

Department of Labor

Services to Workers Under the Worker Adjustment and Retraining Notification Act

Report 2022-S-11 | June 2023

OFFICE OF THE NEW YORK STATE COMPTROLLER

Thomas P. DiNapoli, State Comptroller

Division of State Government Accountability



Audit Highlights

Objectives

To determine whether the Department of Labor (Department) is providing appropriate and timely services to workers affected by closings and layoffs that are covered under the Worker Adjustment and Retraining Notification Act (WARN Act or Act), and is effectively overseeing employer compliance with the Act. The audit covered WARN Notices received by the Department that were dated January 2019 through April 2022. We also considered Department activities related to these Notices through January 2023.

About the Program

The Department's mission is to provide outstanding services to its customers – the workers and businesses in New York State. As part of fulfilling its mission, the Department, through its Division of Employment and Workforce Solutions (DEWS), administers the State's WARN Act and provides related services. Enacted in 2008, the WARN Act requires covered employers to give early warning to employees – defined as at least 90 days advance notice (Notice) – of a mass layoff, relocation, or employment loss, with some exceptions. Employers must also notify the Department, Local Workforce Development Boards, and certain local officials.

Covered employers are those with 50 or more full-time employees in the State or 50 or more employees who, in aggregate, work at least 2,000 hours per week. This advance notice protects employees – as well as their families and communities – by giving them time to transition, seek new employment, and enter workforce training programs. Employers that fail to submit a Notice at least 90 days prior to the event and are not exempt may be liable for back pay and the value of any benefits that laid-off employees would have been entitled to. This liability can be reduced if the employer pays all applicable employees appropriate back pay and benefits within 3 weeks from the date the employer orders the mass layoff, relocation, or employment loss.

Department receipt of a Notice triggers staff to offer Rapid Response services, such as job search and résumé preparation assistance, career counseling, and occupational skills training, to assist workers in obtaining re-employment as soon as possible. DEWS maintains the Notices and the workforce intelligence data needed to initiate a response to mass closures or layoffs. Within DEWS, the Statewide Rapid Response Coordinator oversees a WARN Unit and 10 Regional Rapid Response Teams (Regional Teams) located throughout the State. The WARN Unit receives the Notices, tracks their receipt in a database, and delegates Rapid Response activities to the appropriate Regional Teams. The Department also works with partners, such as Local Workforce Development Boards and Career Centers, to provide Rapid Response services to workers affected by Notices.

With many New Yorkers losing their jobs as a result of the COVID-19 pandemic, starting in March 2020, the Department shifted its work focus, including those of Rapid Response staff, to processing Unemployment Insurance (UI) claims instead of performing their regular duties. The WARN Act's 90-day advance notice requirement was not suspended during the pandemic. Existing provisions of the notice requirements of the Act, however, include exceptions, such as when the need to provide Notice was not reasonably foreseeable at the time it would have been required. The Department received 2,752 Notices that were dated during the period January 2019 through April 2022, covering a reported 280,302 affected employees. Of the 2,752 Notices, 1,887– about 69% – cited the pandemic as the reason for the Notice.

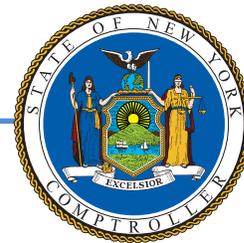
Key Findings

We found several areas the Department could improve to better meet its obligations under the Act and ultimately the needs of dislocated workers. Specifically, we found weaknesses in the Department's oversight of employer compliance with the advance notice requirements of the Act. We also identified WARN Notices that were not entered into the Department's One-Stop Operating System (OSOS), the system used to record related services to employers and affected employees. Further, Department staff were often late in attempting initial outreach to employers that submitted Notices and to affected employees, and in some cases, there was no record of any outreach. In combination, these weaknesses impede the Department's success in meeting the needs of dislocated workers and may undermine public perception of its commitment to its mission. The Department was cooperative throughout the audit and cited the unprecedented challenges of the pandemic as a major factor in these audit results:

