

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 FOR

4 COMMITTEE SUBSTITUTE

5 FOR

6 **Senate Bill No. 88**

7 (Senators Stollings and Plymale, *original sponsors*)

8 _____
9 [Passed March 14, 2015; in effect ninety days from passage.]
10 _____

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12
13 AN ACT to amend and reenact §15-2-24 of the Code of West Virginia, 1931, as amended; and to
14 amend said code by adding thereto a new article, designated §16-46-1, §16-46-2, §16-46-3,
15 §16-46-4, §16-46-5, §16-46-6, §16-46-7, §16-46-8 and §16-46-9, all relating to requiring
16 background checks for individuals who have direct access to residents, members or
17 beneficiaries of covered providers participating in the West Virginia Clearance for Access:
18 Registry and Employment Screening program; defining terms; requiring the Secretary of the
19 Department of Health and Human Resources to develop a plan and a program for conducting
20 background checks; requiring centralized database to maintain criminal history record
21 information and results; establishing prescreening process conducted by covered providers;
22 requiring applicants to provide fingerprints and undergo criminal background check;
23 authorizing the State Police to assess a fee for conducting the criminal background check;

1 providing for deposit of State Police collected fees into a nonappropriated special revenue
2 fund; directing notification to be given to applicants regarding the retention of fingerprints;
3 establishing procedures and criteria for obtaining and reviewing criminal history record
4 information; establishing criteria for approving applicants as covered individuals; authorizing
5 contractors and fees; creating special revenue account for administrative fees; providing for
6 protests of the secretary's decisions and permitting variances; creating exceptions;
7 authorizing legislative rules; providing monetary penalties; and providing civil and criminal
8 immunity.

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

10 That §15-2-24 of the Code of West Virginia, 1931, as amended, be amended and reenacted;
11 and that said code be amended by adding thereto a new article, designated §16-46-1, §16-46-2, §16-
12 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:

13 **ARTICLE 2. WEST VIRGINIA STATE POLICE.**

14 **§15-2-24. Criminal Identification Bureau; establishment; supervision; purpose; fingerprints,**
15 **photographs, records and other information; reports by courts and prosecuting**
16 **attorneys; offenses and penalties.**

17 (a) The superintendent of the department shall establish, equip and maintain at the
18 departmental headquarters a Criminal Identification Bureau, for the purpose of receiving and filing
19 fingerprints, photographs, records and other information pertaining to the investigation of crime and
20 the apprehension of criminals, as hereinafter provided. The superintendent shall appoint or designate
21 a supervisor to be in charge of the Criminal Identification Bureau and such supervisor shall be
22 responsible to the superintendent for the affairs of the bureau. Members of the department assigned
23 to the Criminal Identification Bureau shall carry out their duties and assignments in accordance with

1 internal management rules and regulations pertaining thereto promulgated by the superintendent.

2 (b) The Criminal Identification Bureau shall cooperate with identification bureaus of other
3 states and of the United States to develop and carry on a complete interstate, national and
4 international system of criminal identification.

5 (c) The Criminal Identification Bureau may furnish fingerprints, photographs, records or
6 other information to authorized law-enforcement and governmental agencies of the United States
7 and its territories, of foreign countries duly authorized to receive the same, of other states within the
8 United States and of the State of West Virginia upon proper request stating that the fingerprints,
9 photographs, records or other information requested are necessary in the interest of and will be used
10 solely in the administration of official duties and the criminal laws.

11 (d) The Criminal Identification Bureau may furnish, with the approval of the superintendent,
12 fingerprints, photographs, records or other information to any private or public agency, person, firm,
13 association, corporation or other organization, other than a law-enforcement or governmental agency
14 as to which the provisions of subsection (c) of this section shall govern and control, but all requests
15 under the provisions of this subsection for such fingerprints, photographs, records or other
16 information must be accompanied by a written authorization signed and acknowledged by the person
17 whose fingerprints, photographs, records or other information is to be released.

18 (e) The Criminal Identification Bureau may furnish fingerprints, photographs, records and
19 other information of persons arrested or sought to be arrested in this state to the identification bureau
20 of the United States government and to other states for the purpose of aiding law enforcement.

