



1 and criteria for obtaining and reviewing criminal history  
2 record information; establishing criteria for approving  
3 applicants as covered individuals; authorizing contractors and  
4 fees; creating a special revenue account for administrative  
5 fees; providing for protests of the secretary's decisions and  
6 permitting variances; creating exceptions; authorizing  
7 legislative rules; providing monetary penalties; and providing  
8 for civil and criminal immunity.

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

10 That the Code of West Virginia, 1931, as amended, be amended  
11 by adding thereto a new article, designated §16-46-1, §16-46-2,  
12 §16-46-3, §16-46-4, §16-46-5, §16-46-6, §16-46-7, §16-46-8, §16-46-  
13 9 and §16-46-10, all to read as follows:

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

16 **§16-46-1. Short title.**

17 This article may be cited as the "West Virginia CARES Act."

18 **§16-46-2. Definitions.**

19 As used in this article:

20 "Applicant" means an individual who a covered provider is  
21 considering for employment or engagement.

22 "Background check" means a prescreening of registries  
23 specified by the secretary by rule, and a fingerprint-based search

1 of state and federal criminal history record information.

2 "Covered Contractor" means an individual or entity, including  
3 their employees and subcontractors, that contracts with a covered  
4 provider to perform services that include any direct access  
5 services.

6 "Covered provider" means any facility or provider required to  
7 participate in the West Virginia Clearance for Access: Registry and  
8 Employment Screening program as determined by the secretary by  
9 rule.

10 "Department" means the Department of Health and Human  
11 Resources.

12 "Direct access" means physical contact with a resident,  
13 member, beneficiary, or client of a covered provider, or access to  
14 their property, personally identifiable information, protected  
15 health information, or financial information.

16 "Direct access personnel" means an individual who has direct  
17 access by virtue of ownership, employment, engagement, or agreement  
18 with a covered provider. Direct access personnel does not include  
19 volunteers or students performing irregular or supervised  
20 functions, or contractors performing repairs, deliveries,  
21 installations or similar services for the covered provider. The  
22 secretary shall determine by rule whether the position in question  
23 involves direct access.

24 "Disqualifying offense" means:

1       (A) A conviction of any crime described in 42 U.S.C. §1320a-  
2 7(a); or

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

7       "Negative finding" means a finding in the prescreening that  
8 excludes an applicant from direct access personnel positions.

9       "Notice of ineligibility" means a notice pursuant to section  
10 four of this article that the secretary's review of the applicant's  
11 criminal history record information reveals a disqualifying  
12 offense.

13       "Prescreening" means a mandatory search of databases and  
14 registries specified by the secretary in rule, for exclusions and  
15 licensure status prior to the submission of fingerprints for a  
16 criminal history record information check.

17       "Rap back" means the notification to the department when an  
18 individual who has undergone a fingerprint-based, state or federal  
19 criminal history record information check has a subsequent state or  
20 federal criminal history event.

21       "Secretary" means the Secretary of the West Virginia  
22 Department of Health and Human Resources.

23       "State Police" means the West Virginia State Police Criminal  
24 Identification Bureau.

1 **§16-46-3. Background check program for covered providers.**

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

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

10 (c) The program shall include:

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

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

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

24 **§16-46-4. Prescreening and criminal background checks.**

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

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

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

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

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

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

21 **§16-46-5. Notice of ineligibility; prohibited participation as**  
22 **direct access personnel.**

23       (a) If the secretary's review of the applicant's criminal  
24 history record information reveals a disqualifying offense, the

1 secretary shall provide written notice to the covered provider  
2 advising that the applicant is ineligible for work. The secretary  
3 may not disseminate the criminal history record information.

4 (b) The covered provider may not engage an applicant with a  
5 disqualifying offense as direct access personnel. If the applicant  
6 has been conditionally employed pursuant to section six of this  
7 article, the provider shall terminate the conditional employment  
8 upon receipt of the notice.

9 **§16-46-6. Variance; appeals.**

10 (a) If the prescreening process reveals a negative finding, or  
11 if the secretary issues a notice of ineligibility, the applicant,  
12 or the provider on the applicant's behalf, may file a written  
13 request for a variance with the secretary not later than thirty  
14 days after the date of the notice required by section three or  
15 section four of this article.

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

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

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

21 (c) The secretary shall establish in rule factors that qualify  
22 as mitigating circumstances.

23 (d) The secretary shall mail to the applicant and the provider  
24 a written decision within ninety days of receipt of the request

1 indicating whether a variance has been granted or denied.

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

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

13 (g) If any changes, corrections, or updates are made in the  
14 criminal history record information, the State Police shall notify  
15 the secretary that the applicant has appealed the accuracy of the  
16 criminal history records and provide the secretary with the updated  
17 results of the criminal history record information check, which the  
18 secretary shall review de novo in accordance with the provisions of  
19 this article.

20 **§16-46-7. Conditional employment pending completion of background**  
21 **check.**

22 (a) A covered provider may permit an applicant to work on a  
23 conditional basis for not more than sixty days pending notification  
24 from the secretary regarding the results of the criminal background



1 check if:

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

5 (2) In a signed statement the applicant:

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

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

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

14 (b) A covered provider may continue to employ an applicant if  
15 an applicant applies for a variance of his or her fitness  
16 determination until the variance is resolved.

17 **§16-46-8. Exceptions.**

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

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

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

24 (3) The individual received prior approval from the secretary

1 to work for or with the same type of covered provider; and

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

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

6 **§16-46-9. Fees.**

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

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

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

22 **§16-46-10. Rules; penalties; confidentiality; immunity.**

23 (a) The secretary shall propose rules for legislative approval  
24 in accordance with article three, chapter twenty-nine-a of this

1 code, to implement the provisions of this article. The secretary  
2 may promulgate emergency rules, if justified, pursuant to section  
3 fifteen, article three, chapter twenty-nine-a of this chapter as  
4 may be required.

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

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