

WEST VIRGINIA LEGISLATURE
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REGULAR SESSION, 2015



ENROLLED

COMMITTEE SUBSTITUTE
FOR

COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 88

(SENATORS STOLLINGS AND PLYMALE, *ORIGINAL SPONSORS*)

[PASSED MARCH 14, 2015; IN EFFECT NINETY DAYS FROM PASSAGE.]

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AN ACT to amend and reenact §15-2-24 of the Code of West Virginia, 1931, as amended; and to amend said code 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 participating in the West Virginia Clearance for Access: Registry and Employment Screening program; defining terms; requiring the Secretary of the Department of Health and Human Resources to develop a plan and a program for conducting background checks; requiring centralized database to maintain criminal history record information and results; establishing prescreening process conducted by covered providers; requiring applicants

to provide fingerprints and undergo criminal background check; authorizing the State Police to assess a fee for conducting the criminal background check; providing for deposit of State Police collected fees into a nonappropriated special revenue fund; directing notification to be given to applicants regarding the retention of fingerprints; establishing procedures and criteria for obtaining and reviewing criminal history record information; establishing criteria for approving applicants as covered individuals; 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 civil and criminal immunity.

Be it enacted by the Legislature of West Virginia:

That §15-2-24 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code 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 2. WEST VIRGINIA STATE POLICE.

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

- 1 (a) The superintendent of the department shall establish,
- 2 equip and maintain at the departmental headquarters a
- 3 Criminal Identification Bureau, for the purpose of receiving
- 4 and filing fingerprints, photographs, records and other
- 5 information pertaining to the investigation of crime and the
- 6 apprehension of criminals, as hereinafter provided. The

7 superintendent shall appoint or designate a supervisor to be
8 in charge of the Criminal Identification Bureau and such
9 supervisor shall be responsible to the superintendent for the
10 affairs of the bureau. Members of the department assigned to
11 the Criminal Identification Bureau shall carry out their duties
12 and assignments in accordance with internal management
13 rules and regulations pertaining thereto promulgated by the
14 superintendent.

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

19 (c) The Criminal Identification Bureau may furnish
20 fingerprints, photographs, records or other information to
21 authorized law-enforcement and governmental agencies of
22 the United States and its territories, of foreign countries duly
23 authorized to receive the same, of other states within the
24 United States and of the State of West Virginia upon proper
25 request stating that the fingerprints, photographs, records or
26 other information requested are necessary in the interest of
27 and will be used solely in the administration of official duties
28 and the criminal laws.

29 (d) The Criminal Identification Bureau may furnish, with
30 the approval of the superintendent, fingerprints, photographs,
31 records or other information to any private or public agency,
32 person, firm, association, corporation or other organization,
33 other than a law-enforcement or governmental agency as to
34 which the provisions of subsection (c) of this section shall
35 govern and control, but all requests under the provisions of this
36 subsection for such fingerprints, photographs, records or other
37 information must be accompanied by a written authorization
38 signed and acknowledged by the person whose fingerprints,
39 photographs, records or other information is to be released.

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

45 (f) Persons in charge of any penal or correctional
46 institution, including any city or county jail in this state, shall
47 take, or cause to be taken, the fingerprints and description of
48 all persons lawfully committed thereto or confined therein
49 and furnish the same in duplicate to the Criminal
50 Identification Bureau, Department of Public Safety. Such
51 fingerprints shall be taken on forms approved by the
52 Superintendent of the Department of Public Safety. All such
53 officials as herein named may, when possible to do so,
54 furnish photographs to the Criminal Identification Bureau of
55 such persons so fingerprinted.

56 (g) Members of the Department of Public Safety, and all
57 other state law-enforcement officials, sheriffs, deputy sheriffs
58 and each and every peace officer in this state, shall take or
59 cause to be taken the fingerprints and description of all
60 persons arrested or detained by them, charged with any crime
61 or offense in this state, in which the penalty provided therefor
62 is confinement in any penal or correctional institution, or of
63 any person who they have reason to believe is a fugitive from
64 justice or a habitual criminal, and furnish the same in
65 duplicate to the Criminal Identification Bureau of the
66 Department of Public Safety on forms approved by the
67 superintendent of said department. All such officials as
68 herein named may, when possible to do so, furnish to the
69 Criminal Identification Bureau, photographs of such persons
70 so fingerprinted. For the purpose of obtaining data for the
71 preparation and submission to the Governor and the
72 Legislature by the Department of Public Safety of an annual
73 statistical report on crime conditions in the state, the clerk of

74 any court of record, the magistrate of any magistrate court
75 and the mayor or clerk of any municipal court before which
76 a person appears on any criminal charge shall report to the
77 Criminal Identification Bureau the sentence of the court or
78 other disposition of the charge and the prosecuting attorney
79 of every county shall report to the Criminal Identification
80 Bureau such additional information as the bureau may require
81 for such purpose, and all such reports shall be on forms
82 prepared and distributed by the Department of Public Safety,
83 shall be submitted monthly and shall cover the period of the
84 preceding month.

85 (h) All persons arrested or detained pursuant to the
86 requirements of this article shall give fingerprints and
87 information required by subsections (f) and (g) of this
88 section. Any person who has been fingerprinted or
89 photographed in accordance with the provisions of this
90 section who is acquitted of the charges upon which he or she
91 was arrested and who has no previous criminal record may,
92 upon the presentation of satisfactory proof to the department,
93 have such fingerprints or photographs, or both, returned to
94 them.

