

NOTICE OF POTENTIAL LAYOFFS ACT RULES

December 19, 2014

RULE 1. AUTHORITY TO ADOPT RULES

These rules are adopted pursuant to 21 V.S.A. § 416(a).

RULE 2. SCOPE

These rules pertain to the notice, administrative hearing, and penalty provisions of the Notice of Potential Layoffs Act (Act), 21 V.S.A. chapter 5, subchapter 3A.

RULE 3. DEFINITIONS

As used in these rules:

(1) “Affected employees” means employees who may be expected to experience an employment loss as a consequence of a proposed or actual business closing or mass layoff by their employer. The term “affected employees” also includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that the individual employees can be reasonably 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 an individual who is self-employed.

(2) “Business closing” means:

(A) the permanent shutdown of a facility;

(B) the permanent cessation of operations at one or more worksites in the State that results in the layoff of 50 or more employees over a 90-day period; or

(C) the cessation of work or operations not scheduled to resume within 90 days that affects 50 or more employees.

(3) “Commissioner” means the Commissioner of Labor, or designee.

(4) “Date of termination” means the last day an employee is eligible or permitted to work for his or her employer. The fact that an employer continues to pay an employee after the date of termination does not change the employee’s employment status for the purpose of this rule. Payments to an employee subsequent to the date of termination, whether continuing to pay an employee’s normal weekly wage, or for severance pay, vacation pay, personal leave, or other similar benefits, shall not extend the employee’s date of termination.

(4) “Department” means the Department of Labor.

(5) “Employee representative” means an exclusive bargaining agent legally recognized under State or Federal Labor laws.

(6)(A) “Employer” means any person that employs:

(i) 50 or more full-time employees;

(ii) 50 or more part-time employees who work at least 1,040 hours per employee per year; or

(iii) a combination of 50 or more full-time employees and part-time employees who work at least 1,040 hours per employee per year.

(B) The calculation of total hours shall include overtime hours.

(C) Subsidiaries that are wholly or partially owned by a parent company may be treated by the Commissioner as a separate employer depending on the degree of independence from the parent. The factors to be considered in making this determination include: (1) common ownership; (2) common directors or officers; (3) de facto exercise of control; and (4) unity of personnel policies emanating from a common source.

(D) “Employer” includes a receiver, trustee, debtor-in-possession, or other fiduciary under the provisions the U.S. Bankruptcy Code (Title 11 of the United States Code) or any other provision of federal or state law where a party is responsible for the continued operation of a business entity.

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

(F) “Employer” shall not include the federal government. However, private or not-for-profit businesses contracting with the federal government may be considered an employer.

(7) “Employment loss” means the termination of employment that is the direct result of a business closing or mass layoff. An employee will not have suffered an employment loss if the employee is offered a transfer to a different site of employment within 35 miles, or if prior to receiving the layoff notice the employee voluntarily separates or retires from employment or is separated by the employer for unsatisfactory performance or misconduct.

(8) “Mass layoff” means a permanent employment loss of at least 50 employees at one or more worksites in Vermont during any 90-day period. In determining whether a mass layoff has occurred or will occur, employment losses for two or more groups of employees, each of which is below the threshold but which in the aggregate exceed the threshold and which occur within

any 90-day period shall be considered to be a mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes.

RULE 4. EMPLOYER REQUIREMENTS; GENERALLY

(a) An employer who will engage in a business closing or mass layoff shall provide notice to the Commissioner 45 days prior to the effective date of the closing or layoffs. Additionally, the employer shall provide 30 days notice to the chief elected official or administrative officer of the municipality in which the business closing or mass layoff will occur, the affected employees, and the employee representative if any. When all of the employees are not terminated on the same date, the date of the first individual termination shall trigger the notice requirement. The first and each subsequent group of employees to be terminated are entitled to a full 45 days notice.

(b) Notice to the Commissioner shall be in writing and comply with the requirements of Rule 6.

(c) The information in the notice shall be specific and based on the best information available to the employer at the time that notice is provided.

(d) An employer claiming an exception to the notice requirement or a reduction in the notice period shall provide a statement to the Commissioner of the reasons for reducing the notice period and a factual explanation of the basis for claiming the reduced notice period.

(e) Where an employer has sold all or part of a business, the selling employer shall be responsible for providing notice of any business closing or mass layoff connected with the sale up to and including the effective date of the sale. After the effective date of the sale, the purchasing employer shall be responsible for providing notice in accordance with the Act. Any individual who is an employee of the selling employer as of the effective date of the sale shall be considered an employee of the purchasing employer immediately after the effective date of the sale.

