



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Health And Human Resources TITLE-SERIES: 69-10

RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: WEST VIRGINIA CLEARANCE FOR ACCESS:
REGISTRY AND EMPLOYMENT SCREENING

CITE STATUTORY AUTHORITY: 16-49-9

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/25/2022 4:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: April Robertson

ADDRESS: One Davis Square, Suite 100 E
Charleston, WV 25301

EMAIL:

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

It is the purpose of this rule to protect West Virginias vulnerable population by requiring registry prescreening and state and federal criminal background checks for all direct access personnel of the departments bureaus, covered providers, and covered contractors.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

Providing any false information to the department during the background check process is an automatic disqualifying offense; applicants shall be prescreened on the Adult and Child Protective Services websites; applicants must submit new fingerprints if there has been a gap in rap back enrollment; inaccurate or unverifiable information will result in a denial of a variance request; requires cooperation by the State Police, prosecuting attorneys; circuit clerks, arresting agency, and others in the judicial system.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

n/a

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

n/a

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

n/a

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			0
Personal Services			0
Current Expenses			0
Repairs and Alterations			0
Assets			0
Other			0
2. Estimated Total Revenues			0

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

n/a

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

April L Robertson -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 69
LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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 the department's bureaus, 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. -- ~~April 29, 2021.~~

1.4. Effective Date. -- ~~April 30, 2021.~~

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on August 1, ~~2026~~ 2028.

1.6. Application. -- This rule applies to the department's bureaus, 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.

2.1. Definitions incorporated by reference. -- Those terms defined in W. Va. Code §§16-49-1, *et seq.*, are incorporated herein by reference.

2.2. 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.

2.3. Covered Provider -- means the following facilities or 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; intermediate care facilities for individuals with intellectual disabilities; persons responsible for the care of children as described in W. Va. Code §49-2-114; chronic pain management clinics; behavioral health centers; neonatal abstinence syndrome centers; opioid treatment centers; and any other facility or provider required to participate in the WV CARES program as determined by the secretary in legislative rule.

2.4. 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.

2.5. Disqualifying Offense -- means a conviction or substantiated finding for any of the crimes that exclude an applicant from direct access personnel positions ~~in the Department~~ with a bureau or covered provider, including the conviction of attempt, solicitation, conspiracy, aiding, or abetting the underlying crime. Providing any false information to the department is an automatic disqualifying offense. 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:

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

2.5.2. Patient abuse or neglect;

2.5.3. Health care fraud;

2.5.4. Felony drug crimes;

2.5.5. Crimes against care-dependent or vulnerable individuals;

2.5.6. Felony crimes against the person;

2.5.7. Felony crimes against property;

2.5.8. Sexual offenses;

2.5.9. Felony crimes against chastity, morality and decency;

2.5.10. Felony crimes against public justice;

2.5.11. Felony traffic offenses; and

2.5.12. Felony crimes against the peace.

2.6. 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.

§ 69-10-3. Prescreening.

3.1. A bureau, covered provider, or covered contractor shall prescreen all direct access personnel and applicants considered for hire for negative findings by way of an internet search of registries and licensure databases through the WV CARES website and the links on the WV CARES website to the department's Adult Protective Services and Child Protective Services websites to request a prescreening of those registries. ~~The Department shall prescreen all 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 will charge a \$20 fee for ~~its~~ use as specified in W. Va. Code §16-49-8.

3.2. A covered provider shall ensure that all covered 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 by centralized search engines and links to the department's Adult Protective Services and Child Protective Services websites to request a prescreening of those registries.

3.3. The department shall ensure that all covered 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 by centralized search engines and links to the department's Adult Protective Services and Child Protective Services websites to request a prescreening of those registries.

