

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 4581

BY DELEGATES PACK AND HILL

[Passed March 6, 2020; in effect ninety days from
passage.]

1 AN ACT to amend and reenact §16-49-1, §16-49-2, §16-49-3, §16-49-4, §16-49-5, §16-49-6, §16-
2 49-7, and §16-49-8 of the Code of West Virginia, 1931, as amended; all relating to
3 employment screening; including the screening of West Virginia Department of Health and
4 Human Resources employees in the background check process; and streamlining the
5 variance procedures.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 49. WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY AND
EMPLOYMENT SCREENING ACT.**

§16-49-1. Definitions.

1 As used in this article:

2 “Applicant” means an individual who is being considered for employment or engagement
3 with the department, a covered provider or covered contractor.

4 “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 “Bureau” means a division within the Department of Health and Human Resources.

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

10 “Covered provider” means the following facilities or providers:

11 (i) A skilled nursing facility;

12 (ii) A nursing facility;

13 (iii) A home health agency;

14 (iv) A provider of hospice care;

15 (v) A long-term care hospital;

16 (vi) A provider of personal care services;

- 17 (vii) A provider of adult day care;
- 18 (viii) A residential care provider that arranges for, or directly provides, long-term care
- 19 services, including an assisted living facility;
- 20 (ix) An intermediate care facility for individuals with intellectual disabilities; and
- 21 (x) Any other facility or provider required to participate in the West Virginia Clearance for
- 22 Access: Registry and Employment Screening program as determined by the secretary by
- 23 legislative rule.

24 “Department” means the Department of Health and Human Resources.

25 “Department employee” means any prospective or current part-time employee, full-time

26 employee, temporary employee, independent contractor, or volunteer of the department.

27 “Direct access” means physical contact with a resident, member, beneficiary or client, or

28 access to their property, personally identifiable information, protected health information or

29 financial information.

30 “Direct access personnel” means an individual who has direct access by virtue of

31 ownership, employment, engagement or agreement with the department, a covered provider, or

32 covered contractor. Direct access personnel does not include volunteers or students performing

33 irregular or supervised functions or contractors performing repairs, deliveries, installations or

34 similar services for the covered provider. The secretary shall determine by legislative rule whether

35 the position in question involves direct access.

36 “Disqualifying offense” means:

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

38 (B) A conviction of any other crime specified by the secretary in rule, which shall include

39 crimes against care-dependent or vulnerable individuals, crimes of violence, sexual offenses and

40 financial crimes.

41 “Negative finding” means a finding in the prescreening that excludes an applicant from

42 direct access personnel positions.

43 “Notice of ineligibility” means a notice pursuant to §16-49-3 of this code that the secretary’s
44 review of the applicant’s criminal history record information reveals a disqualifying offense.

45 “Prescreening” means a mandatory search of databases and registries specified by the
46 secretary in legislative rule for exclusions and licensure status prior to the submission of
47 fingerprints for a criminal history record information check.

48 “Rap back” means the notification to the department when an individual who has
49 undergone a fingerprint-based, state or federal criminal history record information check has a
50 subsequent state or federal criminal history event.

51 “Secretary” means the Secretary of the West Virginia Department of Health and Human
52 Resources, or his or her designee.

53 “State Police” means the West Virginia State Police Criminal Identification Bureau.

**§16-49-2. Background check program for the department, covered providers, and covered
contractors.**

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

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

8 (c) The program shall include:

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

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

13 (3) An integrated Rap Back Program with the State Police to allow retention of fingerprints
14 and updates of state and federal criminal information on all direct access personnel until such
15 time as the individual is no longer employed or engaged by the department, the covered provider,
16 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
19 Federal Bureau of Investigation.

§16-49-3. Prescreening and criminal background checks.

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

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

6 (c) If the applicant has a negative finding on any required prescreening registry or
7 database, that individual may not immediately be engaged by the department, covered provider,
8 or covered contractor.

9 (d) If the applicant does not have a negative finding in the prescreening process, the
10 applicant shall submit to fingerprinting for a state and federal criminal history record information
11 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 bureau, covered provider, or covered contractor that the individual may be engaged.

**§16-49-4. Notice of ineligibility; prohibited participation as direct access personnel or
department employee.**

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

5 (b) The department, covered provider, or covered contractor may not engage an applicant
6 with a disqualifying offense as direct access personnel. If the applicant has been provisionally
7 employed pursuant to §16-49-6 of this code, the employer shall terminate the provisional
8 employment upon receipt of the notice.

§16-49-5. Variance; appeals.

1 (a) If the secretary issues a notice of ineligibility, the applicant, or the employer on the
2 applicant's behalf, may file a written request for a variance with the secretary not later than 30
3 days after the date of the notice required by §16-49-3 or §16-49-4 of this code.

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

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

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

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

11 (d) The secretary shall mail to the applicant and the bureau, covered provider, or covered
12 contractor a written decision within 60 days of receipt of the request indicating whether a variance
13 has been granted or denied.

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

17 disposition level, the applicant must address this with the court or arresting agency that submitted
18 the record to the State Police.

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

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

§16-49-6. Provisional employment pending completion of background check.

1 (a) The department, covered provider, or covered contractor may permit an applicant to
2 work on a provisional basis for not more than 60 days pending notification from the secretary
3 regarding the results of the criminal background check if:

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

6 (2) In a signed statement the applicant:

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

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

10 (C) Acknowledges that the department, covered provider, or covered contractor may
11 terminate the individual if a disqualifying offense is reported in the background check.

12 (b) Provisional employees who have requested a variance shall not be required to sign
13 such a statement. The department, covered provider, or covered contractor may continue to
14 employ an applicant if an applicant applies for a variance of his or her fitness determination until
15 the variance is resolved.

§16-49-7. Clearance for subsequent employment.

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 or the individual received prior approval from the secretary to work for or
7 with the same type of covered provider or covered contractor; and

8 (3) The Rap Back Program has not identified any criminal activity that constitutes a
9 disqualifying offense.

10 (b) The secretary shall provide notice of prior clearance for direct access status upon
11 request by a subsequent bureau, covered provider, or covered contractor inquiries.

§16-49-8. Fees.

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

3 (1) The State Police may assess a fee to the department, applicants, covered providers,
4 or covered contractors for conducting the criminal background check and for collecting and
5 retaining fingerprints for Rap Back as authorized under this article.

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, House Committee

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Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

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Clerk of the House of Delegates

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Clerk of the Senate

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Speaker of the House of Delegates

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President of the Senate

The within this the.....
day of, 2020.

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Governor