(f) An employer is encouraged to voluntarily provide notice of employment losses to its employees and the Commissioner even if the notice is not required.

(g) The notice requirements of this rule shall not apply to a nursing home in situations where Rules 2.8 and 3.14 of the Vermont Licensing and Operating Rules for Nursing Homes apply or where the CMS Requirements for Long-Term Care Facilities apply, pursuant to 42 C.F.R. §§ 483.12 and 483.75.

RULE 5. SERVICE OF NOTICE

(a) Notice shall be provided within the time period provided by the Act 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, the notice must be postmarked within the time period specified in the Act.

(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 only be utilized where all the 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 shall demonstrate that an e-mail notice was received by each affected employee. The employee e-mail addresses used to give notice shall be addresses provided to the employees by the employer and used in the conduct of business. The e-mail notice shall be identified as “urgent.” If an e-mail notice is returned to the sender as undeliverable, notice shall be provided to the employee as soon as possible, for example by overnight delivery, hand delivery, or inter-office mail.

(c) Notice shall be sent on the official letterhead of the employer or on the employer’s computer network and shall be signed by an individual with authority to represent the employer. The employer’s representative must have the authority to bind the employer and shall attest to the truthfulness of all the information provided in the notice.

(d) Notice shall be provided within the statutory time frame to:

(1) The Commissioner;

(2) The affected employees;

(3) The local chief elected official or administrative officer of the municipality in which the business closing or mass layoffs will occur; and

(4) The employee representative, if any.

(e) Notice 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 these employees can be identified at the time notice is required to be given.

RULE 6. CONTENTS OF NOTICE

(a) Notice sent to the recipients identified below shall be provided within the time frame required by the Act and shall be provided for each site of employment where a business closing or mass layoff will occur. Notice to an affected employee shall be provided in a language the employee understands.

(b) **Notice to Commissioner.** Notice to the Commissioner shall include the following:

- (1) The name and address of the employment site where the business closing or mass layoff 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 the purpose of providing rapid response to the affected employees.
- (5) The name, job title, mailing address, telephone number, and email, if applicable, of each affected employee.
- (6) The expected first date of separation of employees and the anticipated schedule of separations.
- (7) A statement indicating whether bumping rights exist.
- (8) A statement indicating whether the planned action is expected to be permanent or temporary, and whether the entire worksite is to be closed. The notice shall state whether the planned action is expected to affect identifiable units of employees differently, for example if the layoff of employees in one unit is temporary and permanent in another.
- (9) A statement indicating whether the other notices required by statute will be given, including the date the notice was or will be given.
- (10) A statement indicating the method of delivery used to give notice to the affected employees.
- (11) A sample of the notice provided to the affected employees.

(c) **Notice to employees.** Notice to each affected employee shall include the following:

- (1) The expected date of the first separation of employees and the date when the individual employee will be separated.
- (2) A statement indicating whether the planned separation is expected to be permanent or temporary, and whether the entire worksite is to be closed. The notice shall state whether the separations are expected to affect identifiable units of employees differently, for example if the layoff of employees in one unit is temporary and permanent in another.
- (3) A statement indicating whether bumping rights exist.

(4) The name and telephone number of an employer representative to contact for further information.

(5) The following notice:

“You are hereby notified that as a result of your employment loss you may be eligible to receive job training, re-employment services, and other assistance from the Vermont Department of Labor. You may also be eligible for unemployment benefits. The Vermont Department of Labor will provide information regarding all available benefits and services. You are encouraged to visit one of the Department’s local offices for job placement information and assistance.”

(d) **Notice to employee representative.** Notice to the employee representative shall include the following:

(1) The name and address of the employment site where the business closing or mass layoff will occur.

(2) The name and telephone number of an employer representative to contact for further information.

(3) A statement indicating whether bumping rights exist.

(4) A statement indicating whether the planned separation is expected to be permanent or temporary, and whether the entire worksite is to be closed. The notice shall state whether the separations are expected to affect identifiable units of employees differently, for example if the layoff of employees in one unit is temporary and permanent in another.

(5) The expected first date of separation of employees and the anticipated schedule of separations.

(6) The names and addresses of the affected employees and their job titles.

(7) A statement indicating whether the other notices required by statute have been given or will be given, including the date the notice was or will be given.

(8) A statement indicating the method of delivery used to give notice to the affected employees.

