

**NEW YORK STATE WORKER ADJUSTMENT AND RETRAINING
NOTIFICATION (WARN) ACT
Labor Law Article 25-A**

Rural Flexibility Analysis

1. Types and estimated numbers of rural areas:

Employers of fifty (50) or more employees in the state who engage in plant closings, mass layoffs, relocations or reductions in work hours covered under the Act and the rule must provide notice of such employment losses under both the statute and the rule to employees, their representatives, the Commissioner of Labor and the Local Workforce Investment Board. Such employers are located throughout the state, including all of the State's rural areas.

2. Reporting, recordkeeping and other compliance requirements; other professional services:

Covered employers located in rural areas that are engaging in an action constituting an employment loss under the rule will be required to issue notices of such employment loss to the mandatory parties identified in the rule. In order to do so, they will not be required to undertake any additional reporting or record keeping requirements. We have changed the standard statement that must be given to each employee in their WARN Notice to reflect the fact that not all employers give notice prior to the date when the termination takes place. Some, especially in the financial services arena, give notice on the date of layoff along with the requisite sixty days pay.

Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state and federal laws relating to the payment of wages, workers' compensation coverage, and tax withholdings. These records identify all persons employed by the employer and allow employers to calculate the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. In order to further clarify when a WARN notice is required, we have added language from the federal regulations to make it clear that we make such determinations based upon the workers employed on the day that that notice was due.

Information regarding employees who will be affected by a plant closing, mass layoff, relocation or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Additionally, the records required to support a WARN exception claim are

records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open. Provisions of the WARN Act protect the confidentiality of such information shared with the Commissioner, eliminating employer concerns regarding disclosure of proprietary or financial information that could be damaging to the employer if generally known.

Also, if, after notice has been given, the employer determines that it will continue operations and that the plant closing, mass layoff, relocation, or reduction in work hours will not occur, the rule now requires employers to provide a notice of rescission. This notice must be given to all affected employees as soon as possible after the employer determines it will continue operations. Information regarding employees who must receive this notice would be in the employer's possession as information regarding the affected employees would have already been compiled by the employer when the initial WARN notice was given.

Rural area employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, affected employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. In an effort to assist employers with meeting this requirement, the Department has included the content of this notice in the rule.

Any employer who is cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

3. Costs:

It is impossible to predict the potential initial capital or annual costs of the rule on regulated parties in rural areas with any certainty. As noted elsewhere in this rulemaking, employers with 100 or more employees are already required to provide WARN notice for covered employment losses under the federal WARN Act. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. Some of these employers will undoubtedly be located in rural areas. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, relocation, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those rural employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to affected employees and allowing notification to affected employees by electronic mail. Additionally, the requirements regarding service of a notice of rescission, if applicable, allow employers to include this notice with paychecks and direct deposit statements or via electronic mail, which will keep costs at a minimum. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve limited circumstances in which employees may be represented by different unions, or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation or covered reduction in work hours and postpones or rescinds that action for which notice was given, that employer must also give notice of the extension, postponement or rescission as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence showing that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination. Paying employees their regular wages and benefits over the period of the violation, exceeding three weeks, does not exempt the employer from penalties.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, relocations, covered reductions in work hours or covered reductions in pay but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

To the extent that early intervention and reemployment services offered by the Department through its Rapid Response activities reduce the number of workers who will ultimately claim unemployment insurance benefits as a result of the adverse employment action, covered employers will see UI charges decrease as a result of the rule.

Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required 90-day notice, must provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate paper or electronic mail notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

4. Minimizing adverse impact:

The proposed rule is being promulgated in response to additional requests received from employers and their representatives seeking clarification and guidance on the scope and requirements of the statute creating the state WARN program. Employers that meet the triggering requirements of the state WARN Act are not exempted from coverage due to their location in a rural area. However, the Department has taken steps to minimize the adverse impact on all employers whenever feasible by including language in the rule that addresses the issues and concerns raised in these inquiries.

Wherever feasible and desirable, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. The Department will allow a single notice form to be used to satisfy both the state and federal notice requirements so long as the form contains all the information elements required under the state regulation. The Department has also drafted language to be included in the notice informing employees of the availability of Departmental programs and benefits as a service to employers. Service of notice is permitted along with paychecks, direct deposit slips, or via electronic mail should the employer choose to do so in order to avoid costs associated with separate delivery.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses in rural areas so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their rural area communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

5. Rural area participation:

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the State Association of Corporate Counsel. Individuals attending these events likely represent some clients located in rural areas. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. These efforts resulted in the Department receiving dozens of phone calls and written requests for clarification of various aspects of the law from all over the state. The Department has attempted to address all these requests for clarification in the emergency rule.

The Department intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor in all areas of the state, including rural areas, for their comment and distribution to their constituency, including those located in rural areas. These information activities will be in addition to the formal publication of the rule in the State Register.