide the secretary with the updated results of the criminal
9 history record information check, which the secretary shall review *de novo* in accordance with the
10 provisions of this article.

11 **§16-46-6. Provisional employment pending completion of background check.**

12 (a) A covered provider or covered contractor may permit an applicant to work on a
13 provisional basis for not more than sixty days pending notification from the secretary regarding the
14 results of the criminal background check if:

15 (1) The applicant is subject to direct on-site supervision, as specified in rule by the secretary,
16 during the course of the provisional period; and

17 (2) In a signed statement the applicant:

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

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

21 (C) Acknowledges that the covered provider or covered contractor may terminate the

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1 individual if a disqualifying offense is reported in the background check.

2 (b) Provisional employees who have requested a variance shall not be required to sign such
3 a statement. A covered provider or covered contractor may continue to employ an applicant if an
4 applicant applies for a variance of his or her fitness determination until the variance is resolved.

5 **§16-46-7. Clearance for subsequent employment.**

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

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

10 (2) The prior criminal background check confirmed that the individual did not have a
11 disqualifying offense or the individual received prior approval from the secretary to work for or with
12 the same type of covered provider or covered contractor; and

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

15 (b) The secretary shall provide notice of prior clearance for direct access status upon request
16 by a subsequent covered provider or covered contractor.

17 **§16-46-8. Fees.**

18 In order to enforce the requirements and intent of this article, the following fees may be
19 charged:

20 (1) The State Police may assess a fee to applicants, covered providers or covered contractors
21 for conducting the criminal background check and for collecting and retaining fingerprints for rap

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1 back as authorized under this article.

2 (2) The secretary may assess a fee to applicants, covered providers or covered contractors
3 for the maintenance of the Internet-based system required by this article. The assessment shall be
4 deposited into a special revenue account within the State Treasurer's Office to be known as the
5 DHHR Criminal Background Administration Account. Expenditures from the account shall be made
6 by the secretary for purposes set forth in this article and are authorized from collections. The account
7 shall be administered by the secretary and may not be deemed a part of the general revenue of the
8 state.

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

10 (a) The secretary shall propose rules for legislative approval in accordance with article three,
11 chapter twenty-nine-a of this code to implement the provisions of this article. The secretary may
12 promulgate emergency rules, if justified, pursuant to section fifteen, article three, chapter twenty-
13 nine-a of this chapter as may be required.

14 (b) Failure of a covered provider or covered contractor to ensure proper completion of the
15 background check process for each individual employed as direct access personnel may result in the
16 imposition of monetary civil penalties. In addition, engaging individuals knowing that they are
17 ineligible to work may subject the employer to monetary civil penalties.

18 (c) The secretary shall treat and maintain any criminal background search information
19 obtained under this article as confidential. The secretary shall limit the use of records solely to the
20 purposes authorized in this article. The criminal history record information in the custody of the
21 secretary is not subject to subpoena, other than one issued in a criminal action or investigation; is

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1 confidential by law and privileged; and is not subject to discovery or admissible in evidence in any
2 private civil action.

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