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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

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check; establishing procedures and criteria for obtaining and reviewing criminal history 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
- 22 covered provider. The secretary shall determine by legislative rule whether the position in question

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1 involves direct access.

2 (8) “Disqualifying offense” means:

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

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

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

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

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

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

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

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

21 **§16-46-2. Background check program for covered providers and covered contractors.**

22 (a) The secretary shall create and implement a background check program to facilitate the

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1 processing and analysis of the criminal history and background of applicants to covered providers
2 and covered contractors with direct access. This program shall be called the West Virginia Clearance
3 for Access: Registry and Employment Screening.

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

7 (c) The program shall include:

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

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

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

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

18 **§16-46-3. Prescreening and criminal background checks.**

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

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

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

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

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

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

13 **§16-46-4. Notice of ineligibility; prohibited participation as direct access personnel.**

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

18 (b) The covered provider or covered contractor may not engage an applicant with a
19 disqualifying offense as direct access personnel. If the applicant has been provisionally employed
20 pursuant to section seven of this article, the employer shall terminate the provisional employment
21 upon receipt of the notice.

22 **§16-46-5. Variance; appeals.**

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

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 covered provider or covered contractor
13 a written decision within ninety days of receipt of the request indicating whether a variance has been
14 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 State
17 Police for a personal review. However, if the discrepancies are at the charge or final disposition
18 level, the applicant must address this with the court or arresting agency that submitted the record to
19 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.

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

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

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

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

12 (2) In a signed statement the applicant:

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

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

16 (C) Acknowledges that the covered provider or covered contractor may terminate the
17 individual if a disqualifying offense is reported in the background check.

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

21 **§16-46-7. Clearance for subsequent employment.**

22 (a) An applicant is not required to submit to fingerprinting and a criminal background check

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1 if:

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

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

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

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

11 **§16-46-8. Fees.**

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

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

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

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1 state.

2 **§16-46-9. Rules; penalties; confidentiality; immunity.**

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

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

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

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