

PART 921

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

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

Subpart 921-1	Purpose and Definitions
Subpart 921-2	Notice
Subpart 921-3	Extension, Postponement or Rescission of Employment Loss
Subpart 921-4	Transfers
Subpart 921-5	Temporary or Seasonal Employment
Subpart 921-6	Exceptions
Subpart 921-7	Enforcement by Commissioner of Labor
Subpart 921-8	Confidentiality of Information Obtained by the Commissioner of Labor
Subpart 921-9	Preservation of Other Rights and Remedies

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 §860 et seq. of the New York State Labor Law.

§921-1.1 Definitions.

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

(a) *Affected employee* means an employee, whether full- or part-time, who, at the time notice is required to be given, 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 and is therefore entitled to notice. The term “affected employee” also includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual employees 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 an officer, director, shareholder, or 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 two or more branches, units, divisions, or like parts of an employer’s business operations.

(c) *Date of layoff* means the last day an employee is eligible or permitted to work for his/her employer. The fact that an employer continues to pay an employee after the date of the layoff does not change the employee’s employment status for purposes of this Part. Payments to an

employee subsequent to the date of layoff, whether continuing to pay an employee's normal weekly wage, or for severance pay, vacation pay, personal leave, and other similar benefits, shall not extend the employee's date of layoff.

(d) *Days* mean calendar days.

(e) *Employer*.

(1) *Employer* means any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees (see §921-1.1(e)(7), below) within New York State, excluding part-time employees, or fifty (50) or more employees including part-time employees within the state that work in aggregate at least 2,000 hours per week. For purposes of this Part:

(i) The calculation of total weekly hours shall include overtime hours earned on a regular basis;

(ii) *Overtime hours earned on a regular basis* shall mean any overtime hours worked by an employee when such employee has worked overtime in seven or more weeks out of the twelve weeks immediately prior to the date upon which notice was required under the Act.

(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) A receiver, trustee, debtor-in-possession, or other fiduciary, where those terms are applicable under the provisions of the U.S. Bankruptcy Code (Title 11 of the United States Code), or any other provision of federal or state law where such party is responsible for continuing operations of the business entity, is considered an employer under this Part.

(4) Where a client-employer of a professional employer organization (PEO) has worksite employees under Article 31 of the Labor Law, such employees, with the exception of the client-employer's officers, directors, shareholders or partners, are employees of the client-employer for purposes of this Part.

(5) An employer may have one or more sites of employment under common ownership or control.

(6) (i) The term *employer* shall not include the federal or state government or any of their political subdivisions, including any unit of local government or any school district, any public authority, public benefit corporation, board, or commission, or any federally recognized Indian tribal government.

(ii) Private for-profit and not-for-profit businesses contracting with such exempted governmental entities are employers.

(7) Number of employees: In reaching a determination whether an employer meets the threshold of fifty (50) employees for purposes of establishing coverage as an employer under this rule:

- (i) All individuals employed at a single site of employment, other than part-time employees, are counted as employees for purposes of determining coverage as an employer.
- (ii) Individuals on temporary layoff or on leave who have a reasonable expectation of recall, other than part-time employees, are counted as employees. An employee has a reasonable expectation of recall when the employer can demonstrate that it notified the employee that his/her employment has been temporarily interrupted and that he/she will be recalled to the same or a similar job, or when the employee is notified through industry practice.
- (iii) The point in time at which the number of employees is to be measured for the purpose of establishing coverage is the date the first notice is required to be given.

(f) *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, as defined in §921-1.1(i), that exceeds six months in duration; or
- (iii) A reduction in hours of work of more than fifty percent (50%) during each month of any consecutive six-month period:

(A) For either:

(1) At least twenty-five (25) employees constituting at least 33% of the employees at the site (excluding part-time employees); or

(2) 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 (excluding part-time employees).

(B) 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 Title 7-A of Article 18 of the New York Labor Law, provided however, that

should the employer become aware at any point during its participation in the shared work program that an employment loss not subject to this exception will occur, the employer shall provide as much notice of the employment loss as is practicable accompanied by a statement of the basis for reducing the notice period.

(C) For purposes of this provision, the “consecutive six-month period” shall begin with the first month in which the employee experiences a reduction of more than fifty-percent (50%) and shall continue for a period of twenty-six (26) weeks beginning with the first week in which there was a reduction in hours compared with the previous week.

- (iv) A plant closing as defined in §921-1.1(m) affecting twenty-five (25) or more employees, excluding part-time employees.
- (v) A relocation as defined in §921-1.1(n) affecting twenty-five (25) or more employees, excluding part-time employees.

(2) An employee does not suffer an employment loss while he/she 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, or otherwise trigger an employment loss as set forth above.