21 (f) Persons in charge of any penal or correctional institution, including any city or county jail
22 in this state, shall take, or cause to be taken, the fingerprints and description of all persons lawfully
23 committed thereto or confined therein and furnish the same in duplicate to the Criminal

1 Identification Bureau, Department of Public Safety. Such fingerprints shall be taken on forms
2 approved by the superintendent of the Department of Public Safety. All such officials as herein
3 named may, when possible to do so, furnish photographs to the Criminal Identification Bureau of
4 such persons so fingerprinted.

5 (g) Members of the Department of Public Safety, and all other state law-enforcement
6 officials, sheriffs, deputy sheriffs and each and every peace officer in this state, shall take or cause
7 to be taken the fingerprints and description of all persons arrested or detained by them, charged with
8 any crime or offense in this state, in which the penalty provided therefor is confinement in any penal
9 or correctional institution, or of any person who they have reason to believe is a fugitive from justice
10 or a habitual criminal, and furnish the same in duplicate to the Criminal Identification Bureau of the
11 Department of Public Safety on forms approved by the superintendent of said department. All such
12 officials as herein named may, when possible to do so, furnish to the Criminal Identification Bureau,
13 photographs of such persons so fingerprinted. For the purpose of obtaining data for the preparation
14 and submission to the Governor and the Legislature by the Department of Public Safety of an annual
15 statistical report on crime conditions in the state, the clerk of any court of record, the magistrate of
16 any magistrate court and the mayor or clerk of any municipal court before which a person appears
17 on any criminal charge shall report to the Criminal Identification Bureau the sentence of the court
18 or other disposition of the charge and the prosecuting attorney of every county shall report to the
19 Criminal Identification Bureau such additional information as the bureau may require for such
20 purpose, and all such reports shall be on forms prepared and distributed by the Department of Public
21 Safety, shall be submitted monthly and shall cover the period of the preceding month.

22 (h) All persons arrested or detained pursuant to the requirements of this article shall give
23 fingerprints and information required by subsections (f) and (g) of this section. Any person who has

1 been fingerprinted or photographed in accordance with the provisions of this section who is acquitted
2 of the charges upon which he or she was arrested and who has no previous criminal record may,
3 upon the presentation of satisfactory proof to the department, have such fingerprints or photographs,
4 or both, returned to them.

5 (i) All state, county and municipal law-enforcement agencies shall submit to the bureau
6 uniform crime reports setting forth their activities in connection with law enforcement. It shall be
7 the duty of the bureau to adopt and promulgate rules and regulations prescribing the form, general
8 content, time and manner of submission of such uniform crime reports. Willful or repeated failure
9 by any state, county or municipal law- enforcement official to submit the uniform crime reports
10 required by this article shall constitute neglect of duty in public office. The bureau shall correlate
11 the reports submitted to it and shall compile and submit to the Governor and the Legislature
12 semiannual reports based on such reports. A copy of such reports shall be furnished to all
13 prosecuting attorneys and law- enforcement agencies.

14 (j) Neglect or refusal of any person mentioned in this section to make the report required
15 herein, or to do or perform any act on his or her part to be done or performed in connection with the
16 operation of this section, shall constitute a misdemeanor and, such person shall, upon conviction
17 thereof, be punished by a fine of not less than \$25 nor more than \$200, or by imprisonment in the
18 county jail for a period of not more than sixty days, or both. Such neglect shall constitute
19 misfeasance in office and subject such persons to removal from office. Any person who willfully
20 removes, destroys or mutilates any of the fingerprints, photographs, records or other information of
21 the Department of Public Safety shall be guilty of a misdemeanor and such person shall, upon
22 conviction thereof, be punished by a fine of not more than \$100, or by imprisonment in the county
23 jail for a period of not more than six months, or both.

1 (k) The Criminal Identification Bureau (CIB) and the Federal Bureau of Investigation (FBI)
2 shall retain applicant fingerprints for the purpose of participating in the Rap Back Program to
3 determine suitability or fitness for a permit, license or employment. Agencies participating in the
4 program shall notify applicants and employees subject to a criminal history check that their
5 fingerprint shall be retained by the CIB and the FBI. Notification shall also be given to the applicant
6 and employee subject to the Rap Back Program.

