

TEXT

Sections 921-1.1, 921-2.1, 921-2.2, 921-2.3, 921-3.1, 921-4.1, 921-6.1, 921-6.2, 921-6.3, 921-6.6, 921-7.1, 921-7.3, 921-7.7, and 921-8.1 of Title 12 of the New York Codes, Rules, and Regulations are amended as follows.

The introductory text and subdivisions (a), (c), (e), (f), (l), (o) are amended and a new subdivision (q) is added to Section 921-1.1 (Definitions) as follows:

As used in this Part (rule), Act shall mean the New York State Worker Adjustment and Retraining Notification (WARN) Act (Article 25-A of the New York State Labor Law). Additionally, the [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 a 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, member of an LLC, or business partner with a ten percent or greater ownership interest, 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.

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(c) Date of layoff means the last day an employee is eligible or permitted to work for [his/her] their 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.

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(e) Employer.

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(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, including individuals who work remotely but are based at the employment site, 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] their employment has been temporarily interrupted and that [he/she] the employee 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]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 (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]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]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.

(d) For purposes of this provision, a "temporary layoff" is a mass layoff with a duration of less than a consecutive six-month period and a planned return of employees after the layoff period ends, which will not be deemed to be subject to the notice requirements set forth in this Part. A "permanent layoff" is a mass layoff that extends beyond a consecutive six-month period for which the employer must comply with the notice requirements in this Part from the time of the employment loss.

(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] the 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, or otherwise trigger an employment loss as set forth above.

* * *

(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/she] the employee was employed or the ninety (90) day period immediately prior to the date on which the notice is required shall be used.

* * *

(o) Employee [R] 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.), 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.

* * *

(g) Local Board means a Local Workforce Investment Board as defined by the Workforce Investment Act, or a Local Workforce Development Board as defined by the Workforce Innovation and Opportunity Act, or any similar local workforce board defined under a federal law which amends or supersedes the Workforce Innovation and Opportunity Act or its successors.

Subdivisions (a), (b), and (e) of Section 921-2.1 (Notice, generally) are amended as follows:

(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] before such order takes effect, 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] purchasing employer to an employee does not relieve the [seller] selling employer of the obligation to provide notice. If the transfer of employees is a good faith condition of the

purchase agreement, and that condition is not upheld by the purchasing employer, the purchasing employer is obligated to provide notice and the selling employer is relieved of such obligation.

* * *

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

(1) Shall [L]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) Shall [L]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[.]; and

[(i) (3) Shall not aggregate [E]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.

Subdivisions (c), (d), (e), and (f) of Section 921-2.2 (Service of notice) are amended as follows:

* * *

(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 acting as the agent of the employer 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]'s agent 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] Employee representatives;
- (3) The Commissioner of Labor; [and]
- (4) The [local Workforce Investment] Local Board[(s) (LWIB)] where the site of employment is located.

(i) 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] Worker Adjustment and Retraining Notification Act does not constitute service on the [LWIB] Local Board unless such chief elected official is the [LWIB] Local Board 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.]

- (5) The chief elected official of the unit or units of local government where the site of employment is located;
- (6) The school district or districts where the site of employment is located;
- (7) The locality that provide(s) police, firefighting, emergency medical or ambulance services, or other emergency services, to the locale where the site of employment is located. Where two or more villages, towns, cities, counties, or a combination therefore provide the above services, each locality that provides the services must be notified; and
- (8) Any other individual or entity identified in the Act.

(e) Notice to the Commissioner of Labor [may be mailed or faxed with a hard copy to follow] must be provided electronically in the [mail, to the following address:] manner proscribed by the Commissioner of Labor identified on the Department's website, or through an alternative method approved by the Commissioner.

[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] Local Board(s) may be mailed to the Board's contact listed on the Department's website.

Subdivisions (a), (b), (c), and (d) of Section 921-2-3 (Contents of notice) are amended as follows:

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 complete legal business name, and any business names used in the operation of the business, and address of the employment site(s) where the plant closing, mass layoff, relocation or covered reduction in work hours will occur;
- (2) The name, business address and telephone number, and email address(es) of [an] the agent of the employer [representative] to contact for further information;
- (3) The name, business address and telephone number, and email address(es) of an employee representative to contact for further information[;], including the name of each employee representative of such affected employees, and the name, business address, telephone number, and email address of the chief elected officer of such employee representative;

(4) The name, business address and telephone number, and email address(es) 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;]

The name, address (including home address), personal telephone number(s), personal email address(es) (if known), job title, and work locations of each employee to be laid off. For each employee, notice must also identify whether the employee is paid on an hourly, salary, or commission basis, whether the employee is part-time or full-time, and any affiliation to an employee representative;

(6) The expected date of the first separation of [employees] each employee and the anticipated schedule of any additional 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)[.];

(12) The total number of full-time employees in New York State and at each affected site, as well as the number affected employees at each affected site;

(13) The total number of part-time employees in New York State and at each affected site, as well as the number affected employees at each affected site; and

(14) Any additional information required by the Commissioner.

