



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Health And Human Resources TITLE-SERIES: 69-10
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: 69-10 WV Clearance for Access: Registry and Employment Screening

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: 16-49-9(a)

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

STATUTORY AUTHORITY

The Secretary of the Department of Health and Human Resources shall propose rules for legislative approval in accordance with W. Va. Code §29A-3-1 et seq. to implement the all of the provisions of W. Va. Code §16-49-1 et seq. The Department of Health and Human Resources is empowered to enact each provision of W. Va. Code of State Rules 69-10 by the authority specifically found in W. Va. Code §16-49-9(a).

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/26/2017

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/26/2017

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

BRIEF SUMMARY

This rule sets forth the standards and procedures for the pre-employment registry screening and state and federal fingerprint-based criminal background checks for all direct access personnel of certain facilities and providers regulated by the Department of Health and Human Resources in order to protect West Virginia's vulnerable population.

PURPOSE AND PROPOSED CONTENT

This rule contains amendments to add the disqualifying felony offenses in W. Va. Code §61-6-1, et seq., Crimes Against the Peace, and felony offenses in W. Va. Code §17C-5-1, et seq., Serious Traffic Offenses. The meaning of the phrase passage of time as a mitigating factor when used in variance determinations has been clarified, and the name of temporary employment pending the results of a criminal background check has been changed from conditional to provisional to mirror the statute. Other minor technical and stylistic cleanup has also been made.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

STATEMENT OF CIRCUMSTANCES

Additional disqualifying offenses are being added to the rule to accommodate state and federal laws, rules and regulations that govern facility and provider types that will now be required to participate in the West Virginia Clearance for Access: Registry and Employment Screening (WV CARES) program pursuant to W. Va. Code §16-49-1(4)(x) and W. Va. Code of State Rules 69-10-2.5.

PURPOSE AND PROPOSED CONTENT

This rule contains amendments to add the disqualifying felony offenses in W. Va. Code §61-6-1, et seq., Crimes Against the Peace, and felony offenses in W. Va. Code §17C-5-1, et seq., Serious Traffic Offenses. The meaning of the phrase passage of time as a mitigating factor when used in variance determinations has been clarified, and the name of temporary employment pending the results of a criminal background check has been changed from conditional to provisional to mirror the statute. Other minor technical and stylistic cleanup has also been made.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

This rule sets forth the standards and procedures for the pre-employment registry screening and state and federal fingerprint-based criminal background checks for all direct access personnel of certain facilities and providers regulated by the Department of Health and Human Resources in order to protect West Virginia's vulnerable population.

Additional disqualifying offenses are being added to the rule to accommodate state and federal laws, rules and regulations that govern facility and provider types that will now be required to participate in the West Virginia Clearance for Access: Registry and Employment Screening (WV CARES) program pursuant to W. Va. Code §16-49-1(4)(x) and W. Va. Code of State Rules 69-10-2.5.

This rule contains amendments to add the disqualifying felony offenses in W. Va. Code §61-6-1, et seq., Crimes Against the Peace, and felony offenses in W. Va. Code §17C-5-1, et seq., Serious Traffic Offenses. The meaning of the phrase passage of time as a mitigating factor when used in variance determinations has been clarified, and the name of temporary employment pending the results of a criminal background check has been changed from conditional to provisional to mirror the statute. Other minor technical and stylistic cleanup has also been made.

These changes will have no fiscal impact.

B. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

These changes will have no fiscal impact.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2017 Increase/Decrease (use "-")	2018 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues	0	0	0

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

These changes will have no fiscal impact.

TITLE 69
LEGISLATIVE RULES
WEST VIRGINIA DIVISION OF HEALTH

SERIES 10
WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY AND 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. --

1.4. Effective Date. --

1.5. Sunset Date. -- This rule shall terminate and have no further force or effect upon the expiration of five years from its effective date.

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

1.7. 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 – means a person who is being considered for employment or engagement with a covered provider or covered contractor.

2.2. Background Check – means 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 – means 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 – means 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 – means the following facilities and providers that 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, and any provider authorized by the secretary.

2.6. Department – means the West Virginia Department of Health and Human Resources.

2.7. Direct Access – means 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 – means 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. Direct On-site Supervision – means uninterrupted observation of a provisional employee by another employee who has cleared all the required background checks. Provisional employees cannot have direct access without being supervised or observed as required by the provisions of this rule.