(3) Employment loss shall include a plant closing, mass layoff, covered reduction in work hours, or relocation that is a result of a bankruptcy filing or the sale of a business (see §921-2.1(b)).

(g) *Facility* means a building or other location in which the business operations of an employer takes place.

(h) *Hours of work* shall generally mean the average hours of work per week for each employee during the previous calendar year. If the employee did not work for at least 90 days during the previous calendar year, hours of work shall mean the average hours of work per week for the 90-day period prior to the date on which notice was due. Overtime hours will be included, if applicable, as described in §921-1.1(e)(1).

(i) *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, beginning on the date of the first employment loss, for either:

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

(j) *Merger* means a combination of all or part of the business operations of two separate employers.

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

(l) *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 employees 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 was employed or the ninety (90) day period immediately prior to the date on which notice is required shall be used.

(m) *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 of 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 constitute an “employment loss” under the Act.

(n) *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 where 25 or more employees, excluding part-time employees, suffer an employment loss. 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.

(o) *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.

(p) *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 physically 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. Where an employer has two separate locations in the same geographic area and the purpose of one location is to support the operations of the other location, and this support requires travel between the two locations, the two locations will be considered a single-site.

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

(v) Non-contiguous sites in the same geographic area that have separate management, produce different products or provide different services, and have separate workforces do not constitute a single site of employment.

(vi) The single site of employment for employees 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 employees, bus drivers, salespersons), shall be the site to which they are assigned as their employer's home base, from which their work is assigned, or to which they report.

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 covered by this rule unless, at least 90 calendar days prior to such mass layoff, plant closing, relocation or covered reduction in work hours, 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) Where an employer has sold all or part of a business, the selling employer shall be responsible for providing notice for any plant closing, mass layoff, relocation or a covered reduction in hours connected with such sale to any affected employees 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 to any affected employees included in such sale for any plant closing, mass layoff, or a covered reduction in hours. Any individual who is an employee of the selling employer as of the effective date of the sale and who is included in such sale shall be considered an employee of the purchasing employer immediately after the effective date of this sale. A promise of employment by the buyer to an employee does not relieve the seller of the obligation to provide notice.

(c) Where a consolidation of all or part of a business is accompanied by an employment loss, the original business entity is responsible for providing required notice. If employees are employed at the consolidated business for one day or more at the time notice would become due, the new business entity is responsible for notice.

(d) Where a merger is accompanied by an employment loss, the original business entity is responsible for providing required notice. If employees are employed at the merged business for one day or more at the time notice would become due, the new merged business entity is responsible for notice; therefore, as of the date of the merger, the merged entity is the employer for all employees who worked for the employers involved in the merger.

(e) *Scope of employment action.* In deciding whether notice is required the employer shall:

(1) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate, for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement; and

(2) Look ahead 90 days and behind 90 days from the date of each employment action to determine whether actions constituting employment losses within the meaning of this Part, both taken and planned, each of which separately is not of sufficient size to trigger the notice requirement will in the aggregate, for any 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.

(i) Employees previously given notice pursuant to the 30-day look ahead/look behind period, shall not be aggregated with other employees suffering employment losses during a given 90-day period in order to require that notice be given to the employees who would not otherwise be covered.

(f) *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) An employer eligible for a reduction in notice required under this Rule pursuant to the provisions of Subpart 921.6 shall include with its notice a statement of the reasons for reducing the notice provided and a factual explanation of the basis for claiming entitlement to such reduced notice period.

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

§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. If first class mail is used, notice must be postmarked at least ninety (90) days prior to separation.

(b) Notice to the affected employees may also be served by:

(1) Insertion of the notice into envelopes containing pay or envelopes containing receipts for direct deposit of pay; or

(2) Electronic mail (e-mail). E-mail notification may be utilized only where all affected employees have regular access in the workplace to personal computers at which e-mail may be received and viewed during work hours. If an employer elects to use electronic mail to provide notice to employees, the employer must be able to demonstrate that an e-mail notice was received by each affected employee. The employee e-mail addresses used to give notice must be addresses provided to the employees by the employer and used in the conduct of business. The e-mail notice must be identified as "urgent." Where an e-mail notice to an individual employee is returned to sender as undeliverable, notice must be provided to the employee as expeditiously as possible, e.g., overnight delivery, hand delivery, inter-office mail, etc. In any circumstance in which delivery of notice takes more than five days, the employer must extend the period of notice given to the employee by the number of days which elapsed between the date notice was first attempted and the date on which notice was finally effectuated.

(c) All notices must be sent on official letterhead of the employer or via the employer's computer network 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. The employer representative must have the authority to bind the employer and must attest to the truthfulness of all information provided in the notice.