(b) Notice to each affected employee:

(1) The complete legal business name and any business names used in the operation of the business, the address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur, and t[T]he expected date of the first separation of employees and the date [whether] 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, business address and telephone number(s), and email address(es) of [an] the agent of the 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

(6) Any additional information known at the time of the notice and relevant to the separation, including but not limited to information on severance packages or financial incentives if the employee remains and works until the effective date of the mass layoff, relocation or employment loss, available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration.

(c) Notice to [representative(s) of the affected employees] employee representatives:

(1) The complete legal business name and any business names used in the operation of the business 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] business address, telephone number(s), and email address(es) of the agent 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 any additional separations;

(6) The [names and addresses of the employees to be laid off and their job titles] name, address (including home address), personal telephone number(s), personal email address(es) (if known), job title, and work location of each employee to be laid off;

(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 other notices [to the Commissioner of Labor and the local Workforce Investment Board] required under the Act and this Part 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 and other individuals or entities identified in the Act:

(1) The complete legal business name and any business names used in the operation of the business and address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur;

(2) The name, business address and telephone number(s) and email address(es) of the agent of the employer [representative] to contact for further information;

(3) The name, business address and telephone number(s), and email address(es) 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, as defined in this Part, 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 any additional 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] employee representative of such affected employees, and the name [and], address, telephone number, and email address of the chief elected officer of each such [union] employee representative;
- (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.

Section 921-3.1 (Extension of a mass layoff period) is renamed and amended as follows:

§ 921-3.1 Extension of a [mass] temporary layoff period

An employer that previously announced and carried out a [short-term] temporary 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, subject to a determination by the Commissioner of eligibility for such exception, shall be treated as [an employment loss] a permanent layoff from the date [it] the layoff 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.

Subdivision (c) of Section 921-4.1(Transfers) is amended as follows:

* * *

(c) For purposes of this part, reasonable commuting distance is the distance an individual could be reasonably expected to commute to [his/her] their 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.

Section 921-6.1 (Exceptions, generally) is amended as follows:

The [State WARN] Act [allows] sets forth 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] is practicable in advance of the plant closing, mass layoff, relocation, or covered reduction in work hours to all required parties[, and also include]. An employer seeking to rely on an exception in the Act and Subpart 921-6 of this Part shall provide a statement of the reason for reducing the notice period and [a factual explanation of the basis for claiming entitlement to] any other documents required by the Commissioner to establish eligibility to claim 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 and the process for review of an application for an exception to apply set forth in Section 921-6.6 of this Part shall apply only to determinations of eligibility by the Commissioner.

If an employer is unable to provide the notice as required by the Act as a result of circumstances described in this section, it shall still provide as much notice as is practicable accompanied by a statement of the basis for reducing the notice period.

Subdivision (a) of Section 921-6.2 (Faltering company) is amended as follows:

(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] This exception applies only to plant closings as defined under the Act. An employer qualifies for a reduced notice under this exception if at the time notice 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, if obtained, to enable [the facility, operating unit, or site] employer 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. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.

Subdivision (a) of Section 921-6.3 (Unforeseeable business circumstances) is amended as follows:

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, a public health emergency, including but not limited to a pandemic, that results in a sudden and unexpected closure, a terrorist attack directly affecting operations, or a government-ordered closing of an employment site that occurs without prior notice.

New subdivisions (a), (b), (c), and (d) are added to and Section 921-6.6 (Timeliness) is renamed and amended as follows:

§ 921-6.6 [Timeliness] Eligibility for exception

[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.]

(a) An employer cannot be eligible for a reduction or excusal of the notice requirement in the Act pursuant to any exception set forth in this Subpart without a determination by the Commissioner that the employer established all elements of the claimed exception.

(b) Submitting Request. The employer must present a request for consideration for eligibility for a claimed exception in addition to the required notice to be provided to the Commissioner. The request shall be submitted within ten business days of the required notice being provided to the Commissioner, unless an extension of time is granted by the Commissioner.

(c) Documentation. The Commissioner shall require the employer to provide documentation demonstrating the applicability of an exception set forth in Sections 921-6.2 through 921-6.5 of this Part. Such documentation may include but not be limited to the following:

(1) Faltering Company and Unforeseeable Business Circumstances.

(i) A written record consisting of documents relevant to the determination of whether the employer was actively seeking capital or business, or that the need for notice was not reasonably foreseeable as specified by the department; and

(ii) An affidavit verifying the contents of the documents contained in the record.

