

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #8

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NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: Department of Health and Human Resources TITLE NUMBER: 69

DATE EMERGENCY RULE WAS ORIGINALLY FILED: June 26, 2015

FIRST EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X NO

SECOND EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO X

DATE OF FIRST EMERGENCY AMENDMENT:

SERIES NUMBER OF RULE: 10

TITLE OF RULE: West Virginia Clearance for Access: Registry and Employment Screening

THE ATTACHED IS AN EMERGENCY AMENDMENT TO AN EXISTING EMERGENCY RULE. THIS EMERGENCY AMENDMENT BECOMES EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY AMENDMENT ARE AS FOLLOWS:

Use additional sheets if necessary


Authorized Signature

Form #7

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2015 JUN 26 A 11:02

OFFICE WEST VIRGINIA
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Effective Date

Review Committee

EMERGENCY RULE, 69 CSR 10
Department of Health and Human Resources
Office of Inspector General
WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY AND EMPLOYMENT SCREENING
(WV CARES)

STATEMENT OF FACTS AND CIRCUMSTANCES
CONSTITUTING EMERGENCY

The West Virginia Clearance for Access: Registry and Employment Screening Act was passed by the Legislature in 2015 as W.Va. Code §§ 16-49-1, *et seq.* The Act requires the Secretary for the Department of Health and Human Resources to propose rules for legislative approval to implement the provisions of the Act, and permits the promulgation of emergency rules. See W.Va. Code § 16-49-9(a).

This rule establishes criminal background check requirements for applicants for employment as direct access personnel in long-term care facilities. This rule includes definitions and sets forth disqualifying offenses and disqualification time periods; establishes requirements for prescreening applicants on online registries; requires state and federal finger-print based criminal history record information searches; provides for conditional employment, variances and appeals.

The WV CARES rule must be effective before completing the full Legislative cycle, and promulgation is necessary for the immediate preservation of the public health, safety, and welfare, and to prevent substantial harm to the public interest.

Date Requested: January 16, 2015 Time Requested: 10:24 AM	Agency:	Health and Human Resources, Department of		
	CBD Number:	Version:	Bill Number:	Resolution Number:
	1483	Introduced	SB88	
	CBD Subject:	Health		

FUND(S)
8722

Sources of Revenue

Special Fund

Legislation creates:

A New Fund

Fiscal Note Summary

Effect this measure will have on costs and revenues of state government.

The purpose of this legislation is to require 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 (WVCARES) program. The bill requires the Secretary of the Department of Health and Human Resources (DHHR) to develop a plan and a program for conducting background checks. The bill requires a centralized database to maintain criminal history record information and results; it establishes a prescreening process conducted by covered providers and requires applicants to provide fingerprints and undergo a criminal background check. The bill establishes procedures and criteria for obtaining and reviewing criminal history record information. In 2011 DHHR received a grant from the Centers for Medicaid and Medicare Services (CMS) to implement a criminal background check system with a rap-back process. The initial grant covered three years, with an expiration date of 9/30/14. In August 2014, a fourth year no-cost extension was granted by CMS to expire 9/30/15, which will make all SFY2015 and the first quarter of SFY2016 costs fully federally funded. Due to some delays in getting the program initiated, the program intends to request a fifth year no-cost extension from CMS to extend the grant until 9/30/16, which will cover all SFY2016 and the first quarter of SFY2017 costs. To date, the states that have requested the fifth year no-cost extension have been approved. The grant does require a 25% match; however CMS has allowed for background check fees that are paid by providers to be used as the in-kind match, resulting in no state revenue being needed to match the federal funds during the entire grant period. For full implementation of the program after the federal grant has expired, the program will rely upon a funding mechanism generated from the administrative fees assessed for the use of the WV CARES system. Estimated cost of this program for FY15 is \$125,000, FY16 is \$380,205 and on-going is \$441,668. Federal Revenue and State Revenue, which is generated by fees, covers expected expenses. Revenue estimate for FY16 is \$270,000 and \$480,000 for FY17. Please see explanation below.

