

PART 921

NEW YORK STATE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION
(WARN) REQUIREMENTS

(Statutory authority: Labor Law, §§ 860 – 860-i; art. 25-A)

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**SUBPART 921-1
DEFINITIONS**

§921-1.0 Purpose

The purpose of this Part is to set forth regulations implementing the New York State Worker Adjustment and Retraining Notification (WARN) Act (Chapter 475 of the laws of 2008), hereinafter “Act,” and amendments thereto, as set forth in §598 et seq. of the New York State Labor Law.

Nothing in this part shall be read to abridge, mitigate, reduce, remove, or otherwise affect an employer’s responsibility to comply with the notice requirements set forth in the federal Worker Adjustment and Retraining Notification Act and regulations promulgated thereunder.

§921-1.1 Definitions.

As used in this Part (rule), the terms below have the following meanings:

(a) *Affected employee* means an employee who may reasonably be expected to experience an employment loss as the result of a proposed plant closing, mass layoff, relocation, or covered reduction in hours by the employer. The term “affected employee” includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term *affected employee* includes a managerial and supervisory employee, but does not include a business partner, or a consultant or contract employee who has a separate employment relationship with another employer and is paid by that employer or who is self-employed.

(b) *Consolidation of all or part of a business* means the combining of an employer’s business operations which results in the creation of a new corporation or other business entity and the termination of the employer’s existing business entities.

(c) *Days* means calendar days.

(d) *Employer.*

(1) *Employer* means any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees within New York State, excluding part-time employees, or fifty (50) or more employees within the state that work in aggregate at least 2,000 hours per week. The calculation of total weekly hours shall include overtime hours that are earned on a regular basis. For purposes of this paragraph, overtime hours earned on a regular basis shall be any overtime hours worked by an employee if overtime has been earned by that employee in seven or more weeks of the twelve week period prior to the date on which notice required under the Act and regulations must be given.

(2) Independent contractors and subsidiaries that are wholly or partially owned by a parent company may be treated as separate employers depending on the degree of their independence from the parent. Some of the factors to be considered in making this determination include, but are not limited to: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) the dependency of operations.

(3) The term *employer* shall not include the federal or state government, any of their political subdivisions, including any unit of local government or school district, or any public authority, board, or commission, or any federally recognized Indian tribal government. Private for-profit and not-for-profit businesses contracting with federal, state, or local governmental entities, or with public authorities, boards, or commissions are employers.

(4) Where an employer has sold all or part of his business, the selling employer shall be responsible for providing notice for any plant closing, mass layoff, or a covered reduction in hours in accordance with this section, up to and including the effective date of the sale. After the effective date of the sale of all or part of the employer's business, the purchasing employer shall be responsible for providing notice for any plant closing, mass layoff, or a covered reduction in hours in accordance with the Act and this Part. Any individual who is an employee of the selling employer as of the effective date of the sale shall be considered an employee of the purchasing employer immediately after the effective date of this sale.

(5) An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one "employer", the auto maker.

(e) *Employment loss.*

(1) The term *employment loss* means:

(i) An employment termination, other than a discharge for cause, voluntary departure, or retirement;

(ii) A mass layoff exceeding six months; or

(iii) A reduction in hours of work of more than fifty percent (50%) during each month of any consecutive six-month period. For purposes of this provision, a reduction in hours of work shall not be deemed to have occurred during any week that the employee is

receiving unemployment insurance benefits as a partial wage replacement for lost hours of work through the employer's participation in a shared work program under Article 7-A of Article 18 of the New York Labor Law, provided however, that should the employer become aware at any point in the duration of the shared work program that an employment loss not subject to this exception will occur, the employer shall provide as much notice as is practicable accompanied by a statement of the basis for reducing the notice period.

(2) Where a termination, layoff, or covered reduction in hours of work is involved, an employment loss does not occur when an employee is reassigned or transferred to an employer-sponsored program, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) *Employment loss* does not include instances where the plant closing, layoff, or covered reduction in hours of work is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or, the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(f) *Facility* means a building or other location in which business operations of employers take place.