95 (i) All state, county and municipal law-enforcement
96 agencies shall submit to the bureau uniform crime reports
97 setting forth their activities in connection with law
98 enforcement. It shall be the duty of the bureau to adopt and
99 promulgate rules and regulations prescribing the form,
100 general content, time and manner of submission of such
101 uniform crime reports. Willful or repeated failure by any
102 state, county or municipal law-enforcement official to submit
103 the uniform crime reports required by this article shall
104 constitute neglect of duty in public office. The bureau shall
105 correlate the reports submitted to it and shall compile and
106 submit to the Governor and the Legislature semiannual
107 reports based on such reports. A copy of such reports shall

108 be furnished to all prosecuting attorneys and law-
109 enforcement agencies.

110 (j) Neglect or refusal of any person mentioned in this
111 section to make the report required herein, or to do or
112 perform any act on his or her part to be done or performed in
113 connection with the operation of this section, shall constitute
114 a misdemeanor and, such person shall, upon conviction
115 thereof, be punished by a fine of not less than \$25 nor more
116 than \$200, or by imprisonment in the county jail for a period
117 of not more than sixty days, or both. Such neglect shall
118 constitute misfeasance in office and subject such persons to
119 removal from office. Any person who willfully removes,
120 destroys or mutilates any of the fingerprints, photographs,
121 records or other information of the Department of Public
122 Safety shall be guilty of a misdemeanor and such person
123 shall, upon conviction thereof, be punished by a fine of not
124 more than \$100, or by imprisonment in the county jail for a
125 period of not more than six months, or both.

126 (k) The Criminal Identification Bureau (CIB) and the
127 Federal Bureau of Investigation (FBI) shall retain applicant
128 fingerprints for the purpose of participating in the Rap Back
129 Program to determine suitability or fitness for a permit,
130 license or employment. Agencies participating in the program
131 shall notify applicants and employees subject to a criminal
132 history check that their fingerprint shall be retained by the
133 CIB and the FBI. Notification shall also be given to the
134 applicant and employee subject to the Rap Back Program.

135 (l) The State Police may assess a fee to applicants,
136 covered providers or covered contractors for conducting the
137 criminal background check and for collecting and retaining
138 fingerprints for Rap Back as authorized under article forty-
139 six, chapter sixteen of this code. The assessment shall be
140 deposited into a nonappropriated special revenue account

141 within the State Treasurer's office to be known as the WVSP
142 Criminal History Account. Expenditures from this account
143 shall be made by the superintendent for purposes set forth in
144 this article and are authorized from collections. The account
145 shall be administered by the superintendent and may not be
146 deemed a part of the general revenue of the state.

**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
3 considered for employment or engagement with a covered
4 provider or covered contractor.

5 (2) "Background check" means a prescreening of
6 registries specified by the secretary by rule and a fingerprint-
7 based search of state and federal criminal history record
8 information.

9 (3) "Covered contractor" means an individual or entity,
10 including their employees and subcontractors, that contracts
11 with a covered provider to perform services that include any
12 direct access services.

13 (4) "Covered provider" means the following facilities or
14 providers:

15 (i) A skilled nursing facility;

16 (ii) A nursing facility;

17 (iii) A home health agency;

18 (iv) A provider of hospice care;

19 (v) A long-term care hospital;

20 (vi) A provider of personal care services;

21 (vii) A provider of adult day care;

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

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

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

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

33 (6) “Direct access” means physical contact with a
34 resident, member, beneficiary or client of a covered provider,
35 or access to their property, personally identifiable
36 information, protected health information or financial
37 information.

38 (7) “Direct access personnel” means an individual who
39 has direct access by virtue of ownership, employment,
40 engagement or agreement with a covered provider or covered

41 contractor. Direct access personnel does not include
42 volunteers or students performing irregular or supervised
43 functions or contractors performing repairs, deliveries,
44 installations or similar services for the covered provider. The
45 secretary shall determine by legislative rule whether the
46 position in question involves direct access.

47 (8) “Disqualifying offense” means:

48 (A) A conviction of any crime described in 42 U. S. C.
49 §1320a-7(a); or

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

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

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

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

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

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

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

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

1 (a) The secretary shall create and implement a
2 background check program to facilitate the processing and
3 analysis of the criminal history and background of applicants
4 to covered providers and covered contractors with direct
5 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
8 Virginia’s vulnerable populations by requiring registry and
9 criminal background checks for all direct access personnel of
10 covered providers and covered contractors.

11 (c) The program shall include:

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

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

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

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

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

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

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

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

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

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

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

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

1 (a) If the secretary's review of the applicant's criminal
2 history record information reveals a disqualifying offense, the
3 secretary shall provide written notice to the covered provider
4 or covered contractor advising that the applicant is ineligible
5 for work. The secretary may not disseminate the criminal
6 history record information.

7 (b) The covered provider or covered contractor may not
8 engage an applicant with a disqualifying offense as direct
9 access personnel. If the applicant has been provisionally
10 employed pursuant to section six of this article, the employer
11 shall terminate the provisional employment upon receipt of
12 the notice.

§16-46-5. Variance; appeals.

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

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

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

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

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

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

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

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

31 (g) If any changes, corrections, or updates are made in the
32 criminal history record information, the State Police shall
33 notify the secretary that the applicant has appealed the
34 accuracy of the criminal history records and provide the
35 secretary with the updated results of the criminal history
36 record information check, which the secretary shall review de
37 novo in accordance with the provisions of this article.

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

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

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

8 (2) In a signed statement the applicant:

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

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

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

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

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

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

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

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

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

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

§16-46-8. Fees.

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

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

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

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

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

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

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman Senate Committee

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Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the

Day of, 2015.

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Governor