Fiscal Note Detail

Over-all effect

Effect of Proposal	Fiscal Year		
	2015	2016	Fiscal Year (Upon Full Implementation)
	Increase/Decrease (use "-")	Increase/Decrease (use "-")	
1. Estimated Total Cost	125,000	380,205	441,668
Personal Services	60,776	151,724	242,672
Current Expenses	64,224	228,481	198,996
Repairs and Alterations	0	0	0

Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	270,000	480,000

3. Explanation of above estimates (including long-range effect):

Programs costs of approximately \$125,000 are anticipated for FY2015; which includes salary and benefits for the Program Manager, travel, supplies, office space, and a desktop computer to comply with FBI requirements to access background results. Estimated costs for FY2015 are covered by a federal grant from Centers for Medicaid and Medicare Services (CMS). It is anticipated that the associated startup costs will occur during state fiscal years 2015 and 2016.

In FY2016, at least 25% of the anticipated costs will be covered by the federal grant, which will not expire until September 30, 2015. If the fifth year extension is approved, no state dollars will pay for the program during FY2016; however, revenues will be collected to continue the program upon full implementation. If the extension is not approved, the remaining nine months of expenses for FY2016 will equal 75% of estimated costs or \$249,353 (this excludes costs of \$47,735 to state hospitals, see explanation below). These costs are as follows: Program Manager (salary \$45,696 plus benefits for a total of \$60,776), and 2 Fitness Determination staff (salary of \$34,105 each plus benefits for a total of \$90,948). Current expenses of \$180,746 include \$54,500 for Office of Technology project management services, \$18,946 for travel to national conferences and training through the state, \$96,000 for annual rent costs, \$5,300 for copier lease, \$2,400 for cell phone/iPad usage and \$3,600 for office supplies. The proposed fee is \$20 per applicant; at this stage of implementation, it is anticipated that only long term care providers will participate with approximately 13,500 applications, based upon historical figures. FY2016 revenue is estimated at \$270,000. For fiscal years beginning in SFY2017, the full estimated cost of \$441,668 per year would be covered by the fees assessed to providers for utilizing the system as required by federal law. These costs are as follows: One FTE program manager (salary \$45,696 plus benefits for a total of \$60,776), and 4 Fitness Determination staff (salary of \$34,105 each plus benefits for a total of \$181,896). Current expenses of \$180,746 include: Office of Technology project management services of \$54,500, travel to national conferences and training through the state at \$18,946; printing, supplies, office rent, and other miscellaneous costs of \$107,300. Costs \$18,250 related to state facilities for the WVCARES system will be absorbed by the Departments current budget (see explanation below). Revenue estimates are based on a current average of 6,000 background checks per quarter according to State Police data, approximately 24,000 background checks annually, assuming all quarters are equal and the statute as passed permits the Secretary to add provider types to the program to create a single point of contact for background checks. FY2017 revenue is estimated at \$480,000 (\$20 x 24,000 applicants).

This legislation will result in additional costs for the state hospitals, which the Department will absorb with its current budget. FY2016 costs are based on all current facility employees obtaining the required FBI background check at \$16.50 per employee; this includes 937 Long Term Care employees and 850 Psychiatric Facility employees. FBI background check costs for existing employees is \$29,485.50. All new hires will require an FBI background check (\$16.50), as well as the projected WVCARES Fee (\$20.00); this is an additional \$36.50 per new employee. There are approximately 500 new hires annually. This legislation will result in an additional \$18,250 for new hires per year (FY2016 and on-going). Total cost for FY2016 is \$47,735 and \$18,250 on-going.

Memorandum

SFY2015 and the first quarter of SFY2016 are entirely supported by a federal grant from CMS. DHHR will apply for the fifth year no cost extension in June 2015 and should receive a response prior to the fourth year extension expiration. If the fifth year extension is approved, all expenses stemming from operations in SFY2016 as well as the first quarter of SFY 2017 will be fully covered by the federal grant. Beginning in the second quarter of state fiscal year 2017, the program will be supported by a \$20 per application administrative fee assessed on the providers requesting this service that has been mandated by federal law. It is anticipated that the fully implemented program will be self sustaining upon expiration of fifth year of the federal grant.