- We reviewed 50 Notices, covering 19,132 affected employees, to determine whether they were submitted timely by employers and to identify any actions Department staff took when they were not. For five Notices covering 1,310 employees, we found the Department didn't take adequate action to substantiate either the validity of the exemption or the employer's claim that it would pay the affected employees.
- Of a random sample of 184 Notices, representing 17,171 reported employees, 91 Notices, representing 6,908 reported employees, were not entered in the system the Department uses to record related services to employers and affected employees. Projecting these results to the population of 2,752 Notices with a 95% confidence interval results in at least 1,164 Notices that were received but not entered in OSOS, indicating that the number of affected employees not offered Rapid Response services (in addition to the number of related employers) is potentially much greater.
- The Department's attempts at outreach to both employers and the affected employees were often late and at times did not happen at all, according to its records.

Key Recommendations

- Implement a process to substantiate that employers that file late Notices meet exemption criteria and, where applicable, to verify that they pay affected employees when they cite past or planned payments in Notices.
- Follow up on Notices that were not entered in OSOS, including those identified by our audit, and offer and provide Rapid Response services as appropriate.
- Take steps to improve timely outreach to both employers and employees affected by employment changes covered by the WARN Act.



Office of the New York State Comptroller Division of State Government Accountability

June 21, 2023

Roberta Reardon
Commissioner
Department of Labor
W.A. Harriman Campus, Building 12
Albany, NY 12240

Dear Commissioner Reardon:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage government resources efficiently and effectively. By doing so, it provides accountability for the tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Services to Workers Under the Worker Adjustment and Retraining Notification Act*. The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Division of State Government Accountability

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Glossary of Terms

Term	Description	Identifier
Department	Department of Labor	<i>Auditee</i>
Affected employees	Employees who are affected by a mass layoff or closure covered by the WARN Act	<i>Key Term</i>
Covered employers	Employers that must comply with the WARN Act	<i>Key Term</i>
DEWS	Division of Employment and Workforce Solutions	<i>Division</i>
Guidance	The Department's internal guidance, last updated April 14, 2021	<i>Key Term</i>
Notice	An employer's advance notice to affected employees and others of plant closings, layoffs, and other covered reductions in work hours	<i>Key Term</i>
OSOS	The Department's One-Stop Operating System	<i>System</i>
Pandemic Phase	3/17/20–6/20/21: the period of time when Department employees' work focus was on UI claims	<i>Time Period</i>
Post-Pandemic Phase	6/21/21–4/27/22: the period of time, subsequent to the focus on UI claims, when Department employees worked on Rapid Response services	<i>Time Period</i>
Pre-Pandemic Phase	1/1/19–3/16/20: the period of time when Department employees worked on Rapid Response services, prior to the shift to focus on UI claims	<i>Time Period</i>
Rapid Response	Services provided to both businesses and employees that are affected by cutbacks and site closings	<i>Key Term</i>
Regional Teams	Regional Rapid Response Teams	<i>Key Term</i>
UI	Unemployment Insurance	<i>Program</i>
WARN Act (or Act)	New York's Worker Adjustment and Retraining Notification Act	<i>Law</i>

Background

The Department of Labor's (Department) mission is to provide outstanding service to its customers – the workers and businesses in New York State. The Department assists workers by connecting them to employment, training, and upskilling opportunities to aid them in finding a career. It also supports businesses by helping them find qualified workers and informing them about tools and incentives to make their businesses thrive. Additionally, it supports the unemployed and helps ensure safe workplaces and fair wages for workers. As part of fulfilling its mission, the Department, through its Division of Employment and Workforce Solutions (DEWS), administers the State's Worker Adjustment and Retraining Notification Act (WARN Act or Act) and provides related services.

