

FILED

2015 APR -2 P 12:38

**WEST VIRGINIA LEGISLATURE**  
**EIGHTY-SECOND LEGISLATURE**

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**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.]

SB 88

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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.

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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

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.

*Mad. S. Mansour*  
.....  
Chairman Senate Committee

*John B. Hill*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*Clark A. Barnes*  
.....  
Clerk of the Senate

*Steph D. Harris*  
.....  
Clerk of the House of Delegates

*Phillip P. Halpern*  
.....  
President of the Senate

*Philip D. Miller*  
.....  
Speaker of the House of Delegates

The within *is approved*..... this the *2nd*  
Day of *April*....., 2015.

*Earl Ray Tomblin*  
.....  
Governor

PRESENTED TO THE GOVERNOR

MAR 27 2015

THRU 3:15 pm