

April 1, 2009

**Comments from The Business Council of New York State, Inc. on the
Emergency/Proposed Rule Making on Part 921 New York State Worker
Adjustment and Retraining Notification (WARN) Requirements**

Section 921-1.1(d)(4)

The responsibilities of the selling employer and purchasing employer are clear. The last sentence seems unnecessary and is confusing. Federal regulations and the state statute include this language within the "notice" sections. The Business Council believes this is more consistent with the intent. We would also support inclusion of language in the regulation similar to that found in federal guidance which stipulates "No notice is required if the sale does not result in a covered plant closing or mass layoff" to clarify that merely a sale of a facility should not trigger a state WARN notice.

Section 921-1.1(e)(2)

Constructive discharge is not defined in the draft regulations so it is unclear what the process is by which NYSDOL or an employer will determine if transfer to an employer program such as retraining or job search is a constructive discharge or involuntary termination. The phrase beginning with "such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination." should be deleted

Section 921-2.1(e)

The *Additional notice requirements* reaches beyond the scope of the statute. The purpose of Part 921 is to lay out the administrative requirements of the Act and the obligations of employers. Authorizing additional notice requirements beyond the statute and these draft regulations, which are then not defined, not only exceeds the scope of the statute but ensures confusion and will impede compliance. The statute provides specific language which permits governmental entities to require additional or earlier notice as a condition for the receipt of economic development incentives. The proposed regulation expands the statutory authority to include "grant" or "contract" as options where additional notice requirements may be imposed. Both terms are so overly broad as to cause confusion and inconsistency in compliance and application. It should not be presumed that, particularly within large employers, the terms and conditions of a given contract or grant are widely known and understood across the entire organization, including that staff which may be tasked with ensuring compliance with this statute. The language in the proposed *additional notice* regulation should be limited to only that category of government incentives found within the statute.

Section 921-2.2(a)

The draft regulation should acknowledge the electronic world as an appropriate means of compliance with the notification requirements in the statute and reflective of how organizations communicate with their employees. The statute is silent on this issue and the draft regulations provide no background on how the decision was



reached to automatically exclude electronic communication. The Business Council supports including email as one of the allowable methods employers may use in ensuring compliance with employee notification requirements. The employee email addresses could be restricted to those provided to an employee by an employer used in the conduct of business. Personal email addresses would not be applicable. The burden of proof that the notice was received electronically would rest with the employer. Current systems have a receipt feature for the kind of documentation that this regulation requires.

This email notification option The Business Council proposes would only apply to employee notification. Other parties would continue to be notified by first-class mail or personal delivery.

Section 921-2.2(4)

Please clarify that notification to the local Workforce Investment Board(s) constitutes compliance with notification to the chief elected official as found in 20 CFR 639.7.

Section 921-2.3(a)(4)

The state statute stipulates that an "employer required to give notice ...under this article shall include in its notice the elements required by the federal Worker Adjustment and Retraining Notification Act." 20 CFR 639.7 (4)(e) identifies the elements which must be provided to the state dislocated worker unit, which it is presumed in this instance is receiving the information on behalf of the Commissioner of Labor. 20 CFR 639.7(4)(e)(4) requires the "job titles of positions to be affected, and the number of affected employees in each job classification."

The proposed regulation expands the notification scope beyond that found in the state statute and federal regulations to require the inclusion of the names of affected employees, in addition to their job titles. The Business Council considers the listing of employee names in the Commissioner's notice as a breach of confidential employee personal information in addition to going beyond the authority provided in the statute and requests that it be removed. The regulations provide no context for expanding the scope to include employee names.

Losing one's employment is unsettling enough. With the increased timeframe of 90 days within which employers must now provide notification, reductions in force become a much more fluid event. Much can and does happen within 90 days and other activities may result in substantially fewer employees losing employment. Release of names beyond the scope of that required under the federal WARN does not provide potentially impacted employees with any preferred service status. The possibility of employees' names being available to outside parties for unknown uses in the future reaches beyond a 'notification act' particularly when an employer is required under Section 921-2.2(c)(1) to notify the employee directly. The job titles of the positions affected and the number of affected employees in each job title is sufficient information to execute the purpose of the federal and state Act. At the initial employee orientation meetings conducted by the DOL or local workforce board staff, affected employees will have the choice to access services for which they may be eligible. Applying for unemployment insurance benefits will also provide DOL or local workforce agency staff with the necessary information needed to commence services.

Section 921-2.3(b)(5), (c)(7),

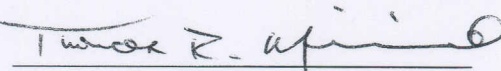
The language contained within the information required may cause confusion to recipients, as it will be provided 90 days prior to any *potential* separation from employment. Individuals may interpret the required information to be included as appropriate timing for them to actually apply for unemployment insurance benefits and/or to voluntarily separate from employment prior to any separation date. The Business Council believes this required language needs further refinement to minimize confusion and clarify timelines within which an individual should act, if required language is to be included in final regulations.

Section 921-4.1(d)

As noted in The Business Council's comments on Section 921-1.1(e)(2), no definition is provided on constructive discharge making this section unclear in terms of understanding or compliance.

Section 921-8.1(c)

Consistent with The Business Council's comments on Section 921-2.3(a)(4), we believe the release of employees' names as part of the Commissioner's notice is beyond the authorization provided in statute and that this information is confidential. The statement within this regulation that information obtained from the employer notice required by this Act shall not be considered confidential affirms our understanding that the employee names can and will be used for purposes beyond the scope of the Act. If the Department chooses not to take individual privacy concerns under consideration before issuing final regulations, The Business Council would request that the Department be required to notify in writing all potentially impacted employees of any intended use and distribution of their names by the Department and the purposes for which that information was shared.


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