Enacted in 2008, the WARN Act requires covered employers to give early warning to employees – defined as at least 90 days advance notice (Notice) – of a mass layoff, relocation, or employment loss, with some exceptions. They must also file a Notice with the Department and with Local Workforce Development Boards and certain local officials. Department receipt of a Notice triggers staff to offer Rapid Response services, such as job search and résumé preparation assistance, career counseling, and occupational skills training, to assist workers in obtaining re-employment as soon as possible. Employers may claim an exemption to the 90-day requirement under the following circumstances:

- The employer was actively seeking capital or business that would have prevented or postponed a relocation or termination and the employer – in good faith – believed that giving notice would prevent the business from obtaining the capital or business needed.
- The closing is a temporary facility, or the mass layoffs are the result of the completion of a particular project.
- The layoff/closure was not reasonably foreseeable at the time the Notice would have been required.
- The plant closing or mass layoffs were due to natural disaster.

According to Department policies and procedures, if the Notice is submitted within fewer than the required 90 days or appears not to meet one or more other WARN provisions, staff reach out to employers to substantiate any claim for an exception, and review information to determine if a violation may have occurred. If they find that an exception is not substantiated, the Notice is referred to Counsel's Office for guidance. Employers that fail to submit a Notice at least 90 days prior to the event and are not exempt may be liable for back pay and the value of any benefits that laid-off employees would have been entitled to. This liability can be reduced if the employer pays all applicable employees appropriate back pay and benefits within 3 weeks from the date the employer orders the mass layoff, relocation, or employment loss. Furthermore, an employer may be subject to a civil penalty of up to \$500 for each day of the violation for up to 60 days. Late-filed Notices must be submitted to the Department as soon as practicable and must provide the basis for the reduced notification period.

Covered employers are those with 50 or more full-time employees in the State or 50 or more employees who, in aggregate, work at least 2,000 hours per week. A mass layoff is an event that affects 25 or more full-time employees, if those employees make up at least 33% of all the employees at the site, or that otherwise involves 250 or more full-time workers. This advance notice protects employees – as well as their families and communities – by giving them time to transition, seek new employment, and enter workforce training programs.

New York's WARN Act is more stringent than the federal WARN Act, which took effect in 1989 and requires covered employers with 100 or more employees to give 60 days advance notice. Some states' laws differ from New York's Act and cover a broader class of employees. For example, unlike New York's Act, Vermont's covers part-time employees. Other differences relate to conditions under which Rapid Response services may be offered. For example, New Jersey requires employers to provide Rapid Response teams with on-site work-time access to the affected employees, whereas New York employers are not obligated to accept Rapid Response services or to allow them to take place at their business location(s).

In addition to providing Rapid Response services, DEWS maintains Notices and the workforce intelligence data needed to initiate a response to mass closures or layoffs. Within DEWS, the Statewide Rapid Response Coordinator oversees a WARN Unit and 10 Regional Rapid Response Teams (Regional Teams) located throughout the State. The WARN Unit receives the Notices, tracks their receipt in a database, and delegates Rapid Response activities to the appropriate Regional Teams. The Department also works with partners, such as Local Workforce Development Boards and Career Centers, to provide Rapid Response services to workers affected by Notices. In December 2020, the Department created a Strategic Workforce Action Team to provide additional assistance to Regional Teams as needed.

After a Notice is received, Regional Teams conduct outreach to the employer to notify it of available services and to obtain employee contact information. Regional Teams' subsequent outreach to affected employees includes an orientation letting them know about available services, followed by routine contact and/or support in obtaining services. Regional Teams use the Department's One-Stop Operating System (OSOS) as a case management system to track employer information as well as the Rapid Response activities and services they offer and/or provide on behalf of affected employees. OSOS serves as the agency-wide system of record for services provided to both employers and employees covered by the WARN Act (the Department uses OSOS to maintain other service information as well).