In §16-46-8 of this proposed legislation, it states that the State Police may assess a fee to applicants or covered providers for conducting the criminal background check and for collecting and retaining fingerprints for rap back as authorized under this article; since this process has not been complete, additional fees may be assessed that are not included in the above cost. Person submitting Fiscal Note:

Karen L. Bowling

Email Address:

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EMERGENCY RULE QUESTIONNAIRE

DATE: June 19, 2015

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) M. Katherine Lawson, Inspector General
Department of Health & Human Resources, State Capitol Complex, Bldg 6, Rm 817-B
Charleston, WV 25305 (304) 558-2278

EMERGENCY RULE TITLE: WV Clearance for Access: Registry & Employment Screening

1. Date of filing _____
2. Statutory authority for promulgating emergency rule:
W Va. Code 16-49-9(a)

3. Date of filing of proposed legislative rule: _____
4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? This rule establishes new criminal background check requirements for applicants for employment as direct access personnel in long-term care facilities.

5. Has the same or similar emergency rule previously been filed and expired?
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
By implementing WV CARES immediately, DHHR is taking a decisive step to stop those who might abuse, neglect, or financially exploit our most vulnerable citizens. The national scope of the program limits the ability of bad actors to hide their criminal or abusive actions by crossing state lines. The web-based system will provide an efficient and effective means for an employer to check an applicant's registry status prior to paying the cost of a full criminal history record check. Through fingerprinting, this program ensures applicants are not misidentified and barred from gainful employment.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

n/a

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

~~By 2016, the national demand for direct access workers in long term care facilities is~~
expected to increase at a rate that is three times greater than the projected growth rate in
~~overall employment levels. DHHR has a public interest in keeping criminals from~~
working in direct access jobs in long-term care facilities, while enabling those
applicants who are eligible to be employed as quickly as possible.

69CSR10

**TITLE 69
LEGISLATIVE RULES
WEST VIRGINIA DIVISION OF HEALTH**

FILED

2015 JUL 17 P 3:17

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**SERIES 10
WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY & EMPLOYMENT SCREENING**

§69-10-1. General Provisions.

1.1. Scope. It is the purpose of this rule to protect West Virginia's vulnerable population by requiring registry prescreening and state and federal criminal background checks for all direct access personnel of covered providers and covered contractors. The short title of this rule shall be known as WV CARES.

1.2. Authority. W. Va. Code §16-49-9.

1.3. Filing Date. *Tu*

1.4. Effective Date.

1.5. Application. This rule applies to covered providers and covered contractors as defined in this rule and W. Va. Code §16-49-1 et seq.

1.6. Enforcement. This rule is enforced by the secretary of the Department of Health and Human Resources or his or her lawful designee.

§69-10-2. Definitions.

The following definitions are for the purposes of implementing this rule.

2.1. Applicant. The person who is being considered for employment or engagement with a covered provider or covered contractor.

2.2. Background Check. A prescreening of registries on the WV CARES website and a fingerprint-based search of state and federal criminal history record information.

2.3. Conviction. A finding of guilt by a court, a plea of guilty or *nolo contendere* was accepted, or when the individual entered a first offender, deferred adjudication, or arrangement or program where the judgment of conviction is withheld, regardless of whether an appeal is pending.

2.4. Covered Contractor. A licensed, certified, and/or registered health care provider who performs personal services for the covered provider in exchange for monetary compensation, where the covered provider has the right to specify the result to be accomplished by the work, but not the means and methods by which the result is accomplished.

2.5. Covered Provider. The following facilities and providers are required to participate in the WV CARES program: skilled nursing facilities, nursing facilities, home health agencies, providers of hospice care, long-term care hospitals, providers of personal care services, providers of adult day care, residential care providers that arrange for, or directly provide, long-term care services, including assisted living

facilities, and intermediate care facilities for individuals with intellectual disabilities, all as defined in W.Va. Code and W.Va. Code of State Rules.

2.6. Department. West Virginia Department of Health and Human Resources.

2.7. Direct Access. Physical contact with a resident, member, beneficiary, or client of a covered provider or covered contractor, or access to their property, personally identifiable information, protected health information, or financial information.

2.8. Direct Access Personnel. An individual who has direct access by virtue of ownership, employment, engagement, or agreement with 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 facility.

