New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

February 3, 2009

[redacted]

Re: Our File No. RO-09-0004

Dear [redacted]

I am writing in response to your letter dated January 22, 2009, concerning the interpretation of the New York State Worker Adjustment and Retraining Notification (WARN) Act which took effect February 1, 2009. The State WARN Act is a Department of Labor legislative proposal recently enacted into law as chapter 475 of the laws of 2008. You have requested clarification as to how the occurrence of a layoff being considered by one of your employer clients would affect that employer's duty to provide a State WARN notice. The Department also filed Emergency/Proposed regulations with the Secretary of State on January 30, 2009 to provide regulated parties with further guidance regarding enforcement and interpretation of the Act. These rules became effective immediately upon filing.

The WARN Act requires notice when there is a layoff of 25 employees and 33% of the employees at a single site of employment. In your letter, you ask for the definition of a "single site" of employment. The new regulations define "single site of employment" as follows:

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

Phone: (518) 457-3665 Fax: (518) 457-1164
W. Averell Harriman State Office Campus, Bldg. 12, Room 508, Albany, NY 12240

www.labor.state.ny.us USCSJL@labor.state.ny.us

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 directly 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. An example is an employer who manages a number of warehouses in an area, but who regularly shifts or rotates the same employees from one building to another.

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

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

(2) The application of the definition of single site of employment by an employer in order to evade the purpose of the Act shall constitute a violation under this Part.

The two employment sites you refer to in your letter may be considered a single site if "they are in reasonable geographic proximity, are used by the employer for the same purpose, and share the same staff or equipment." If the two locations are considered a single site, and all of your employees in the State work at that site, 40 to 45 employees out of 330 does not meet the 33% requirement and therefore notice would not be required. However, if the two sites are not considered a single location, and the layoffs fall disproportionately upon one site such that they meet the 25/33% trigger, your employer-client will be required to provide 90 days notice unless it is subject to one of the exceptions detailed in the regulations.

You also ask in your letter about a scenario where your client employer lays off 200 employees over a six-month period. The new regulations provide a 90-day "look ahead" and "look behind" periods. The regulations require:

In deciding whether notice is required, an employer shall look ahead ninety (90) days and behind ninety (90) days to determine whether actions constituting employment losses within the meaning of this Part, both taken and planned, will, in the aggregate for any ninety (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. An employer is not required to give notice if the employment losses result from separate and distinct actions and causes that should not be aggregated into a single employment loss.

This means that any actions constituting employment losses over a 90-day period that -- in the aggregate -- reach the minimum standards, trigger the notice requirement. The regulations

also prohibit an employer from deliberately staggering its layoff period to avoid the notice requirement of the WARN Act. If you wish to review the entire text of the regulations, they are available on the Department's website at www.labor.state.ny.us.

If you have any additional questions, please feel free to contact me.

Sincerely,
Maria Colavito, Counsel

By: Shannon Lawlor
Attorney I

MLC:sl