On March 7, 2020, the Governor issued a series of Executive Orders declaring a Statewide Disaster Emergency due to the threat of the COVID-19 pandemic. By March 22, 2020, all businesses not defined as essential by the Executive Orders were directed to close or operate remotely. Businesses such as bars, restaurants, gyms, and casinos were not eligible for designation as essential businesses and were instructed to remain closed. With many New Yorkers losing their jobs as the pandemic emerged and continued, the Department shifted its work focus in March 2020 to processing Unemployment Insurance (UI) claims, drawing staff away from

their regular duties – including WARN-related activities – to manage the increased demand for UI benefits. According to Department officials, staff returned to providing WARN-related Rapid Response services in June 2021.

While the Department’s focus during the pandemic may have changed, the WARN Act’s 90-day advance notice requirement was not suspended. Existing provisions of the Act, however, include exceptions, such as when the need to provide Notice was not reasonably foreseeable at the time it would have been required. As many employers were closing their businesses or laying off workers due to the pandemic, a gap emerged in the Department’s ability to assist workers who were affected by closures covered by the Act. As a result, by June 2021 – when the number of UI claims slowed enough to allow most Department staff to return to their regular job duties – there was a significant backlog of unaddressed Notices.

Department data indicated that it received 2,752 Notices dated during the period January 2019 through April 2022, covering a reported 280,302 affected employees. Of the 2,752 Notices, 1,887 – about 69% – cited the pandemic as the reason for the Notice. During the approximately 3-year period, the number of Notices ranged from three in October 2021 to a high of 834 in March 2020 (the second highest number of Notices was 478 in April 2020). Notices prior to and during the pandemic covered multiple industries across the State, including entertainment, agriculture, construction, and manufacturing. For additional information on the industries and affected areas, click on the image below to see our interactive map.



Audit Findings and Recommendations

We found several areas the Department could improve to better meet its obligations under the Act and ultimately the needs of dislocated workers. Specifically, we found weaknesses in the Department's oversight of employer compliance with the advance notice requirements of the Act. We also identified WARN Notices that were not entered in OSOS, the system the Department uses to record related services to employers and affected employees. Further, Department staff were often late in attempting initial outreach to employers that submitted Notices and to affected employees, and in some cases, there was no record of any outreach. In combination, these weaknesses impede the Department's success in meeting the needs of dislocated workers and may undermine public perception of its commitment to its mission. The Department was cooperative throughout the audit and cited the unprecedented challenges of the pandemic as a major factor in these audit results.

Employer Compliance With Advance Notice Requirements

We found the Department didn't take adequate steps to determine whether some employers that submitted late Notices qualified for exemptions to the minimum 90-day advance notice requirement or that they paid affected employees back pay and benefits cited in their Notice and were therefore not in violation of the Act.

We reviewed a sample of 50 Notices, covering 19,132 affected employees, to determine if they were submitted timely by employers and to identify any actions Department staff took when they were not. Of the 50 Notices, 25 were submitted at least 90 days prior to the reported closure or layoff date, as required. Of the remaining 25 Notices that were not submitted timely, 20 included a request for an exemption to the 90-day requirement and cited pandemic-related circumstances that didn't require the Department to take further action to substantiate. For example, one employer's contract to provide busing to school districts was canceled as schools moved to remote classes during the pandemic. In this case, the business qualified for an exemption from the 90-day requirement because the layoff was not foreseeable at the time the Notice would have been required.

For the remaining five Notices, the Department didn't take adequate action to substantiate either the validity of the exemption or the employer's claim that it would pay the affected employees. Results for these Notices, which covered a reported 1,310 employees, were as follows:

- Two Notices, filed by the same employer for two separate locations and covering 1,096 employees, included statements that the employer qualified for a late filing because it was unable to attract new investors. However, the Department did not take steps to substantiate whether the claimed exemption was valid. In response to our observations, Department officials stated they granted an exemption to this employer due to the pandemic, even though the employer's explanation did not cite the pandemic as relevant to its exemption request.

