New York State Department of Labor
David A. Paterson, *Governor*
Colleen C. Gardner, *Acting Commissioner*

February 24, 2010

[redacted]

Re: Our File No. RO-10-0023

Dear [redacted]:

I am writing in response to your letter dated February 10, 2009, concerning the interpretation of the New York State Worker Adjustment and Retraining Notification (WARN) Act which took effect February 1, 2009. Initially, the Department 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. You have requested clarification regarding the 90-day aggregation rule set forth in the WARN Act and its implementing regulations filed on January 30, 2009.

As you stated in your letter, Section 860-c of the WARN Act states as follows:

> In determining whether a plant closing or mass layoff has occurred or will occur, employment losses for two or more groups of employees at a single site of employment, each of which is less than the minimum number of employees specified in subdivisions four or six of section eight hundred sixty-a of this article but which in the aggregate meet or exceed that minimum number set forth in such subdivisions, and which occur within any ninety-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this article.

Phone: (518) 457-4380 Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

www.labor.state.ny.us uscsjl@labor.ny.gov

The Emergency/Proposed regulations filed on January 30, 2009, state in Section 921-2.1(b)(1):

> 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.

The Department has recognized the inconsistency of these two provisions and in the new Emergency/Proposed Regulations filed on February 12, 2010, the language has been amended for clarification purposes. The new regulation, Section 921-2.1(e) reads as follows:

> 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.

Therefore, in regard to your first question, the regulations were not intended to expand the 90-day aggregation rule to require aggregation, either of employment losses which number less than those which are covered under the Act, or employment losses which are, of themselves, sufficient in number to comprise a covered employment loss. Each employment loss is considered individually and within the applicable 30-day period surrounding the employment loss to determine if it should be aggregated with an employment loss within the applicable 90-day period.

This amendment also answers your second question, where you ask whether 921-2.1(a) requires the aggregation, under the 90-day aggregation rule, of an employment loss event which on its own, involves a sufficient number of employment losses to trigger a covered employment loss. Again, as the new Emergency/Proposed regulations state, the 90-day aggregation period applies only to employment losses that do not, on their own, constitute covered employment losses. Employment losses that qualify as a covered employment losses on their own will not be aggregated under the 90-day aggregation rule.

Finally, you requested confirmation of your analysis of the example you provided where an employer that employs 100 employees, lays off nine (9) employees on Day 1, thirty-five (35) employees on Day 45, and five (5) employees on Day 90. Your analysis is correct in that the layoff on Day 45 constitutes an employment loss on its own and, therefore, cannot be aggregated with the uncovered employment losses on Days 1 and 90. The Day 1 and Day 90 employment losses, however, will be aggregated to determine if an employment loss occurred. In this specific example, an employment loss that requires notice only occurred on Day 45.

If you have any additional questions, please feel free to contact me at (518) 457-4380.

Sincerely,
Maria Colavito, Counsel

By:
Shannon J. Hesnor
Senior Attorney

MLC:SJH:cmh