WEST VIRGINIA CODE CHAPTER 16b ARTICLE 15

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§16B-15-1. Definitions.

As used in this article:

"Applicant" means an individual who is being considered for employment or engagement with the department, a covered provider or covered contractor.

"Background check" means a prescreening of registries specified by the Inspector General by rule and a fingerprint-based search of state and federal criminal history record information.

"Bureau" means a division within the Department of Health, Department of Human Services and Department of Health Facilities.

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

"Covered provider" means the following facilities or providers:

(i) A skilled nursing facility;

(ii) A nursing facility;

(iii) A home health agency;

(iv) A provider of hospice care;

(v) A long-term care hospital;

(vi) A provider of personal care services;

(vii) A provider of adult day care;

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

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

(x) Any other facility or provider required to participate in the West Virginia Clearance for Access: Registry and Employment Screening program as determined by the Inspector General by legislative rule; and

(xi) Excludes medical foster home approved and annually reviewed by the United States Department of Veterans Affairs pursuant to 38 CFR §17.73.

"Department" means the Department of Health, Department of Human Services and

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Department of Health Facilities.

"Department employee" means any prospective or current part-time employee, full-time employee, temporary employee, independent contractor, or volunteer of the department.

"Direct access" means physical contact with a resident, member, beneficiary, or client, or access to their property, personally identifiable information, protected health information, or financial information.

"Direct access personnel" means an individual who has direct access by virtue of ownership, employment, engagement or agreement with the department, a covered provider, or covered contractor. Direct access personnel does not include volunteers or students performing irregular or supervised functions or contractors performing repairs, deliveries, installations or similar services for the covered provider. The director shall determine by legislative rule whether the position in question involves direct access.

"Director" means the Director of the West Virginia Clearance for Access: Registry and Employment Screening program.

"Disqualifying offense" means:

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

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

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

"Notice of ineligibility" means a notice pursuant to §16-49-3 of this code that the Inspector General's review of the applicant’s criminal history record information reveals a disqualifying offense.

"Prescreening" means a mandatory search of databases and registries specified by the Inspector General in legislative rule for exclusions and licensure status prior to the submission of fingerprints for a criminal history record information check.

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

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

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§16B-15-2. Background check program for the department, covered providers, and covered contractors.

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

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

(c) The program shall include:

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

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

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

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

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§16B-15-3. Prescreening and criminal background checks.

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

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

(c) If the applicant has a negative finding on any required prescreening registry or database, that individual may not immediately be engaged by the department, covered provider, or covered contractor.

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

(e) The State Police shall notify the Inspector General of the results of the criminal history record information check.

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

(g) An applicant shall submit to a subsequent required prescreening and background check 90 days prior but no later than 60 days to the expiration date of the clearance. The director shall review and provide approval prior to any lapse in clearance or approval.

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§16B-15-4. Notice of ineligibility; prohibited participation as direct access personnel or department employee.

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

(b) The director, covered provider, or covered contractor may not engage an applicant with a disqualifying offense as direct access personnel. If the applicant has been provisionally employed pursuant to §16B-15-6 of this code, the employer shall terminate the provisional employment upon receipt of the notice.

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§16B-15-5. Variance; appeals.

(a) If the director issues a notice of ineligibility, the applicant, or the employer on the applicant's behalf, may file a written request for a variance with the director not later than 30 days after the date of the notice required by §16B-15-3 or §16B-15-4 of this code.

(b) The director may grant a variance if:

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

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

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

(d) The director shall send notice to the applicant and the department's bureau, covered provider, or covered contractor of the written decision indicating whether a variance has been granted or denied within 30 days of receipt of the written request, if the written request is submitted after receipt of an ineligibility determination, or within 60 days of receipt of the written request if the written request is submitted at the same time as the application.

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

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

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

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§16B-15-6. Provisional employment pending completion of background check.

(a) The department, covered provider, or covered contractor may permit an applicant to work on a provisional basis for not more than 60 days pending notification from the director regarding the results of the criminal background check if:

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

(2) In a signed statement the applicant:

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

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

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

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

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§16B-15-7. Clearance for subsequent employment.

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

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

(2) The prior criminal background check confirmed that the individual did not have a disqualifying offense or the individual received prior clearance by an approved variance from the director to work for or with the same type of covered provider or covered contractor; and

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

(b) The director shall provide notice of prior clearance or approved variance for direct access status upon request by a subsequent bureau, covered provider, or covered contractor inquiries within 10 days of the request.

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§16B-15-8. Fees.

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

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

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

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§16B-15-9. Rules; penalties; confidentiality; immunity.

(a) The Inspector General shall propose rules for legislative approval in accordance with §29A-3-1 *et seq*. of this code to implement the provisions of this article. The Inspector General may promulgate emergency rules, if justified, pursuant to §29A-3-15 of this code as may be required.

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

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

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

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