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- For one late Notice, submitted in September 2019 and covering 108 employees, the employer claimed it was unable to obtain investor backing. Although Department officials stated that the Notice was referred to Counsel's Office, they did not provide evidence of this referral or the final determination made by Department Counsel.
 - Two Notices, representing two employers and covering a total of 106 employees, both cited plant closures and included statements that the employers would pay the affected employees; however, the Department didn't take steps to determine if the employers did so.

Without substantiating an employer's exemption status, there is a risk that affected employees will not only have less advance notice to prepare for job loss – which is the primary purpose of the Act – but also may not receive pay and benefits to which they're entitled and may especially need during their time of job transition. This lack of enforcement may diminish public perception of the Department's commitment to holding employers accountable for providing timely notice of impending job reductions.

Department officials generally cited the circumstances of the pandemic as the reason for not verifying exemption status. They also said that it hasn't been their practice to request proof of payment and that they've historically accepted a business' assertion that payment was made, and that they review the matter if and when a complaint is filed. They also described plans that are in process to provide better assurance about the validity of employer exemptions and claims for payment. Specifically, a new WARN submission portal will require filers to upload information that substantiates claims for exemption, and proof of payment will be required in situations where late-filed Notices indicate that payments were or will be made to affected employees.

Case Management System Completeness

We found that a significant number of Notices were not entered in the Department's case management system used to record and track the services provided to both employers and affected employees. This reduces the likelihood that relevant outreach and services were offered and/or provided to them, and results in the Department having incomplete information about effects on the State's workforce.

The Department's Internal Guidance (Guidance), last updated in April 2021, requires that Regional Coordinators attempt to contact the employer that filed the Notice within 1 business day of receipt of the Notice to gather layoff or closure event details and to explain the services available to the employer and affected employees. The Guidance further requires that all Notices, without exception, be entered in OSOS. The Regional Coordinators must also enter account updates in OSOS – on a real-time basis when possible – including the outreach conducted, Rapid Response activities taken, and related comments.

We selected a random sample of 184 Notices of the 2,752 received to determine if they had been entered in OSOS as required. Of the 184 Notices, 91 had not been entered in OSOS at the time of our testing, representing 6,908 reported employees

(see Exhibit). Projecting these results to the population of 2,752 Notices with a 95% confidence interval results in at least 1,164 Notices that were received but not entered in OSOS, indicating the number of affected employees not offered Rapid Response services (in addition to the number of employers) is potentially much greater.

Department officials confirmed that Notices were missing from OSOS and acknowledged that there was still a backlog of unentered Notices from the pandemic period as a result of the agency shifting its focus to processing UI claims. During visits with staff from the Department's 10 regions, we found that each region had a different method for reducing the backlog. Further, staff at every region said they hadn't received any guidance or instructions from the Department regarding addressing the backlog, despite the Department's assertion that each Regional Office was assigned a staff member from the Strategic Workforce Action Team to assist them in doing so. The Department did not provide us with any support that either written or verbal guidance to the Regional Teams occurred.

In response to our preliminary findings, staff added the missing Notices we identified to OSOS and created business profiles for employers that were not already in OSOS. However, there were no comments or activities entered in OSOS for any of the 91 employers we originally identified as missing from the system, indicating the Department had not attempted meaningful contact with either the employers or the affected employees.

While the high number of layoffs and closures during the pandemic significantly increased the Department's WARN-related workload, officials also cited vacancies throughout DEWS as a factor straining its ability to meet this need. The Statewide Rapid Response Coordinator position, for example, remained vacant for several months during our audit period. Additional vacancies in the Regional Offices resulted in regions operating with a suboptimal number of WARN-focused staff. As of August 2022, Department officials indicated that just 28 of 40 regional positions – 70% – were filled. They said they have made efforts to backfill positions but faced challenges recruiting staff. They also cited statewide hiring freezes, retirements, and staffing reassignments during the pandemic as contributing factors.