7 (l) The State Police may assess a fee to applicants, covered providers or covered contractors
8 for conducting the criminal background check and for collecting and retaining fingerprints for Rap
9 Back as authorized under article forty-six, chapter sixteen of this code. The assessment shall be
10 deposited into a nonappropriated special revenue account within the State Treasurer’s office to be
11 known as the WVSP Criminal History Account. Expenditures from this account shall be made by
12 the superintendent for purposes set forth in this article and are authorized from collections. The
13 account shall be administered by the superintendent and may not be deemed a part of the general
14 revenue of the state.

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

17 **§16-46-1. Definitions.**

18 As used in this article:

19 (1) “Applicant” means an individual who is being considered for employment or engagement
20 with a covered provider or covered contractor.

21 (2) “Background check” means a prescreening of registries specified by the secretary by rule
22 and a fingerprint-based search of state and federal criminal history record information.

23 (3) “Covered contractor” means an individual or entity, including their employees and

1 subcontractors, that contracts with a covered provider to perform services that include any direct
2 access services.

3 (4) “Covered provider” means the following facilities or providers:

4 (i) A skilled nursing facility;

5 (ii) A nursing facility;

6 (iii) A home health agency;

7 (iv) A provider of hospice care;

8 (v) A long-term care hospital;

9 (vi) A provider of personal care services;

10 (vii) A provider of adult day care;

11 (viii) A residential care provider that arranges for, or directly provides, long-term care
12 services, including an assisted living facility;

13 (ix) An intermediate care facility for individuals with intellectual disabilities; and

14 (x) Any other facility or provider required to participate in the West Virginia Clearance for
15 Access: Registry and Employment Screening program as determined by the secretary by legislative
16 rule.

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

18 (6) “Direct access” means physical contact with a resident, member, beneficiary or client of
19 a covered provider, or access to their property, personally identifiable information, protected health
20 information or financial information.

21 (7) “Direct access personnel” means an individual who has direct access by virtue of
22 ownership, employment, engagement or agreement with a covered provider or covered contractor.
23 Direct access personnel does not include volunteers or students performing irregular or supervised

1 functions or contractors performing repairs, deliveries, installations or similar services for the
2 covered provider. The secretary shall determine by legislative rule whether the position in question
3 involves direct access.

4 (8) “Disqualifying offense” means:

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

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

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

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

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

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

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

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

23 **§16-46-2. Background check program for 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 covered providers
3 and covered contractors with direct access. This program shall be called the West Virginia Clearance
4 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 covered
7 providers and covered contractors.

8 (c) The program shall include:

9 (1) A centralized Internet-based system of registries to allow covered providers and covered
10 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 time
15 as the individual is no longer employed or engaged by the covered provider or covered contractor.

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

19 **§16-46-3. Prescreening and criminal background checks.**

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

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

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 five 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 six of this article, the employer shall terminate the provisional employment upon
21 receipt of the notice.

22 **§16-46-5. Variance; appeals.**

23 (a) If the prescreening process reveals a negative finding, or if the secretary issues a notice

1 of ineligibility, the applicant, or the employer on the applicant's behalf, may file a written request
2 for a variance with the secretary not later than thirty days after the date of the notice required by
3 sections three or four of this article.

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

1 of the criminal history records and provide the secretary with the updated results of the criminal
2 history record information check, which the secretary shall review de novo in accordance with the
3 provisions of this article.

4 **§16-46-6. Provisional employment pending completion of background check.**

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

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

10 (2) In a signed statement the applicant:

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

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

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

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

19 **§16-46-7. Clearance for subsequent employment.**

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

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

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

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

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

8 **§16-46-8. Fees.**

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

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

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

21 **§16-46-9. Rules; penalties; confidentiality; immunity.**

22 (a) The secretary shall propose rules for legislative approval in accordance with article three,
23 chapter twenty-nine-a of this code to implement the provisions of this article. The secretary may

1 promulgate emergency rules, if justified, pursuant to section fifteen, article three, chapter twenty-
2 nine-a of this code as may be required.

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

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

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