

SUMMARY OF PROPOSED RULE
WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

The proposed rule creates a new section of regulations designated as 12 NYCRR Part 921 entitled "New York State Worker Adjustment and Retraining Notification Act" created under Chapter 475 of the Laws of 2008. This Act requires employers of fifty (50) or more employees to provide at least ninety (90) days notice to affected employees and representatives of affected employees, the New York State Department of Labor, and local workforce partners before ordering a plant closing, mass layoff, or reduction in work hours that falls within the employment losses covered by the law. At least twenty-five (25) employees must be affected for the notice requirement to be triggered. The rule contains exceptions to the notice requirement for certain employers who are making good faith efforts to avoid employment losses and have reasonable expectation that these efforts will successfully forestall the plant closing, mass layoff, or reduction in work hours.

Many employers in the State are already subject to the federal WARN Act (29 USC §§ 2101 – 2109 and 20 CFR 639.3). The State WARN Act expands the notice requirements to a larger group of employers and, concomitantly, extends its protections to more employees. The State Act also gives the Commissioner of Labor the authority to enforce the law on behalf of affected employees who did not receive appropriate notice of a plant closing, mass layoff, or covered reduction in work hours from their employer in violation of the law. Labor Law §860-f(1) states that the Commissioner of Labor "shall prescribe such rules as may be necessary to carry out this article."

Subpart 921-1, entitled "Purpose and Definitions" sets forth the purpose and defines the terms used in the part. Section 921-1.1(d) defines "employer" as "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." Section 921-1.1(a) defines "affected employee" as "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."

Subpart 921-2, entitled "Notice," requires covered employers to provide notice to affected employees at least 90 calendar days prior to an event that triggers the notice requirement. This section enumerates the factors that trigger the notice requirement. It further spells out the contents of the notice, how notice is to be served and who must receive notice.

Subpart 921-3, entitled "Extension or Postponement of Mass Layoff Period" requires an employer to give additional notice if the triggering event is extended or postponed. Section 921-3.1 states that 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., unforeseeable 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.” Section 921-3.2 states that “if, after notice has been given, an employer decides to postpone a plant closing, mass layoff, 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.” This subpart also prohibits “rolling notice”.

Subpart 921-4, entitled "Transfers," states that “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.”

Subpart 921-5, entitled "Temporary Employment," states that “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.” This subpart also makes clear that the burden of proof is on the employer to show that the job was understood to be temporary.

Subpart 921-6, entitled "Exceptions," provides exceptions to the 90-day notice period for which the employer bears the burden of proof. This subpart includes exceptions for faltering companies, unforeseeable business circumstances, natural disasters, strikes or lockouts, and economic strikers.

Subpart 921-7, entitled "Enforcement by the Commissioner of Labor,” describes the administrative procedure followed by the Department when a WARN violation is suspected or alleged. Section 921-7.2 states that an employer who fails to give notice, as required, is subject to a civil penalty of \$500 for each day of the employer’s violation. Section 921-7.3 states that an employer who fails to give notice is liable to each employee for back pay and the value of any benefits to which the employee would have been entitled. Further this subpart provides for an administrative appeal to the Commissioner and then an appeal under Article 79 of the CPLR.

Subpart 921-8, entitled "Confidentiality of Information Obtained by the Commissioner of Labor," requires that information obtained by the Commissioner through the administration of this Act be maintained as confidential and not be published or open to public inspection.