2.9. Disqualifying Offense. A conviction or substantiated finding for any of the crimes that exclude an applicant from direct access personnel positions in a covered provider, including the conviction of attempt, solicitation, conspiracy, aiding, or abetting the underlying crime. Disqualifying convictions include those crimes enumerated in federal or state code and recognized by the West Virginia State Police, and that generally fall within the following categories:

2.9.a. State or federal health and social services program-related crimes;

2.9.b. Patient abuse or neglect;

2.9.c. Health care fraud;

2.9.d. Felony drug crimes;

2.9.e. Crimes against care-dependent or vulnerable individuals;

2.9.f. Felony crimes against the person; and

2.9.g. Felony crimes against property.

~~2.10. Disqualification time periods. The length of time an applicant is barred from employment in direct access care starts from the date of conviction or the date of release from imprisonment, whichever is later. After the specified disqualification time period has elapsed, the conviction is no longer considered a reason for an automatic negative fitness determination. The individual hiring decision is ultimately the prerogative of each covered provider or covered contractor.~~

~~2.10.a. Program-related crimes disqualify applicants for 15 years.~~

~~2.10.b. Patient abuse or neglect convictions disqualify applicants for 15 years.~~

~~2.10.c. Health care fraud convictions disqualify applicants for 15 years.~~

~~2.10.d. Felony drug crimes disqualify applicants for 15 years.~~

~~2.10.e. Felony convictions of crimes against care-dependent or vulnerable individuals disqualify applicants for 10 years. Misdemeanor convictions of crimes against care-dependent or vulnerable individuals disqualify applicants for five years.~~

~~2.10.f. Violent felony crimes against the person disqualify applicants for 10 years. Non-violent felony crimes against the person disqualify applicants for five years.~~

~~2.10.g. Felony crimes against property disqualify applicants for five years.~~

2.10. Fitness Determination. A finding by the secretary after review of an applicant's criminal history record information that the applicant is either eligible for employment or not.

2.11. Negative Finding. A finding in the employment prescreening that excludes an applicant from direct access personnel positions.

2.12. Notice of Ineligibility. A notice pursuant to W.Va. Code § 16-49-3 that the secretary's review of the applicant's criminal history record information reveals a disqualifying offense.

2.13. Prescreening. A mandatory search of databases and registries on the WV CARES website for exclusions and licensure status prior to the submission of fingerprints for a criminal history record information check.

2.14. Rap Back. 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.

2.15. Secretary. The secretary of the Department of Health and Human Resources, or his or her designee.

2.16. State Board of Review. A board within the department designated by state law through which an applicant may appeal a negative fitness determination.

§69-10-3. Prescreening.

3.1. A covered provider or covered contractor shall prescreen all direct access personnel applicants considered for hire for negative findings by way of an internet search of registries and licensure databases through the WV CARES website. The secretary may charge a fee for its use.

3.2. A covered provider shall ensure that all independent health contractors who provide direct access personnel prescreen their applicants considered for hire for negative findings by way of an internet search of registries and licensure databases through the WV CARES website. The secretary may charge a fee for its use.

§69-10-4. Fingerprinting.

4.1. If the applicant has a negative finding on any required registry or licensure database, the covered provider or covered contractor shall notify the applicant, in writing, of such finding and shall not employ that applicant.

4.2. If the applicant does not have a negative finding in the prescreening process, and the covered provider or covered contractor, if applicable, is considering the applicant for employment, the applicant shall submit to fingerprinting for a state and federal criminal history record information check, and may be employed as a conditional employee subject to the provisions of this rule.

4.3. Applicants considered for hire shall be notified by the hiring entity that their fingerprints will be retained by the State Police Criminal Identification Bureau and the Federal Bureau of Investigation to allow for updates of criminal record information according to applicable standards, rules, regulations or laws.

4.4. An applicant who has gone through the criminal background check process described by the provisions of this rule, but has not been employed by a covered provider for five years, must submit new fingerprints and obtain a new employment fitness determination from the secretary.

§69-10-5. Employment Fitness Determination.

5.1. After an applicant's fingerprints have been compared with the state and federal criminal history information, the State Police shall notify the secretary of the results for the purpose of making an employment fitness determination.

5.2. If the secretary's review of the criminal history record information reveals the applicant does not have a disqualifying offense, the applicant may be employed.

5.3. If the secretary's review of the criminal history record information reveals a conviction of a disqualifying offense, the applicant may not be employed, unless a variance has been requested or granted.