(g) *Mass layoff* means a reduction in workforce that:

(1) Is not the result of a plant closing; and

(2) Results in an employment loss at a single site of employment during any 30-day period for:

(i) At least 33% of the employees at the site (excluding part-time employees) and at least twenty-five (25) employees (excluding part-time employees);

-- OR --

(ii) At least two hundred fifty (250) employees (excluding part-time employees) regardless of whether they comprise thirty-three percent (33%) of the employees at the site.

(3) An employee's layoff shall commence on the date on which he or she is no longer employed by the employer. For the purposes of this Part, the employee's period of employment shall not be extended by the employer's payment of severance pay, vacation pay, personal leave, or similar benefits to the employee.

(h) *Operating unit* means an organizationally or operationally distinct product, operation, or specific work function within or across facilities at a single site of employment.

(i) *Part-time employee* means an employee who is employed for an average of fewer than twenty (20) hours per week or who has been employed for fewer than six (6) of the twelve (12) months preceding the date on which notice is required. Part-time employees for purposes of this Part may include workers who have worked full-time for fewer than six (6) of the twelve (12) months preceding the date on which notice is required. In determining whether an employee worked an average of fewer than twenty (20) hours per week, the shorter of the actual period he or she has been was employed or the ninety (90) days prior to the date on which notice is required shall be used.

(j) *Plant closing*. Plant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during any 30-day period at such site for 25 or more employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A temporary shutdown triggers the notice requirement if the minimum number of terminations, layoffs exceeding 6 months, or reductions in work hours would constitute an “employment loss” under the Act.

(k) *Relocation* means the removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away from the original site of operation. For the purposes of this Part, relocation of substantially all of the operations of an employer shall include the relocation of an entire unit, product line, division, or other segment of the employer’s operation.

(l) *Representative* means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U.S.C. 159(a), 158(f), section 2 of the Railway Labor Act (45 U.S.C. 152), or the New York Labor Relations Act (New York Labor Law sec. 700 et seq.). Where an event requiring notice occurs at an employment site involving employees represented by more than one bargaining unit, notice must be sent to each bargaining unit representing employees affected by the plant closing, mass layoff, relocation, or covered reduction in work hours.

(m) *Single site of employment*.

(1) For the purposes of this Part, the following shall apply to the determination of whether an employment loss involves a single site of employment:

(i) Several single sites of employment within a single building may exist if separate employers conduct activities within the building. For example, an office building housing fifty (50) different businesses will contain fifty (50) single sites of employment.

(ii) A single site of employment may refer to either a single location or a group of contiguous locations in proximity to one another even though they are not directly connected to one another. For example, groups of structures which form a campus or industrial park or separate facilities across the street from one another owned by the same employer may be considered a single site of employment.

(iii) Separate buildings or facilities which are not directly connected or are not in proximity to one another may be considered a single site of employment if they

are in reasonable geographic proximity, are used by the employer for the same purpose, and share the same staff or equipment. An example is an employer who manages a number of warehouses in an area, but who regularly shifts or rotates the same employees from one building to another.

(iv) Contiguous buildings occupied by the same employer that have separate management, produce different products, and have separate workforces would not constitute a single site of employment.

(v) The single site of employment for workers whose primary duties require travel from point to point, who are out-stationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), shall be the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

(2) The application of the definition of single site of employment by an employer in order to evade the purpose of the Act shall constitute a violation under this Part.

SUBPART 921-2 NOTICE

Sec.

921-2.1 Notice, generally

921-2.2 Service of notice

921-2.3 Contents of notice

§921-2.1 Notice, generally.

