

1 **Senate Bill No. 88**

2 (By Senators Stollings and Plymale)

3 _____
4 [Introduced January 14, 2015; referred to the Committee on Health and Human Resources; and
5 then to the Committee on Finance.]

6 _____
7
8
9 **FISCAL
NOTE**

10 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
11 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
12 and §16-46-9, all relating to requiring background checks for individuals who have direct
13 access to residents, members or beneficiaries of covered providers participating in the West
14 Virginia Clearance for Access: Registry and Employment Screening program; defining
15 terms; requiring the Secretary of the Department of Health and Human Resources to develop
16 a plan and a program for conducting background checks; requiring centralized database to
17 maintain criminal history record information and results; establishing prescreening process
18 conducted by covered providers; requiring applicants to provide fingerprints and undergo
19 criminal background check; establishing procedures and criteria for obtaining and reviewing
20 criminal history record information; establishing criteria for approving applicants as covered
21 individuals; authorizing contractors and fees; creating special revenue account for

1 administrative fees; providing for protests of the secretary’s decisions and permitting
2 variances; creating exceptions; authorizing legislative rules; providing monetary penalties;
3 and providing civil and criminal immunity.

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

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

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

10 **§16-46-1. Definitions.**

11 As used in this article:

12 (1) “Applicant” means an individual who is seeking employment or engagement with a
13 covered provider.

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

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

19 (4) “Covered provider” means any facility or provider required to participate in the West
20 Virginia Clearance for Access: Registry and Employment Screening program as determined by the
21 secretary by rule.

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

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

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

10 (8) "Disqualifying offense" means:

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

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

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

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

20 (11) "Prescreening" means a mandatory search of databases and registries specified by the
21 secretary in rule, for exclusions and licensure status prior to the submission of fingerprints for a

1 criminal history record information check.

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

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

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

7 **§16-46-2. Background check program for covered providers.**

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

12 (b) The program shall include:

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

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

17 (3) An integrated rap back program with the State Police to allow retention of fingerprints
18 and updates of state and federal 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 criminal history record check that their
21 fingerprints are retained by the State Police Criminal Identification Bureau and the Federal Bureau

1 of Investigation.

2 **§16-46-3. Prescreening and criminal background checks.**

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

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

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

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

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

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

17 **§16-46-4. Notice of ineligibility; prohibited participation as direct access personnel.**

18 (a) If the secretary's review of the applicant's criminal history record information reveals a
19 disqualifying offense, the secretary shall provide written notice to the covered provider advising that
20 the applicant is ineligible for work. The criminal history record information shall remain
21 confidential.

1 (b) The covered provider may not engage an applicant with a disqualifying offense as direct
2 access personnel. If the applicant has been conditionally employed pursuant to section six of this
3 article, the provider shall terminate the conditional employment 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 provider on the applicant's behalf, may file a written request for
7 a variance with the secretary not later than thirty days after the date of the notice required by section
8 three or section four 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 rule factors that qualify as mitigating circumstances.

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

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

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

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

9 **§16-46-6. Conditional employment pending completion of background check.**

10 A covered provider may permit an applicant to work on a conditional basis for not more than
11 sixty days pending notification from the secretary regarding the results of the criminal background
12 check if:

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

15 (2) In a signed statement the applicant:

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

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

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

21 **§16-46-7. Exceptions.**

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

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

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

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

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

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

13 **§16-46-8. Fees.**

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

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

19 (2) The secretary may assess a fee to applicants or covered providers for the maintenance of
20 the internet-based system required by this article. The assessment shall be deposited into a special
21 revenue account within the State Treasurer’s Office, to be known as the “DHHR Criminal

1 Background Administration Account.” The account shall be administered by the secretary and is not
2 a part of the general revenue of the state.

3 **§16-46-9. Rules; penalties; confidentiality; immunity.**

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

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

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

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

NOTE: The purpose of this bill 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.