2.10. Disqualifying Offense – means 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 any state's code and recognized by the West Virginia State Police, and that generally fall within the following categories:

- 2.10.a. State or federal health and social services program-related crimes;
- 2.10.b. Patient abuse or neglect;
- 2.10.c. Health care fraud;
- 2.10.d. Felony drug crimes;
- 2.10.e. Crimes against care-dependent or vulnerable individuals;
- 2.10.f. Felony crimes against the person;
- 2.10.g. Felony crimes against property;
- 2.10.h. Sexual offenses;
- 2.10.i. Felony crimes against chastity, morality and decency; and

2.10.j. Felony crimes against public justice;

2.10.k. Felony traffic offenses; and

2.10.l. Felony crimes against the peace.

2.11. Fitness Determination – means 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.

2.12. Negative Finding – means a finding in the employment prescreening that excludes an applicant from direct access personnel positions.

2.13. Notice of Ineligibility – means 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.

2.14. Prescreening – means 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.

2.15. 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.

2.16. Secretary – means the secretary of the Department of Health and Human Resources, or his or her designee.

2.17. State Police – means the West Virginia State Police.

§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 ~~shall~~ will charge a \$20 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 ~~shall~~ will charge a \$20 fee for its use.

3.3 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, by regular U.S. mail, of such finding and shall not employ that applicant.

§69-10-4. Fingerprinting.

4.1. 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~~ provisional employee subject to the provisions of this rule.

4.2. 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. The Secretary will notify employers in writing by regular U.S. mail of subsequent criminal events discovered through rap back, but the affected employee's employment status during the time period between an arrest and either a conviction or a dismissal is a matter of company policy.

4.3. 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.

4.4. 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.

§69-10-5. Employment Fitness Determination.

5.1. If the Secretary's review of the criminal history record information provided by the State Police reveals the applicant does not have a disqualifying offense, the applicant may be employed.

5.2. 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.

5.3. If the Secretary's review of an applicant's criminal history record information reveals a pending charge that has not received a final disposition, the following shall apply:

5.3.a. If the pending charge is a disqualifying misdemeanor offense, and the applicant has not had a conviction for a disqualifying offense in the last seven years, the Secretary ~~shall~~ will provide written notice to the covered provider or covered contractor advising that the applicant is eligible for work.

5.3.b. If the pending charge is a disqualifying felony offense, the Secretary ~~shall~~ will provide written notice to the covered provider or covered contractor advising that the applicant is ineligible for work, unless a variance has been requested or granted.

5.3.c. Once a final disposition has been made on the pending charge, the Secretary ~~shall~~ will review the criminal history record information de novo in accordance with the provisions of this rule and W. Va. Code §16-49-1 et seq.

5.4. The Secretary ~~shall~~ will provide written notice by regular U.S. mail 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~~ Provisional Employees.

6.1. ~~Conditional~~ Provisional 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~~ provisional employees shall receive direct on-site supervision by the covered provider until an eligible fitness determination is received.

6.3. The ~~conditional~~ provisional 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~~ Provisional 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.~~ since the completion of sentencing requirements free of new disqualifying offenses.

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~~ will send by regular U.S. mail to the applicant and the covered provider or covered contractor, if applicable, a written decision within 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~~ provisional employees, the covered provider shall maintain documentation that establishes that the individual meets the qualifications for ~~conditional~~ provisional 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 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 civil money penalties of \$2,500 per occurrence. Engaging individuals knowing that they are ineligible to work may subject the employer to civil money penalties of \$2,500 per occurrence. Each civil money penalty ~~shall~~ will be levied by the Secretary by written notice.

§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 will provide a copy of the employment fitness determination upon request by a subsequent covered provider or covered contractor.

§69-10-11. Confidentiality and Immunity.

11.1. The Secretary ~~shall~~ will treat and maintain any criminal background search information obtained under this article as confidential. The Secretary ~~shall~~ will limit the use of records solely to the purposes authorized by W. Va. Code §16-49-1 et seq. The criminal history record information in the custody of the Secretary 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.

11.2. The Secretary, the Department 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 rule.