(a) *General rule.* Subject to the exceptions set forth elsewhere in this Part, no employer may order a mass layoff, plant closing, relocation, or a covered reduction in work hours unless, at least 90 calendar days prior to any planned employment loss, the employer provides notice in compliance with the requirements set forth below. When all employees are not terminated on the same date, the date of the first individual termination shall trigger the 90-day notice requirement. The first and each subsequent group of employees earmarked for termination are entitled to a full 90 days' notice.

(b) *Factors triggering notice requirement.*

(1) Scope of employment action: In deciding whether notice is required, an employer shall look ahead ninety (90) days and behind ninety (90) days to determine whether actions constituting employment losses within the meaning of this Part, both taken and planned, will, in the aggregate for any ninety (90)-day period, reach the minimum standards to trigger the notice requirement for a plant closing, mass layoff, relocation, or covered reduction in work hours. An employer is not required to give notice if the employment losses result from separate and distinct actions and causes that should not be aggregated into a single employment loss.

(2) Number of employees: In reaching a determination whether notice is required:

An employer shall measure the average number of individuals employed by the employer over the ninety (90) day look back period set forth in subsection (1) of this section. If this estimation of the number of employees is clearly unrepresentative of the ordinary or average employment

level for a typical ninety (90) day period, a more representative number can be used. Unrepresentative employment levels would exist when the level is near the peak or trough of an employment cycle, when large upward or downward shifts in the number of employees occur near the time notice is to be given, or when recent layoffs have reduced the average number of employees.

- (i) For purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 90 days in advance, the actual employees who will suffer an employment loss may be counted. Workers, other than part-time workers, who are exempt from notice are nonetheless counted as employees for purposes of determining coverage as an employer.
- (ii) Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job.

(c) *Notice must be specific.*

(1) The information in the notice shall be based on the best information available to the employer at the time the notice is served.

(2) Where voluntary notice which does not contain all the required elements set forth in this Rule has been given more than ninety (90) days in advance to any party for whom notice is required, the employer must ensure that all of the information required by the Act and this Part is provided at least ninety (90) days in advance of the plant closing, mass layoff, relocation, or covered reduction in work hours.

(3) Notice may be given conditional upon the occurrence or non-occurrence of an event only when the event is definite and the consequences of its occurrence or non-occurrence will necessarily, in the normal course of business, lead to a plant closing, mass layoff, relocation, or covered reduction in work hours. For example, if the non-renewal of a major contract will lead to the closing of a plant that produces the articles supplied under the contract thirty (30) days after the contract expires, the employer may give notice at least ninety (90) days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date.

(4) As used in this section, the term "date" refers to a specific date, or to a fourteen (14)-day period during which a planned separation is expected to occur. If separations are planned according to a schedule, the schedule shall indicate the separation date, or the beginning date of each fourteen (14)-day period during which any separations are expected to occur. Where a fourteen (14)-day period is used, notice must be given at least ninety (90) days in advance of the first day of the period.

(d) *Voluntary Notice.* An employer may, and is encouraged to, provide notice of employment losses to employees even if such notice is not required under the Act or this Part.

(e) *Additional notice requirements.* Nothing in these regulations shall prevent a contract, collective bargaining agreement, or grant from imposing additional notice requirements.

§921-2.2 Service of notice.

(a) Notice shall be provided at least ninety (90) days prior to separation using a reasonable and timely method of delivery designed to ensure its receipt. Acceptable forms of delivery include first class mail, or personal delivery with optional signed receipt. Notice to the affected employees may also be served by insertion of the notice into envelopes containing pay or envelopes containing receipts for direct deposit of pay. Notice may not be sent via-email.

(b) All notices must be sent on official letterhead of the employer and must be signed by an individual with authority to represent the employer in this regard. Notice provided to the Department of Labor must contain the original signature of the employer representative.

(c) Notice must be provided to the following:

- (1) Affected employees;
- (2) Representative(s) of affected employees;
- (3) The Commissioner of Labor; and
- (4) The local Workforce Investment Board(s) where the site of employment is located.