5.4. The secretary shall provide written notice of the employment fitness determination to the covered provider or covered contractor, if applicable, but shall not disseminate the criminal history record information.

5.5. The covered provider or covered contractor, if applicable, shall maintain a copy of the written notice of the eligible fitness determination in the applicant's personnel file.

§69-10-6. Conditional Employees.

6.1. Conditional basis employment for no more than 60 days may occur when:

6.1.a. An applicant does not have a negative finding on a required registry or licensure database, and the employment fitness determination is pending the criminal history record information; or

6.1.b. An applicant has requested a variance of the employment fitness determination and that decision is pending.

6.2. All conditional employees shall receive direct on-site supervision by the covered provider until an eligible fitness determination is received.

6.3. The conditional employee, pending the employment fitness determination, must affirm, in a signed statement, that he or she has not committed a disqualifying offense, and acknowledge that a disqualifying offense shall constitute good cause for termination. Conditional employees who have

requested a variance shall not be required to sign such a statement.

§69-10-7. Variance.

7.1. The applicant, or the covered provider or covered contractor, if applicable, on the applicant's behalf, may file a written request for a variance of the fitness determination with the secretary.

7.2. The secretary may grant a variance if mitigating circumstances surrounding the negative finding or disqualifying offense is provided, and the secretary finds that the individual will not pose a danger or threat to residents or their property, or both.

7.3. Mitigating circumstances may include:

7.3.a. The passage of time. The length of time an applicant is barred from employment in direct access care starts from the date of conviction or the date of release from imprisonment, whichever is later.

7.3.b. Extenuating circumstances such as the applicant's age at the time of conviction, substance abuse, or mental health issues.

7.3.c. A demonstration of rehabilitation such as character references, employment history, education, and training.

7.3.d. The relevancy of the particular disqualifying information with respect to the type of employment sought.

7.4. The secretary shall mail to the applicant and the covered provider or covered contractor, if applicable, a written decision within ~~90~~ 60 days of receipt of the request indicating whether a variance has been granted or denied. The individual hiring decision is ultimately the prerogative of each covered provider or covered contractor.

§69-10-8. Appeals.

8.1. If the applicant believes that his or her criminal history record information within the state of West Virginia is incorrect or incomplete, he or she may challenge the accuracy of such information by writing to the State Police for a personal review.

8.2. If the applicant believes that his or her criminal history record information from outside the state of West Virginia is incorrect or incomplete, he or she may appeal the accuracy of such information by contacting the Federal Bureau of Investigation for instructions.

8.3. If the purported 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.

8.4. The applicant shall not be employed during the appeal process.

§69-10-9. Responsibility of the Covered Provider or Covered Contractor.

9.1. Record Retention. A covered provider shall maintain the following documents related to the background checks for all direct access personnel for the duration of their employment, including:

9.1.a. Documents establishing that an applicant has no negative findings on registries and licensure databases.

9.1.b. The secretary's eligible employment fitness determination;

9.1.c. Any variance granted by the secretary, if applicable; and

9.1.d. For conditional employees, the covered provider shall maintain documentation that establishes that the individual meets the qualifications for conditional employment.

9.2. Except as otherwise permitted by this rule, the covered provider may not employ an applicant, or engage an independent health contractor, prior to completing the background check process.

9.3. Failure of the covered provider to maintain background check documentation that all direct access personnel are eligible to work or employing an applicant or engaging an independent contractor who is ineligible to work may subject the covered provider to civil money penalties in an amount not to exceed \$5,000 per occurrence.

§69-10-10. Change in Employment.

10.1. If an individual applies for employment at a subsequent covered provider or covered contractor, the applicant is not required to submit to fingerprinting and a criminal background check if:

10.1.a. The individual previously submitted to fingerprinting and a full criminal background check as required by this rule;

10.1.b. The prior criminal background check confirmed that the individual did not have a disqualifying offense;

10.1.c. The individual received prior approval from the secretary to work for or with the covered provider or independent health contractor, if applicable; and

10.1.d. No new criminal activity that constitutes a disqualifying offense has been reported.

10.2. The secretary shall provide a copy of the employment fitness determination upon request by a subsequent covered provider or covered contractor.