(e) **Notice to municipality.** Notice to the local chief elected official or administrative officer of the municipality shall include:

(1) The name and address of the employment site where the business closing or mass layoff will occur.

(2) The expected first date of separation of employees and the anticipated schedule of separations.

(3) A list of the broad occupational categories that are affected by the layoff or closing, and general information regarding the number of employees affected.

(4) A statement indicating whether the planned separation is expected to be permanent or temporary, and whether the entire worksite is to be closed. The notice shall state whether the separations are expected to affect identifiable units of employees differently, for example if the layoff of employees in one unit is temporary and permanent in another.

RULE 7. EXCEPTIONS

(a) An employer is not required to provide notice or may delay providing notice if:

(1) The business closing or mass layoff results from a strike or a lockout.

(2) The employer is actively attempting to secure capital or investments in order to avoid a business closing or mass layoff.

(3) The business closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time notice was required.

(4) The business closing or mass layoff is due to a disaster beyond the control of the employer.

(5) The business closing or mass layoff is the result of the conclusion of seasonal or temporary employment.

(b)(1) **Faltering company.** An employer is not required to give notice if at the time notice was required:

(A) The employer was actively seeking capital or business and identifies the specific actions taken to obtain the capital or business. For example, the employer shall 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;

(B) There was a realistic opportunity to obtain the capital or business sought; and

(C) 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 business or capital if notice was given.

(2) For the purpose of the exception, the employer's actions shall be viewed in a company-wide context. A company with access to capital markets or cash reserves may not

avail itself of the exception by looking solely at the financial condition of the single site of employment to be closed.

(c)(1) **Unforeseeable business circumstances.** An employer is not required to give notice if the business closing or mass layoff was caused by business circumstances that were not reasonably foreseeable when notice was required.

(2) A business circumstance that is not reasonably foreseeable may be established by the occurrence of a 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 which occurs without prior notice.

(d)(1) **Disaster.** An employer is not required to give notice if the business closing or mass layoff was the result of a disaster beyond the employer's control. To qualify for this exception, the employer must show that:

(A) The closing or layoff was the direct result of a natural disaster including floods, earthquakes, droughts, storms, or other similar effects of nature; and

(B) The employer provided as much notice as was practicable and available under the circumstances, either in advance or after an employment loss caused by the disaster.

(2) When a plant closing or mass layoff occurs as the indirect result of a disaster, this exception shall not apply, but the exception for unforeseeable business circumstances may be applicable.

(e)(1) **Seasonal employment.** Notice is not required if the business closing or mass 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. Seasonal employment includes businesses with regularly planned shutdowns during certain periods of the year, including breaks between academic terms, and the regular cessation of activity in construction, ski areas, mining, quarrying, and other industries.

(2) The employer must be able to demonstrate that it informed each employee at the time of hire that the job was seasonal.

(3) Employment in an industry that traditionally hires seasonal employees does not make an employee a seasonal employee if the employee was hired to perform a variety of jobs and tasks continuously through a majority of the calendar year.

(f)(1) **Temporary employment.** Notice is not required if the business closing or mass 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.

(2) The employer shall demonstrate that it informed each employee at the time of hire that the job was temporary. For purposes of this rule, “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 the employment is temporary.

(3) Employment in an industry that traditionally hires temporary employees does not make an employee a temporary employee if the employee was hired to perform a variety of jobs and tasks continuously through a majority of the calendar year. Providing written notice that a project is temporary with the intent of converting permanent employment into temporary work to avoid the notice requirement shall be considered a violation of the Act.

(g) **Partial notice.** If the employer is eligible for an exception to the notice requirement it shall provide as much notice as is practicable. The notice shall include a statement of the reason for reducing the notice period and the factual basis for claiming an exception.

RULE 8. INVESTIGATION

(a) The Commissioner shall investigate all complaints of violations of the notice requirements of 21 V.S.A. §413 and may initiate investigations.

(b) If the Commissioner determines that an employer has violated any provision of the Act, the Commissioner shall notify the employer of the violation and the amounts due for wages or benefits, as well as any penalties resulting from the violation. The notification shall be sent to the employer as a Notice of Violation accompanied by a Notice of Hearing.

(c) The Commissioner shall not issue an order without first holding a hearing, unless the employer has waived its right to a hearing pursuant to a settlement on terms acceptable to the Commissioner, or failed to respond to the Notice of Violation and Notice of Hearing.