(d) Notice to the Commissioner of Labor may be mailed to:

New York State Department of Labor
Division of Employment and Workforce Solutions
State Dislocated Worker Unit
W. Averell Harriman State Office Campus
Building 12, Room 450
Albany, NY, 12240

(e) Notice(s) to the local Workforce Investment Board(s) may be mailed to the Boards' contact listed on the Department's website at:

<http://www.labor.state.ny.us/workforcenypartners/lwia/lwiacontacts.htm>

(f) Notice to affected employees is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position.

§921-2.3 Contents of notice.

Notice required under this Part sent to the recipients identified below shall be provided for each site of employment where a plant closing, mass layoff, relocation, or covered reduction in work hours will occur and shall include the following elements:

(a) Notice to the Commissioner of Labor:

- (1) The name and address of the employment site where the plant closing, mass layoff, relocation, or covered reduction in work hours will occur;
- (2) The name and telephone number of an employer representative to contact for further information;
- (3) The name of the employer's liaison with the Department for purposes of providing rapid response services to affected employees;
- (4) The names of the affected employees and their job titles;
- (5) The expected date of the first separation of employees and the anticipated schedule of separations;
- (6) A statement as to whether bumping rights exist; and
- (7) A statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently, e.g. should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent, the notice shall so indicate.

(b) Notice to each affected employee:

- (1) The expected date as to when the plant closing, mass layoff, relocation, or covered reduction in work hours will commence, and the date when the individual employee will be separated;
- (2) A statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently, e.g. should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent, the notice shall so indicate;
- (3) A statement as to whether bumping rights exist;
- (4) The name and telephone number of an employer representative to contact for further information; and
- (5) Information concerning unemployment insurance, job training, and re-employment services for which affected employees may be eligible. Such information shall, at a minimum, include the following notice:

“You are also hereby notified that, as a result of your loss of employment, you may be eligible to receive unemployment insurance benefits, job retraining, re-employment services, or other assistance with obtaining new employment upon your termination. The New York State Department of Labor will contact your employer to arrange to provide additional information regarding these benefits and services to you through workshops, interviews, and other activities that will be scheduled prior to the time your employment ends. You can also access reemployment information and apply for unemployment insurance benefits on the Department’s website, www.labor.state.ny.us, or you may use the contact information provided on the website to contact the Department for further information and assistance.”

- (6) Notice to affected employees is to be provided in a language understandable to the employee.
- (c) Notice to representative(s) of the affected employees:
 - (1) The name and address of the employment site where the plant closing, mass layoff, relocation, or covered reduction in work hours will occur;
 - (2) The name and telephone number of the employer representative to contact for further information;
 - (3) A statement as to whether bumping rights exist;
 - (4) A statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently, e.g. should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent, the notice shall so indicate;
 - (5) The expected date of the first separation of employees and the anticipated schedule of separations;
 - (6) The names of the affected employees and their job titles; and
 - (7) Information concerning unemployment insurance, job training, and re-employment services for which affected employees may be eligible. Such information shall, at a minimum, include the following notice:

“You are also hereby notified that, as a result of their loss of employment, individuals represented by you may be eligible to receive unemployment insurance benefits, job retraining, re-employment services, or other assistance with obtaining new employment upon termination. The New York State Department of Labor will contact their employer to arrange to provide additional information regarding these benefits and services through workshops, interviews, and other activities that will be scheduled prior to the time their employment ends. Employees affected by this employment loss can also access reemployment information and apply for unemployment insurance benefits on the Department’s website, www.labor.state.ny.us, or they may use the contact information provided on the website to contact the Department for further information and assistance.

- (d) Notice to the local Workforce Investment Board:

- (1) The name and address of the employment site where the plant closing, mass layoff, relocation, or covered reduction in work hours will occur;
- (2) The name and telephone number of the employer representative to contact for further information;
- (3) A statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently, e.g. should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent, the notice shall so indicate;
- (4) The expected date of the first separation of employees, and the anticipated schedule of separations;
- (5) The job titles of positions to be affected, and the number of affected employees in each job title;
- (6) A statement as to whether bumping rights exist; and
- (7) The name of each union representing affected employees, and the name and address of the chief elected officer of each such union.

