



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

11/7/2023 4:23:45 PM

Office of West Virginia
Secretary Of State

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Health

RULE TYPE: Legislative

TITLE-SERIES: 64-123

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

CITE AUTHORITY: 16-49-9

The above proposed Legislative rules, following review by the Legislative Rule Making Review Committee, is hereby modified as a result of review and comment by the Legislative Rule Making Review Committee. The attached modifications are filed with the Secretary of State.

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.~~ §69-10-2-64-123-1. 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~~ Director of West Virginia Clearance for Access: Registry and Employment Screening within the Office of the Inspector General, 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.~~ §69-10-2-64-123-2. 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 Contractor -- means any contractor whose employees are working at facilities or providers that are required to participate in the West Virginia Clearance for Access: Registry and Employment Screening program and meet the definition of a covered provider as defined within this section.

~~2.3.~~ 2.4. 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~~ Office of the Inspector General, Secretary of the West Virginia Department of Health, Secretary of the West Virginia Department of Human Services, or Secretary of the Department of Health Facilities in legislative rule.

~~2.4.~~ 2.5. 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.

2.6. Director -- means the Director of the West Virginia Clearance for Access: Registry and Employment Screening program or his or her designee located within the Office of the Inspector General.

~~2.5.~~ 2.7. 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.~~ 2.7.1. State or federal health and social services program-related crimes;

~~2.5.2.~~ 2.7.2. Patient abuse or neglect;

~~2.5.3.~~ 2.7.3. Health care fraud;

~~2.5.4.~~ 2.7.4. Felony drug crimes;

~~2.5.5.~~ 2.7.5. Crimes against care-dependent or vulnerable individuals;

~~2.5.6.~~ 2.7.6. Felony crimes against the person;

~~2.5.7.~~ 2.7.7. Felony crimes against property;

~~2.5.8.~~ 2.7.8. Sexual offenses;

~~2.5.9.~~ 2.7.9. Felony crimes against chastity, morality and decency;

~~2.5.10.~~ 2.7.10. Felony crimes against public justice;

~~2.5.11.~~ 2.7.11. Felony traffic offenses; ~~and~~

~~2.5.12.~~ 2.7.12. Felony crimes against the peace;

2.7.13. Human trafficking; and

2.7.14. Felony money laundering.

2.8. Disqualifying Offense for Persons Responsible for the Care of Children -- 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, covered provider, or covered contractor:

2.8.1. Misdemeanor drug crimes;

2.8.2. Misdemeanor crimes against the person;

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

2.8.4. Serious traffic offenses.

~~2.6- 2.9.~~ 2.9. Fitness Determination -- means a finding by the Secretary Director after review of an applicant's criminal history record information that the applicant is either eligible or ineligible for employment or ~~not~~ engagement.

2.10. Office of the Inspector General. -- means the Office of the Inspector General as described in W. Va. Code §16-1-22.

2.11. Persons Response for the Care of Children. -- means those persons referred to in W. Va. Code §49-2-114(b).

2.12. Prescreening. -- means a mandatory search of internet-based registries and databases for exclusions and licensure status prior to the submission of fingerprints for a criminal history record information check. Registries and databases included in prescreening include, but are not limited to the Office of the Inspector General List of Excluded Individuals and Entities, West Virginia Medicaid Exclusions List, National Nurse Aide Registry, West Virginia Nurse Aide Registry, GSA System for Award Management, National Sex Offender public website, and West Virginia Sex Offender Registry. Other national and state registries may be required to be checked where indicated.

~~§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~~ Director 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~~ Director 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~~ Director.

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~~ Director of the results for the purposes of making ~~an a~~ employment fitness determination.

~~§69-10-5~~ 64-123-5. Employment Fitness Determination.

5.1. If the ~~Secretary's~~ Director'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~~ Director'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~~ Director'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~~ Director 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 Director 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~~ Director 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~~ Director 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~~ Director 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 and applicants who will be personal care workers or the equivalent regardless of job title.

~~§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~~ Director.

7.2. The ~~Secretary~~ Director may grant a variance if mitigating circumstances surrounding the negative finding or disqualifying offense is provided, and the ~~Secretary~~ Director 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~~ Director 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.

~~§69-10-9-64-123-8.~~ **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~~ Director's eligible ~~employment~~ fitness determination;

9.1.3. Any variance granted by the ~~secretary~~ Director, 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. Each civil money penalty will be levied by the ~~Secretary~~ Director 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~~ Director 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~~ Director 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~~ Director will treat and maintain any criminal background search information obtained under this article as confidential. The ~~Secretary~~ Director 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~~ Director 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~~ Director, the ~~Department~~ Office of the Inspector General, 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.