RULE 9. ADMINISTRATIVE HEARING; ORDER

(a) A hearing shall be held before a hearing officer designated by the Commissioner to determine whether an employer has violated the provisions of the Act.

(b) Notice of the Hearing shall be sent to the parties at least 14 days prior to the hearing date.

(c) The hearing shall be conducted informally and in a manner to ascertain the substantial rights of the employer and the employees. All relevant issues shall be considered and

passed upon. The hearing officer may accept evidence into the record and may examine or cross-examine any party or witness. Testimony shall be given under oath or affirmation. Hearsay evidence shall be allowed.

(d) The parties and their representatives shall be provided with any relevant documentary evidence prior to the hearing and may examine or cross-examine any other party or witness, and explain or rebut any evidence. The parties shall provide one another with any relevant documentary evidence at least 48 hours prior to the hearing.

(e) If a party is not represented by legal counsel or other agent, the hearing officer shall advise the party of his or her rights and may aid the party in examining or cross-examining witnesses, and give the party every assistance compatible with the impartial discharge of the hearing officer's duties. The hearing officer may take any additional evidence he or she deems necessary, provided that the parties shall be given an opportunity to examine, cross-examine, and refute the additional evidence. The parties shall be given an opportunity to present an argument which shall become part of the record.

(f) Following the conclusion of the hearing, the hearing officer shall render and issue a recommendation to the Commissioner. The recommendation shall be in writing and be signed by the hearing officer. It shall set forth the findings of fact, the reasons for the recommendation, and the recommendation.

(g) All testimony produced at the hearing shall be recorded by the hearing officer but need not be transcribed unless an appeal to the Superior Court is taken. A participant in the hearing is not permitted to record the proceedings. The cost of transcribing the hearing shall be borne by the requesting party.

(h) Administrative hearings shall be conducted by an officer designated by the Commissioner. The hearing officer shall make a recommendation to the Commissioner based on the evidence in the record. The Commissioner shall review the recommendation and shall promptly issue a determination and order.

(i) If the Commissioner determines that an employer has violated any of the requirements of the Act or of this Rule, he or she shall issue an order to the employer that it is in violation of the Act.

(j) The order shall include:

- (1) The facts upon which the violation was found;
- (2) A demand for any wages or benefits owed to any affected employee;
- (3) An assessment of any penalties; and
- (4) A notice of the employer's appeal rights.

RULE 10. VIOLATIONS OF THE ACT

(a) An employer that violates the notice provisions of the Act is liable to each employee who lost his or her employment for:

(1) one day of severance pay for each day after the first day in the 45-day notice period, up to a maximum of ten days severance pay; and

(2) the continuation, not to exceed one month after an employment loss, of existing medical or dental coverage under an employment benefit plan, if any, necessary to cover any delay in an employee's eligibility for obtaining alternative coverage resulting directly from the employer's violation of the Act's notice requirements.

(b) Reduction in liability. The amount of an employer's liability under subsection (a) of this section shall be reduced by the following:

(1) any voluntary and unconditional payments made by the employer to the employee that were not required to satisfy any legal obligation;

(2) any payments by the employer to a third party or trustee, such as premiums for health benefits or [payments to a defined contribution pension plan, on behalf of and attributable to the employee for the period of the violation; and

(3) any liability paid by the employer under any applicable federal law governing notification of mass layoffs, business closings, or relocations.

(c) If an employer proves to the satisfaction of the Commissioner that the act or omission that violated the Act was done in good faith, the Commissioner may reduce the amount of liability. In determining the reduction of liability, the Commissioner shall consider any efforts by the employer to mitigate the violation.

RULE 11. ADMINISTRATIVE PENALTIES

An employer who fails to give notice as required by the Act shall be subject to an administrative penalty of \$500.00 for each day that the employer was deficient in providing notice to the Department. The Commissioner may waive the administrative penalty if the employer:

(1) demonstrates good cause under the Act;

(2) pays to all affected employees the amounts for which the employer is liable under the Act within 30 days from the date of the business closing or mass layoff; and

(3) pays to all affected employees any unpaid wages and compensation owed to the worker.

RULE 12. APPEAL

The employer may appeal an order issued by the Commissioner to the Superior Court within 30 days of the order.

Each order issued by the Commissioner shall state clearly the place and manner for filing an appeal from the order and the period within which the appeal may be taken.

RULE 13. SEVERABILITY

If any provision of these rules is held invalid, the invalidity shall not affect the remainder of the rules that can be given effect without the invalid provision, and to this end these rules are severable.