**SUBPART 921-3
EXTENSION OR POSTPONEMENT OF MASS LAYOFF PERIOD**

Sec.

921-3.1 Extension of a mass layoff

921-3.2 Postponement of a plant closing, mass layoff, relocation or covered reduction in hours

§921-3.1 Extension of a mass layoff.

An employer that previously announced and carried out a short-term layoff of six (6) months or less which is being extended beyond six (6) months due to business circumstances (e.g., changes in price or cost) not reasonably foreseeable at the time of the initial layoff must give notice required under the Act and this Part as soon as it becomes reasonably foreseeable that an extension is required. A layoff extending beyond six (6) months from the date the layoff originally commenced for any other reason other than unforeseeable business circumstances shall be treated as an employment loss from the date it originally commenced. For purposes of this section, the date the layoff originally commenced shall be the date on which the first employee was laid off.

§921-3.2 Postponement of a plant closing, mass layoff, relocation, or covered reduction in hours.

- (a) If, after notice has been given, an employer decides to postpone a plant closing, mass layoff, relocation, or covered reduction in work hours for less than ninety (90) days, additional notice shall be given as soon as possible after the decision to postpone. The notice of postponement shall include reference to the earlier notice, the date (as set forth in §921-2.1(c)(4) of this rule) to which the planned action is being postponed, and the reasons for the

postponement and shall otherwise meet all the requirements of the original notice as to form, delivery, and parties entitled to notice.

(b) If the postponement is for ninety (90) days or more, a new notice which otherwise complies with all the requirements of the Act and this Part shall be provided. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing, mass layoff, relocation, or covered reduction in work hours is impending, and with the intent to evade the purpose of the Act shall constitute a violation of the Act and this Part.

SUBPART 921-4 TRANSFERS

§921-4.1 Transfers.

(a) Notice is not required when an employer offers to transfer an employee to a different site of employment within a reasonable commuting distance with no more than a six (6)-month break in employment, regardless of whether the employee accepts such employment, or when an employer offers to transfer the employee to any other site of employment regardless of distance with no more than a six (6)-month break in employment and the employee accepts within thirty (30) days of the offer or of the closing or layoff, whichever is later.

(b) The meaning of the term “reasonable commuting distance” will vary with local and industry conditions with consideration given to the geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time, provided however, in no event shall such distance exceed that which can be reasonably traveled in one and one-half hours when the site of employment is being moved to a location within the City of New York or on Long Island, or one hour when the site of employment is being moved to any other location in the state.

(c) The making of an offer of transfer beyond a reasonable commuting distance, shall not alter the obligation of the employer to provide notice under the Act or this Part.

(d) An offer of reassignment to a different site of employment shall not be deemed to be an offer of transfer if the new job otherwise constitutes a constructive discharge.

SUBPART 921-5 TEMPORARY EMPLOYMENT

§921-5.1 Temporary employment.

(a) Notice is not required if the closing is of a temporary facility, or if the closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking.

(b) The employer has the burden of proof to show that an employee clearly understood at the time of hire that the job was temporary. For purposes of this Part, “at will” employment is not “temporary” employment and providing notification to employees, at the time of hire or

otherwise, that their employment is at will and subject to termination at any time by the employer shall not constitute notice that employment is of limited duration.

(c) Employment in agriculture for tasks such as harvesting or processing, or in construction for work on a particular building or project, may be considered temporary if the worker understood at the time of hire that the job was temporary. Employment in an industry that traditionally hires temporary or seasonal employees does not, in and of itself, make an employee temporary if the employee was hired to perform a variety of jobs and tasks continuously through most of the calendar year. Giving written notice that a project is temporary with the intent of converting permanent employment into temporary work so as to avoid the requirement of notice shall be a violation of the Act and this Part.

