



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 TITLE-SERIES: 64-123
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: Yes
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: 07/10/2023 4:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

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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 Virginia's vulnerable population by requiring registry prescreening and state and federal criminal background checks for all direct access personnel of the bureaus, covered providers, and covered contractors. The short title of this rule shall be known as WV CARES.

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

WV CARES has expanded as more provider types, as well as DHHR employees, have been added to the list of direct access personnel to be screened, which requires additional clarification in the rule.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

With this expansion, expenses have increased. Therefore, it is necessary to increase WV CARES' administrative fee to process background checks from \$20 per applicant to \$25 per applicant.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

The additional revenue generated will go into WV CARES special revenue account (DHHR Criminal Background Administration Account - Fund 5110). This account funds 100% of the operational costs for WV CARES. Per W. Va. Code 16-49-8, this account is administered by the secretary and may not be deemed a part of the general revenue of the state.

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

The background checks required by this rule will cost \$5 more per applicant.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2023 Increase/Decrease (use "-")	2024 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues	\$1,400,000	\$350,000	\$1,750,000.00

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

WV CARES processes background checks for approximately 70,000 applicants per fiscal year generating \$1,400,000. Increasing the administrative fee from \$20 to \$25, we are estimating \$350,000 in additional revenue ($70,000 \times \$5.00 = \$350,000$) for FY 2024 and ongoing. The total revenue is estimated at \$1,750,000 ($70,000 \times \$25.00 = \$1,750,000$) upon implementation.

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 ~~6964~~
LEGISLATIVE RULE
DEPARTMENT OF HEALTH ~~AND HUMAN RESOURCES~~

SERIES ~~10123~~
WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY AND EMPLOYMENT SCREENING

~~§69-10-1-64-123-1.~~ 64-123-1. 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~~ 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.~~ This rule shall terminate and have no further force or effect on August 1, 2029.

1.6. Application. -- This rule applies to the ~~Department~~ 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.

1.8. Repeal and Replace. -- This legislative rule repeals and replaces WV 69CSR10 filed and effective April 30, 2021, pursuant to HB2006 passed during the 2023 Regular Legislative Session and effective May 23, 2023.

~~§69-10-2 64-123-2.~~ 64-123-2. 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~~ bureau, or covered provider, or covered contractor 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:

2.5.1. 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;

2.5.13. Human trafficking; and

2.5.14. Felony money laundering.

2.6. Disqualifying Offense for Persons Responsible for the Care of Children as described in W. Va. Code §49-2-114 -- means, in addition to those offenses listed in subsection 2.5. of this rule, a conviction or substantiated finding for any of the following crimes, including the conviction of attempt, solicitation, conspiracy, aiding, or abetting the underlying crime, that exclude the applicant from being responsible for the care of children or engagement with the bureau or covered provider:

2.6.1. Misdemeanor drug crimes;

2.6.2. Misdemeanor crimes against the person;

2.6.3. Misdemeanor crimes against chastity, morality, and decency; and

2.6.4. Serious traffic offenses.

~~2.6. 2.7.~~ Fitness Determination -- means a finding by the Secretary after review of an applicant's criminal history record information that the applicant is either eligible or ineligible for employment or ~~not~~ engagement.

~~§69-10-3~~ 64-123-3. 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 ~~Department~~ bureau shall prescreen all direct access 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~~ \$25 fee for its use.

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.

3.3. The ~~Department~~ bureau 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.

3.4. If the applicant has a negative finding on any required registry or licensure database, the employing or engaging ~~Department~~ bureau, 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~~ 64-123-4. 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 or engagement shall be notified by the hiring or engaging 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~~ hiring or engaging entities in writing by ~~regular U.S.~~ electronic mail of subsequent, disqualifying criminal events offenses 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 deeming that employee ineligible. If a variance is requested relating to a rap back notification of ineligibility, the affected employee's status of employment may continue until the variance is resolved at the discretion of the~~

bureau, covered provider, or covered contractor. The requirements related to provisional employees in W. Va. Code §16-49-1, et seq. and section 6 of this rule shall apply.

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, or covered contractor 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 purposes of making an ~~employment~~ fitness determination.

~~§69-10-5 64-123-5.~~ **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 or engaged.

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 or engaged, 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:

5.3.1. If the pending charge is a disqualifying misdemeanor offense, ~~and~~ the applicant has not ~~has~~ had a conviction for of a disqualifying offense in the last seven year years, and the applicant has been granted a variance for his or her position with the bureau, covered provider, or covered contractor for any disqualifying offense prior to the last seven years, the Secretary will provide written notice to the bureau, covered provider, or covered contractor advising that the applicant is eligible for work or engagement. If there has been another disqualifying offense within the last seven years, the Secretary will notify the bureau, covered provider, or covered contractor of the applicant's ineligibility status. A variance may be requested for the pending, disqualifying misdemeanor offense.

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~~ or engagement. A variance may be requested regarding the pending disqualifying felony offense.

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.~~ 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 or engagement provider record.

~~§69-10-6-64-123-6.~~ **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.

6.4. This section does not apply to applicants who are persons responsible for the care of children as described in W. Va. Code §49-2-114.

~~§69-10-7-64-123-7.~~ **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. 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:

7.3.1. The passage of time. The length of time an applicant is barred from employment or engagement 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. Extenuating circumstances such as the applicant's age at the time of conviction, substance abuse, or mental health issues.

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

7.3.4. The relevancy of the ~~particular~~ disqualifying ~~information~~ offense or offenses with respect to the type of employment or engagement sought.

7.4. The Secretary will send by regular U.S. 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 or engaging entity's decision is ultimately the prerogative of each bureau, covered provider, or covered contractor.

~~§69-10-8-64-123-8.~~ **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 or engaged during the appeal process unless a variance has been requested and granted.

~~§69-10-9-64-123-9.~~ **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 criminal background checks for all direct access personnel for the duration of their employment or engagement, 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 bureau,~~ or covered provider, or covered contractor shall maintain documentation that establishes that the individual meets the qualifications for provisional employment or engagement.

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

9.3. Failure of the ~~Department bureau,~~ covered provider, or covered contractor to ensure proper completion of the criminal background check process for each individual employed or engaged as direct access personnel may result in the imposition of civil money penalties of \$2,500 per occurrence. Employing or Engaging engaging individuals knowing that they are ineligible to work or for engagement may subject the employer bureau, covered provider, or covered contractor to civil money penalties of \$2,500 per occurrence. Failure of the bureau, covered provider, or covered contractor to provide onsite supervision for provisional direct access employees may result in the imposition of civil money penalties of \$2,500 per occurrence. Each civil money penalty will be levied by the Secretary by written notice.

~~§69-10-10-64-123-10.~~ **Change in Employment or Engagement Status.**

10.1. If an individual applies for employment ~~at~~ or engagement with the ~~Department~~ bureau or a subsequent 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, covered provider, or independent health contractor, if applicable; and

10.1.4. 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 the ~~Department~~ bureau, or a subsequent covered provider or covered contractor.

~~§69-10-11-64-123-11.~~ **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 and related 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.