

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 88**

4 (By Senators Stollings and Plymale)

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6 [Originating in the Committee on Health and Human Resources;
7 reported January 30, 2015.]
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11 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
12 designated §16-46-1, §16-46-2, §16-46-3, §16-46-4, §16-46-5, §16-46-6, §16-46-7, §16-46-
13 8, §16-46-9 and §16-46-10, all relating to requiring background checks for individuals who
14 have direct access to residents, members or beneficiaries of covered providers or covered
15 contractors participating in the West Virginia Clearance for Access: Registry and
16 Employment Screening program; providing short title; defining terms; requiring the
17 Secretary of the Department of Health and Human Resources to develop plan and program
18 for conducting background checks; requiring centralized database to maintain criminal
19 history record information and results; establishing prescreening process conducted by
20 covered providers and covered contractors; requiring applicants to provide fingerprints and
21 undergo criminal background check; establishing procedures and criteria for obtaining and
22 reviewing criminal history record information; establishing criteria for approving applicants
23 for employment; 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 for 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-
7 8, §16-46-9 and §16-46-10, 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 being considered for employment or
13 engagement with a covered provider or covered contractor.

14 (2) “Background check” means a prescreening of registries specified by the secretary by
15 rule, 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 legislative rule.

22 (5) “Department” means the Department of Health and Human Resources.

23 (6) “Direct access” means physical contact with a resident, member, beneficiary, or client

1 of a covered provider, or access to their property, personally identifiable information, protected
2 health information, or financial information.

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

9 (8) “Disqualifying offense” means:

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

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

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

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

19 (11) “Prescreening” means a mandatory search of databases and registries specified by the
20 Secretary in legislative rule, for exclusions and licensure status prior to the submission of
21 fingerprints for a criminal history record information check.

22 (12) “Rap back” means the notification to the Department when an individual who has
23 undergone a fingerprint-based, state or federal criminal history record information check has a

1 subsequent state or federal criminal history event.

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

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

5 **§16-46-2. Background check program for covered providers and covered contractors.**

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

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

13 (c) The program shall include:

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

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

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

22 (c) The Department shall notify applicants subject to a criminal history record check
23 that their fingerprints shall be retained by the State Police Criminal Identification Bureau and the

1 Federal Bureau of Investigation.

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

3 (a) Except as otherwise permitted in this article, the covered provider or covered
4 contractor may not employ or 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
6 database, the employer shall notify the individual of such finding.

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

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

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

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

19 **§16-46-4. Notice of ineligibility; prohibited participation as direct access personnel.**

20 (a) If the Secretary's review of the applicant's criminal history record information
21 reveals a disqualifying offense, the Secretary shall provide written notice to the covered provider or
22 covered contractor advising that the applicant is ineligible for work. The Secretary may not
23 disseminate the criminal history record information.

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

5 **§16-46-5. Variance; appeals.**

6 (a) If the prescreening process reveals a negative finding, or if the Secretary issues a
7 notice of ineligibility, the applicant, or the employer on the applicant's behalf, may file a written
8 request for a variance with the Secretary not later than thirty days after the date of the notice required
9 by section three or section three of this article.

10 (b) The Secretary may grant a variance if:

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

13 (2) The Secretary finds that the individual will not pose a danger or threat to residents,
14 members, and their property.

15 (c) The Secretary shall establish in legislative rule factors that qualify as mitigating
16 circumstances.

17 (d) The Secretary shall mail to the applicant and the covered provider or covered
18 contractor a written decision within ninety days of receipt of the request indicating whether a
19 variance has been granted or denied.

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

1 the record to the State Police.

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

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

10 **§16-46-6. Provisional employment pending completion of background check.**

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

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

16 (2) In a signed statement the applicant:

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

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

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

22 (b) Provisional employees who have requested a variance shall not be required to sign
23 such a statement. A covered provider or covered contractor may continue to employ an applicant

1 if an applicant applies for a variance of his or her fitness determination until the variance is resolved.

2 **§16-46-7. Clearance for subsequent employment.**

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

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

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

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

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

14 **§16-46-8. Fees.**

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

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

20 (2) The Secretary may assess a fee to applicants, covered providers or covered
21 contractors for the maintenance of the Internet-based system required by this article. The assessment
22 shall be deposited into a special revenue account within the State Treasurer's Office, to be known
23 as the "DHHR Criminal Background Administration Account." Expenditures from the account shall

1 be made by the Secretary for purposes set forth in this article, and are authorized from collections.
2 The account shall be administered by the Secretary and may not be deemed a part of the general
3 revenue of the state.

4 **§16-46-9. Rules; penalties; confidentiality; immunity.**

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

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

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

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

NOTE: The purpose of this article is to require state and federal criminal background checks for all person being considered for work as an employee with direct access to residents, members or beneficiaries in certain covered facilities. The Secretary of the Department of Health and Human Resources shall develop a plan and a program for a centralized database and procedures for searching the criminal history of potential employees of covered providers and covered contractors. The covered providers and contractors shall conduct prescreening reviews of applicable registries or databases. Applicants who pass the prescreening shall provide fingerprints and undergo a criminal history record information check. The West Virginia State Police or designated contractors shall collect fingerprints and conduct the criminal history record information check. The state police may charge fees for collecting the fingerprints and conducting the criminal history record information checks. The secretary may collect a fee for the administration and maintenance of the database. The secretary shall review the results of the background checks and determine whether the individual may work as direct access personnel. The bill further provides for variances, exemptions, immunity and other administrative procedures.

This article is new; therefore strike-throughs and underscoring have been omitted.