3.4. If the applicant has a negative finding on any required registry or licensure database, the ~~Department~~ bureau, covered provider, or covered contractor shall notify the applicant, in writing, by regular U.S. mail or electronic 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 ~~Department~~ bureau, 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 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 or electronic mail ~~or if subsequent criminal events disqualifying offenses are~~ 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 Department or company policy. The applicant, or the bureau, covered provider, or covered contractor on the applicant's behalf, may file a written request for a variance with the secretary.

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 the ~~Department~~ bureau or covered provider for five years, must submit new fingerprints and obtain a new employment fitness determination from the secretary. An applicant must submit new fingerprints if there has been a gap in being enrolled in the rap back service.

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 purposes 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 the applicant is currently provisionally employed prior to a variance being requested or a variance has been 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:

5.3.1. 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 year, the secretary will provide written notice to the bureau, covered provider, or covered contractor advising that the applicant is eligible for work.

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

5.3.3. Once a final disposition has been made on the pending charge, the secretary 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 will provide written notice by regular U.S. mail or electronic mail of the employment fitness determination to the bureau, covered provider, or covered contractor, ~~if applicable~~, but shall not disseminate the criminal history record information.

5.5. The bureau, 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. Provisional Employees.

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

6.1.1. 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

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

6.2. All provisional employees shall receive direct, on-site supervision by the bureau, ~~or~~ covered provider, or covered contractor until an eligible fitness determination is received.

6.3. The 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. 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 ~~Department~~ bureau, 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. If the applicant fails to provide an accurate criminal history or provides only unverifiable information, including, but not limited to, educational achievements, rehabilitation, or letters of recommendation, the secretary may deny the variance request.

~~7.2.~~ 7.3. 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.~~ 7.4. Mitigating circumstances may include:

~~7.3.1.~~ 7.4.1. 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 the penalty imposed, whichever is later.

~~7.3.2.~~ 7.4.2. Extenuating circumstances ~~such as~~ including, but not limited to, the applicant's age at the time of conviction, substance abuse, or mental health issues.

~~7.3.3.~~ 7.4.3. A demonstration of rehabilitation ~~such as~~ including, but not limited to, character references, employment history, education, and training.

~~7.3.4.~~ 7.4.4. The relevancy of the particular disqualifying information with respect to the type of employment sought.

~~7.4.~~ 7.5. The secretary will send by regular U.S. mail or electronic mail to the applicant and the bureau, 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~~ the bureau, 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 ~~Department~~ Bureau, Covered Provider, or Covered Contractor.

9.1. Record Retention. A bureau, ~~or~~ covered provider, or covered contractor shall maintain the following documents related to the background checks for all direct personnel for the duration of ~~their~~ his or her employment, including:

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

9.1.2. The secretary's eligible employment fitness determination;

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

9.1.4. For provisional employees, the ~~Department or~~ bureau, covered provider, or covered contractor shall maintain documentation that establishes that the individual meets the qualifications for provisional employment.

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

9.3. Failure of the ~~Department~~ 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 will be levied by the secretary by written notice.

§ 69-10-10. Change in Employment.

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

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

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

10.1.3. The individual received prior approval from the secretary to work for or with the ~~Department~~ bureau, or for or with the same type of covered provider, or independent health contractor, ~~if applicable; and~~

10.1.4. No new criminal activity that constitutes a disqualifying offense has been reported; and

10.1.5. The individual has not had a gap in being enrolled in the rap back service.

10.2. The secretary will provide a copy of the employment fitness determination upon request by the ~~Department, or a subsequent~~ bureau, covered provider, or covered contractor subsequently employing the individual.

§ 69-10-11. Confidentiality and Immunity.

11.1. The secretary will treat and maintain any criminal background search information obtained under this article as confidential. The secretary 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 West Virginia State Police, prosecuting attorney's office, circuit clerks, arresting agency, or any other person in the judicial system shall cooperate fully with the secretary to provide information, report criminal history, and to implement W. Va. Code §§16-49-1, *et seq.* and this rule.

~~11.2.~~ 11.3. 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.