SUBPART 921-6 EXCEPTIONS

Sec.

- 921-6.1 Exceptions, generally**
- 921-6.2 Faltering company**
- 921-6.3 Unforeseeable business circumstances**
- 921-6.4 Natural disaster**
- 921-6.5 Strikes or lockouts**
- 921-6.6 Economic strikers**
- 921-6.7 Timeliness**

§921-6.1 Exceptions, generally.

The State WARN Act allows certain exceptions under which the 90-day notice period may be reduced. The employer bears the burden of proof to show that the requirements for an exception have been met. In all circumstances set forth below, the employer must provide as much notice as possible in advance of the plant closing, mass layoff, relocation, or covered reduction in work hours to all required parties, and also include a statement of the reason for reducing the notice period. The exceptions to the standard notice required under the Act and this Part include the following:

§921-6.2 Faltering company.

(a) To qualify for this exception, the employer shall establish that at the time notice of the plant closing, mass layoff, relocation, or covered reduction in work hours would have been required:

- (1) The employer was actively seeking capital or business and identifies the specific actions taken to obtain such capital or business. For example, the employer must demonstrate its efforts to obtain financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods, or to obtain additional money, credit, or business through any other commercially reasonable method; and
- (2) There was a realistic opportunity to obtain the capital or business sought; and

(3) The capital or business sought would have been sufficient to enable the facility, operating unit, or site to avoid or postpone the plant closing, mass layoff, relocation, or covered reduction in work hours; and

(4) The employer reasonably and in good faith believed that giving notice would have precluded the ability to obtain the needed capital or business. The employer must be able to objectively demonstrate that a potential customer or financing source would have been unwilling to provide the new business or capital if notice were given.

(b) For the purposes of this Part, the employer's actions will be viewed in a company-wide context. A company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the single site of employment to be closed and doing so shall constitute a violation of the Act and this Part.

§921-6.3 Unforeseeable business circumstances.

To qualify for this exception, the employer shall establish that the plant closing, mass layoff, relocation, or covered reduction in work hours was caused by business circumstances that were not reasonably foreseeable when the 90-day notice would have been required.

(a) A business circumstance that is not reasonably foreseeable may be established by the occurrence of some sudden, dramatic, and unexpected action or condition outside the employer's control. Examples include a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, an unanticipated and dramatic major economic downturn, or a government-ordered closing of an employment site that occurs without prior notice.

(b) The employer shall exercise sound and reasonable business judgment in determining whether a business circumstance is reasonably foreseeable.

§921-6.4 Natural disaster.

(a) To qualify for this exception, the employer shall establish that:

(1) The plant closing, mass layoff, relocation, or covered reduction in work hours was a direct result of any form of a natural disaster including floods, earthquakes, droughts, storms, tidal waves, tsunamis, or similar effects of nature; and

(2) The employer provided as much notice as is practicable and available under the circumstances, whether in advance or after an employment loss caused by the disaster.

(b) Where a plant closing, mass layoff, relocation, or covered reduction in work hours occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception may be applicable.

§921-6.5 Strikes or lockouts.

(a) Nothing in this rule shall require an employer to serve written notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act (29 U.S.C. 151 et seq.). Nothing in this rule shall be deemed to validate or invalidate any

judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

(b) This exception applies to a strike or lockout that is not intended to evade the requirements of the Act.

§921-6.6 Timeliness.

If an employer is unable to provide the notice otherwise required by this Part in a timely fashion as a result of circumstances described above, it shall provide as much notice as is practicable accompanied by a statement of the basis for reducing the notice period.

SUBPART 921-7 ENFORCEMENT BY THE COMMISSIONER OF LABOR

Sec.