(d) 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) (LWIB) where the site of employment is located. Service upon the “chief elected official of the unit of local government within which such closing or layoff is to occur” as required under the federal WARN statute does not constitute service on the LWIB unless such chief elected official is the LWIB contact listed on the Department’s website. Note: Service on the LWIB as required under the State WARN Act does not satisfy the requirement to serve the chief elected official set forth under the federal WARN Act unless such chief elected official is the contact for the LWIB listed on the Department’s website.

(e) Notice to the Commissioner of Labor may be mailed or faxed with a hard copy to follow in the mail, to the following address:

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

(f) Notice(s) to the local Workforce Investment Board(s) may be mailed to the Board’s contact listed on the Department’s website.

(g) 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 employees 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. Notice to an affected employee is to be provided in a language understandable to the employee. As used in this Subpart, the term “expected date of the first separation” 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. Notice required under this Part 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 and telephone number of an employee representative to contact for further information;
- (4) The name of the employer's liaison with the Department for purposes of providing rapid response services to affected employees;
- (5) The names and addresses of the employees to be laid off and their job titles;
- (6) The expected date of the first separation of employees and the anticipated schedule of separations;
- (7) A statement as to whether bumping rights exist;
- (8) 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;
- (9) A statement as to whether the other notices required under the Act and this Part have been given, including the date notices were sent; and
- (10) A statement as to the means of delivery utilized to deliver notice to affected employees.
- (11) A sample of the notice provided to employees and to the employee representative(s).

(b) Notice to each affected employee:

- (1) The expected date of the first separation of employees 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;
- (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 employment loss, you may be eligible to receive job retraining, re-employment services, or other assistance with obtaining new employment from the New York State Department of Labor or its workforce partners upon your termination. You may also be eligible for unemployment insurance benefits after your last day of employment. Whenever possible, 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. If your job has already ended, you can also access reemployment information and apply for unemployment insurance benefits on the Department’s website or you may use the contact information provided on the website or visit one of the Department’s local offices for further information and assistance.”; and

(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 and addresses of the employees to be laid off and their job titles;
- (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 employment loss, individuals represented by you may be eligible to receive job retraining, re-employment services, or other assistance with obtaining new employment upon termination. These individuals may also be eligible for unemployment insurance benefits after their last day of employment. Whenever possible, the New York State Department of Labor will contact the employer to arrange to provide additional information regarding these benefits and services to these individuals through workshops, interviews, and other activities that will be scheduled prior to the time

their employment ends. If their jobs have already ended, they can also access reemployment information and apply for unemployment insurance benefits on the Department's website or they may use the contact information provided on the website or visit one of the Department's local offices to obtain further information and assistance.”;

- (8) A statement as to whether the notices to the Commissioner of Labor and the local Workforce Investment Board have been given, including the date notices were sent; and
- (9) A statement as to the means of delivery utilized to deliver notice to affected employees.
- (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) The name and telephone number of the employee representative to contact for further information;
 - (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 job titles of positions to be affected, and the number of affected employees in each job title;
 - (7) A statement as to whether bumping rights exist;
 - (8) The name of each union representing affected employees, and the name and address of the chief elected officer of each such union;
 - (9) A statement as to whether the other notices required under the Act and this Part have been given, including the date notices were sent; and
- (10) A statement as to the means of delivery utilized to deliver notice to affected employees.

**SUBPART 921-3
EXTENSION, POSTPONEMENT, OR RESCISSION OF EMPLOYMENT LOSS**

Sec.

921-3.1 Extension of a mass layoff period.

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

921-3.3 Rescission of notice of a plant closing, mass layoff, relocation, or covered reduction in hours.

§921-3.1 Extension of a mass layoff period.

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, notice of postponement 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 §921-2.3(a)(6) 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.

§921-3.3 Rescission of notice of a plant closing, mass layoff, relocation, or covered reduction in hours.

(a) If, after notice has been given, an employer determines that it will continue operations, and the announced plant closing, mass layoff, relocation, or covered reduction in hours will not occur, the employer shall give a notice of rescission as soon as possible after determining that the plant closing, mass layoff, relocation or covered reduction in hours will not occur. The notice of rescission shall include reference to the earlier notice, the reason why such action is no longer required, and shall meet all the requirements of the original notice as to parties entitled to notice.

(b) Acceptable forms of delivery of this notice to affected employees include all the methods set forth in §921-2.2 of this rule.

**SUBPART 921-4
TRANSFERS**

§921-4.1 Transfers.

(a) Notice is not required when:

(1) 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

(2) 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) 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.

(c) For purposes of this part, *reasonable commuting distance* is the distance an individual could be reasonably expected to commute to his/her job and is determined solely for purposes of transfers. Reasonable commuting distance will vary with local 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.

SUBPART 921-5 TEMPORARY OR SEASONAL EMPLOYMENT

Sec.