The affidavit shall contain a declaration signed under penalty of perjury by an individual authorized by the employer stating that the affidavit and the contents of the documents contained in the record submitted pursuant to this subdivision are true and correct.

(2) All other exceptions set forth in this Part.

(i) A statement setting forth the reason for the need to close the business, perform a mass layoff or reduce work hours;

(ii) A description for the basis for a total exemption from the notice requirement or a reduced period of notice;

(iii) Documents relevant to a determination of whether the employer is eligible to avail itself of any of the other exception listed in this Part or the Act; and

(iv) An affidavit as required above in this subsection.

(d) Determination by the Commissioner. The Commissioner will notify the employer of its determination upon completion of an investigation into the relevant facts and circumstances, including a review of the documentation provided by the employer in support of the requested eligibility for one of the exceptions listed in this Part or the Act. If the Commissioner determines that the employer failed to establish the elements of any exception, the Commissioner will continue the enforcement action for determining the employer's liability for violation of the Act.

Subdivision (b) is amended and subdivision (d) is added to section 921-7.1 (Powers of the Commissioner) as follows:

* * *

(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] their enforcement of the Act and this Part; and (6) the truthfulness of the information provided in response to the Commissioner's inquiries.

* * *

(d) Investigation. After reviewing the information gathered as set forth in this Part or the Act, the Commissioner shall determine whether a violation of the Act has occurred. If the Commissioner needs additional information to determine if a violation of the Act has occurred, the Commissioner may either notify the employer or employer's agent in writing or convene an investigative conference to gather additional information. Upon receipt by the Commissioner of written consent from employer, the employer's agent may attend on the employer's behalf at the investigative conference. An employer may be accompanied at the investigative conference by an attorney or representative. The Commissioner shall notify the employer or the employer's agent of the results of the investigation.

Subdivision (a) is amended and subdivision (g) is added to section 921-7.3 (Violation; liability) as follows:

(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.]

(i) Calculation for employees receiving hourly based pay. 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 hours worked over the same three-year period. The "final rate of compensation" is calculated by dividing the amount received by the employee in their last paycheck prior to termination divided by the number of hours worked.

(ii) Calculation for employees receiving pay other than hourly based pay. 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 their last paycheck prior to termination divided by the

number of days worked. 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] their current employer through a merger or consolidation of [his/her] their former employer with/into [his/her] their current employer, such employee's history of wage and benefit payments from [his/her] their prior employer shall be treated as if such wages and benefits were earned with [his/her] their current employer for purposes of making any calculations that are required under this Part, including the payment of back wages and benefits due.

* * *

(4) Where the Commissioner determines that an employer has failed to provide sufficient wage, hour, or benefit information to calculate such employer's liability in accordance with the methodologies outlined in this section, the Commissioner may use alternative methodologies using any available data, information, and statistics to calculate such employer's liability.

* * *

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

* * *

(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 p]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.

* * *

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

(g) Payments In Lieu Of Notice of Separation or Layoff.

(1) Amounts paid or payable by an employer to an individual in lieu of notice of separation or layoff, except for payments related to an employer's violation of the Act, shall be treated as wages with respect to the period of notice, provided that the following conditions are met:

(i) There must be an employment agreement or a uniformly applied company policy that requires that the employing unit give the employee a definite period of notice before a layoff or separation; and

(ii) The employee must be laid off or separated without the required notice; and

(iii) The employing unit must pay the employee a sum equal to the employee's regular wages and the value of the costs of any benefits, or an amount computed in accordance with a formula based on the employee's past earnings and benefits costs, for the required period of the notice.

(2) Amounts paid or payable by an employer to an individual in lieu of notice of separation or layoff that do not satisfy the conditions set forth in paragraph (1) of this subdivision shall be treated as severance pay except for payments that qualify as vacation pay in connection with a layoff or separation and are not related to an employer's liability for violation of the Act.

Subdivisions (a) and (b) of Section 921-7.4 (Administrative review) are amended as follows:

(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.

Subdivision (c) is amended and a new subdivision (e) is added to Section 921-8.1 (Confidentiality of information obtained by the Commissioner of Labor) as follows:

* * *

(c) Names[and], addresses, and other personally identifiable information of employees provided to the Commissioner pursuant to Labor Law section 860-b and 12 NYCRR 921-2 shall remain confidential.

* * *

(e) Nothing in this Subpart shall be construed to prohibit disclosure of information that would otherwise be deemed confidential pursuant to this Subpart where such information is used in the course of an enforcement action or proceeding, including but not limited to an investigative conference pursuant to subdivision (c) of section 921-7.1 of this Part or a subsequent hearing.