921-7.1 Powers of the Commissioner

921-7.2 Civil penalty

921-7.3 Violation; liability

921-7.4 Administrative review

921-7.5 Appeals

921-7.6 Distribution of back pay

921-7.7 Admissibility of decision or order

§921-7.1 Powers of the Commissioner.

(a) In any investigation or proceeding under this Part, the Commissioner has, in addition to all powers granted by law, the authority to examine any information of an employer necessary to determine whether a violation has occurred, including to determine the validity of any defense.

(b) If an employer proves to the satisfaction of the Commissioner, during the investigation or during the hearing as set forth in Section 921-7.4 below, that the act or omission that violated the Act or this Part was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the Act, the Commissioner may, in his or her discretion, reduce the amount of penalty and/or reduce the amount of the liability provided for under the Act. In determining the amount of such reduction(s), the Commissioner shall consider: (1) the size of the employer; (2) the hardships imposed on employees by the violation; (3) any efforts by the employer to mitigate the violation; and (4) the grounds for the employer's belief that its violation was made in the good faith belief that the failure to provide notice was not a violation of the Act.

(c) The Commissioner shall not have the authority to enjoin a plant closing, relocation, mass layoff, or covered reduction in work hours.

§921-7.2 Civil penalty.

(a) An employer who fails to give notice as required by the Act and this Part is subject to a civil penalty of not more than five hundred dollars (\$500) for each day of the employer's violation, which shall be imposed in the aggregate and not individually for each affected

employee or other party that failed to receive notice. The employer is not subject to a civil penalty under the Act or this Part if the employer pays all affected employees the total amounts for which the employer is liable under the Act and this Part, including back pay and all fringe benefits, within three (3) weeks from the date the employer orders the plant closing, mass layoff, relocation, or covered loss of work hours. Employers making such payments shall include with the final payment of wages or through some other form of notice provided at the time of employment termination, the following notice:

“You are also hereby notified that, as a result of your loss of employment, you may be eligible to receive unemployment insurance benefits, job retraining, re-employment services, or other assistance with obtaining new employment upon your termination. You can access reemployment information and apply for unemployment insurance benefits on the New York State Department of Labor’s website, www.labor.state.ny.us, or you may use the contact information provided on the website to contact the Department for further information and assistance.”

(b) The total amount of penalties for which an employer may be liable under the Act and this Part shall not exceed the maximum amount of penalties for which the employer may be liable under the federal law for the same violation.

(c) Any penalty amount paid by the employer under federal law that the employer demonstrates to the Commissioner’s satisfaction has been paid prior to the issuance of the Commissioner’s determination, shall be considered a payment made for the purposes of this rule.

§921-7.3 Violation; liability.

(a) An employer who fails to give notice to an employee entitled to receive notice under this Part is liable to each such employee, including part-time employees for:

(1) Back pay at the average regular rate of compensation received by the employee during the three years prior to the date of termination, or the employee’s final rate of compensation, whichever is higher. The “average regular rate of compensation” is calculated by dividing the total regular and overtime wages earned by the employee during the three years prior to the date of termination by the number of days worked over the same three year period. The “final rate of compensation” is calculated by dividing the amount received by the employee in his or her last paycheck prior to termination divided by the number of days worked.

(2) The value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost, including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan. Benefits that the Commissioner will consider shall include, but not be limited to: health benefits, private disability coverage, life insurance, employer paid retirement contributions, and vacation leave.

(b) Back pay and other liabilities under the Act are calculated for the period of the employer’s violation, up to a maximum of 60 days, or one-half the number of days that the employee was employed by the employer, whichever period is smaller.