921-5.1 Temporary employment

921-5.2 Seasonal employment

§921-5.1 Temporary employment.

(a) Notice is not required 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 project or undertaking.

(b) The employer must demonstrate that it informed each employee 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 an industry that traditionally hires temporary 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.

§921-5.2 Seasonal employment.

- (a) Notice is not required if the closing or layoff results from the completion of a particular seasonal project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the seasonal project or undertaking.
- (b) The employer must demonstrate that it informed each employee at the time of hire that the job was seasonal.
- (c) Employment in an industry that traditionally hires seasonal employees does not, in and of itself, make an employee seasonal if the employee was hired to perform a variety of jobs and tasks continuously through most of the calendar year.

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 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, i.e. when the employer asserts a defense in mitigation or exemption from the requirements of the Act or this part, the employer must provide documentation in support of the claimed exception. 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 and a factual explanation of the basis for claiming entitlement to such reduced notice period. The exceptions to the standard notice required under the Act and this Part include those set forth in Sections 921-6.2 through 921-6.5 of this Part.

§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 commercially 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 still 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; (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; (5) the employer's good faith cooperation with the Commissioner's request for additional information necessary to his/her enforcement of the Act and this Part; and (6) the truthfulness of the information provided in response to the Commissioner's inquiries.

(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 only if the employer pays each affected employee the total amount 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 employee's date of layoff, as defined in §921-1.1(c), due to a plant closing, mass layoff, relocation, or covered reduction of work hours. Paying employees their regular wages and benefits over the period of the violation (that exceeds three weeks) does not exempt the employer from the civil penalty. Employers making such payments shall include with the final payment of wages or through some other form of notice provided at the time such payment is made, the following notice:

“You are hereby notified that, as a result of your employment loss, you may be eligible to receive job retraining, re-employment services, or other assistance with obtaining new employment from the New York State Department of Labor or its workforce partners. You may also be eligible for unemployment insurance benefits after your last day of employment. You can access reemployment information and apply for unemployment insurance benefits on the Department's website, and you may also use the contact information provided on the website or visit one of the Department's local offices to obtain 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. For calculations involving salary or commission employees, the number of days worked is the number of days the employee was in active employment status.

- (2) In the case of an employee who became an employee of his/her current employer through a merger or consolidation of his/her former employer with/into his/her current employer, such employee's history of wage and benefit payments from his/her prior employer shall be treated as if such wages and benefits were earned with his/her current employer for purposes of making any calculations that are required under this Part, including the payment of back wages and benefits due.
- (3) 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 liability under the Act is 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. Severance packages or other payments required pursuant to employee contracts, collective bargaining agreements, through other legal obligations, or under law shall not be credited against liability under this section. Promises to make future payments 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) 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.

(e) The period of the violation, for which the employer is liable to each employee, begins on the date of the employee's employment loss and continues up to 90 days after the date the employee received notice. Where the employer failed to provide notice, the period of the violation is 90 days. Where the employer claims exemption from the notice requirements under one of the exceptions provided for in the Act, the Commissioner will consider all information obtained during the investigation and determine when it would have been practicable for the employer to provide notice, if at all.

(f) A WARN Act violation may be shared with other public entities making fitness, responsible contractor, or due diligence inquiries.

§921-7.4 Administrative review.

(a) Should the Commissioner identify any violations of the WARN Act or this Part, he or she shall notify the employer of such violations and the amounts due for wages, benefits, and/or penalties associated with such violations. Such violations may, in the Commissioner's discretion, be set forth in the first instance in either a Notice of Violation or a Notice of Violation accompanied by a Notice of Hearing. In no event shall the Commissioner issue an order or determination addressing such violations without having first held a hearing in the matter, except in those cases in which the employer has waived its right to such hearing pursuant to a settlement upon terms acceptable to the Commissioner

(b) Hearings. Administrative hearings for a violation 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 procedure found in 12 NYCRR Part 701, Procedural Rules for Hearings, shall be the sole and exclusive procedure 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 promptly thereafter issue his or her order and determination.

(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 judicial 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 orders 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 all 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) Except as otherwise provided in this subpart 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.

(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) Names and addresses of employees provided to the Commissioner pursuant to Labor Law section 860-b and 12 NYCRR 921-2 shall remain confidential.

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

**SUBPART 921-9
PRESERVATION OF OTHER RIGHTS AND REMEDIES**

§921-9.1 Other Rights.

The provisions of this Part, including but not limited to notice requirements, shall not be used to alter, abridge, or affect the employment status or rights of any employee entitled to relief under this Act, where the employee's status or rights have been otherwise defined or determined by statute, contract or collective bargaining agreement. The rights and remedies provided to employees by the Act and its regulations are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by the Act shall run concurrently with any period of notification required by contract or any other statute.

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.