

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

House Bill 4581

BY DELEGATES PACK AND HILL

[Originating in the Committee on Health and Human
Resources; Reported on February 11, 2020.]

1 A BILL 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 ~~(1)~~ “Applicant” means an individual who is being considered for employment or
3 engagement with the department, a covered provider or covered contractor.

4 ~~(2)~~ “Background check” means a prescreening of registries specified by the secretary by
5 rule 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 ~~(3)~~ “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 ~~(4)~~ “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 ~~(5)~~ "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 ~~(6)~~ "Direct access" means physical contact with a resident, member, beneficiary or client
28 of a covered provider, or access to their property, personally identifiable information, protected
29 health information or financial information.

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

36 ~~(8)~~ "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 ~~(9)~~ "Negative finding" means a finding in the prescreening that excludes an applicant from
42 direct access personnel positions.

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

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

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

52 ~~(43)~~ “Secretary” means the Secretary of the West Virginia Department of Health and
53 Human Resources, or his or her designee.

54 ~~(44)~~ “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 covered provider or covered
16 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 a the department, covered provider,
8 or covered contractor. ~~However, that individual or the employer may apply for a variance pursuant~~
9 ~~to section five of this article~~

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

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

15 (f) If the secretary's review of the criminal history record information reveals that the
16 applicant does not have a disqualifying offense, the secretary shall provide written notice to the
17 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 prescreening process reveals a negative finding, or if~~ the secretary issues a
2 notice of ineligibility, the applicant, or the employer on the applicant's behalf, may file a written
3 request for a variance with the secretary not later than 30 days after the date of the notice required
4 by §16-49-3 or §16-49-4 of this code.

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

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

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

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

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

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

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

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

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

1 (a) ~~A~~ The department, covered provider, or covered contractor may permit an applicant
2 to 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. ~~A- 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.

NOTE: The purpose of this bill is to include West Virginia Department of Health and Human Resources employees in the West Virginia Clearance for Access: Registry and Employment Screening process.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.