(c) The amount of an employer’s liability, under this section, shall be reduced by the following:

- (1) Any wages, except vacation moneys accrued before the period of the employer's violation, paid by the employer to the employee during the period of the employer's violation. Wages are obtained using the same calculation in paragraph (a)(1) of this section.
 - (2) Any voluntary and unconditional payments made by the employer to the employee that were not required to satisfy any legal obligations and that the employer can demonstrate were made prior to the issuance of the Commissioner's final determination. Such payments shall be made by check or through a previously agreed upon direct deposit arrangement. Future promises to make payments through long-term severance packages shall not be credited against liability under this section.
 - (3) Any payments by the employer to a third party trustee, such as premiums for health benefits or payments to a defined contribution plan, on behalf of and attributable to the employee for the period of the violation.
 - (4) Any liability paid by the employer under any applicable federal law governing notification of mass layoffs, plant closings, relocations, or covered reductions in work hours.
 - (5) In an administrative proceeding by the Commissioner, any liability paid by the employer prior to the Commissioner's determination as the result of a private action brought under this Act.
 - (6) In a private action brought under this Act, any liability paid by the employer in an administrative proceeding by the Commissioner prior to the adjudication of such private action.
- (d) Any liability incurred by an employer under paragraph (a)(2) of this section with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

§921-7.4 Administrative review.

- (a) Within twenty (20) calendar days after the mailing or personal delivery of a notice of violation(s), the aggrieved party may appeal the determination by requesting an administrative hearing in the matter.
- (b) Hearings. Administrative hearings for violations of the State WARN Act shall be conducted by an employee of the Department of Labor designated by the Commissioner to be the hearing officer, who shall not be bound by statutory rules of evidence or by technical or formal rules of procedure. The procedures found in 12 NYCRR Part 701 -- Procedural Rules for Hearings, and Article 3 of the State Administrative Procedure Act, shall be the sole and exclusive procedures for the conduct of such hearings, notwithstanding any other provision of law. The hearing officer, as soon after the conclusion of the hearing as possible, on the basis of the record made in the proceeding, shall submit his or her report and recommendation to the Commissioner, who shall thereafter issue his or her order and determination promptly.
- (c) Determination and Order of the Commissioner. If the Commissioner shall determine that an employer has violated any of the requirements of the Act or this Part, the Commissioner shall issue an order which shall include any penalties assessed by the Commissioner, and file a notice of entry thereof in the office of the Commissioner.

§921-7.5 Appeals.

Within thirty (30) days of the filing of a notice of entry of the order in the office of the Commissioner, any party aggrieved thereby may commence a proceeding for the review thereof pursuant to article 78 of the Civil Practice Law and Rules. Such proceeding shall be commenced directly in the Appellate Division of the Supreme Court. If such order is not reviewed, or is so reviewed and the final decision is in favor of the Commissioner, the Commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the Commissioner containing the amount found to be due. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the Commissioner in the same manner, and with like effect, as the prescribed by the CPLR for the enforcement of a money judgment.

§921-7.6 Distribution of back pay.

The Commissioner shall distribute to employees entitled to notice under the Act and this Part any back pay and the value of any benefits recovered from an employer who did not provide such notice.

§921-7.7 Admissibility of decision or order.

No decision or order issued pursuant to this Act shall be admissible or used in evidence in any subsequent court proceeding except in an action by the Commissioner or the employer to implement, enforce, or challenge a determination made by the Commissioner pursuant to this Act.

SUBPART 921-8 CONFIDENTIALITY OF INFORMATION OBTAINED BY THE COMMISSIONER OF LABOR

§921-8.1 Confidentiality of information obtained by the Commissioner of Labor.

(a) Information obtained by the Commissioner through the administration of the Act from an employer and which is not otherwise obtainable by the Commissioner under the Labor Law or rules or regulations promulgated thereunder shall:

(1) be confidential; and

(2) not be published or open to public inspection except as otherwise provided in this subpart.

(b) Prior to public disclosure of any information otherwise deemed confidential pursuant to this subpart in connection with any court action or proceeding, the employer shall be given a reasonable opportunity to make application to the court to protect the information's confidentiality.

(c) Notwithstanding the provisions set forth in paragraph (a) of this subpart, information obtained by the Commissioner from the employer notice required by the Act or this Part shall not be considered confidential.