Outreach to Employers

Timely outreach to employers helps Department staff obtain contact information for employees and begin providing access to Rapid Response services as quickly as possible. Outreach that occurs long after a Notice is filed reduces the likelihood that staff will contact affected employees and could result in delays in their receiving job readiness services. Other outcomes could include delays in re-employment and employees needing UI benefits for longer than might otherwise be necessary. We found that Department staff were often late in attempting initial outreach to employers that submitted Notices, and in some cases, there was no record of any outreach.

The Department's Guidance requires staff to attempt to contact the employer that filed the Notice within 1 business day of its receipt. We reviewed activities that

staff recorded in OSOS for 50 Notices to determine whether their outreach to employers was timely. We considered any attempted contact that took place within 5 business days of receipt of the Notice to be timely. Of the 49 employers that filed the 50 Notices, staff initiated timely contact with 29 (30 Notices). Of the remaining 20 employers, 14 were contacted late – ranging from 6 to 428 business days after receipt of the Notice – and six were not contacted at all. Table 1 summarizes our results by Pre-Pandemic, Pandemic, and Post-Pandemic Phases (these Phases align with Department descriptions of their work focus during the period under audit).

Table 1 – Outreach to Employers*

Date of Notice	Pre-Pandemic Phase 1/1/19–3/16/20		Pandemic Phase 3/17/20–6/20/21		Post-Pandemic Phase 6/21/21–4/27/22		Totals 1/1/19–4/27/22	
	# of Notices	# of Employees Affected	# of Notices	# of Employees Affected	# of Notices	# of Employees Affected	# of Notices	# of Employees Affected
Timely outreach to employer	17	3,642	6	2,679	7	1,436	30	7,757
Late outreach to employer	3	444	8	6,486	3	386	14	7,316
No outreach to employer	–	–	6	4,059	–	–	6	4,059
Totals	20	4,086	20	13,224	10	1,822	50	19,132

* Pre-Pandemic: period when Department staff worked on Rapid Response services, before the pandemic forced a shift to UI claims.

Pandemic: period when Department staff’s work shifted to focus on UI claims. Post-Pandemic: period when Department staff’s focus shifted back to Rapid Response services.

Department officials, in responding to our preliminary observations, cited the extraordinary circumstances of the pandemic as the primary factor in gaps in outreach. They indicated that training, enhanced reports, and monitoring tools – such as a standardized case management tracker – have been implemented or are planned to improve outreach.

Outreach to Employees

Outreach to both employers and employees increases the likelihood that staff will make meaningful contact with employees and will offer services. Lack of outreach may result in employees not finding employment, staying on UI for longer than might otherwise be necessary, and/or not receiving other job readiness services, such as résumé assistance. However, Department records indicated that staff either did not make contact, were late in attempting contact, or made fewer than three attempts to contact more than half of the affected employees in our sample.

According to the Department’s Guidance, Regional Teams are responsible for making meaningful contact with affected employees. Department officials defined meaningful contacts as those that include a focus on re-employment, such as creating a résumé, practicing interview skills, reviewing job search results, and obtaining skills classes. Although employees covered by a Notice are not required to accept Rapid Response services, officials from all 10 Regional Teams said that their standard practice is to reach out to an affected employee at least three times before deeming the individual “unresponsive” and manually inactivating the employee in

OSOS. The Guidance states that as a dislocation event progresses, Regional Teams will work with the employer to provide a Rapid Response orientation to affected employees prior to layoff whenever possible.

After the orientation, Regional Teams are required to regularly follow up with employees and provide ongoing services to them, which they must record in OSOS. If there is no information entered in OSOS for 90 days for an affected employee, the individual automatically becomes inactive in the system. Although the Guidance doesn't establish a time frame for contacting employees when an orientation is not held or when the employee doesn't attend an orientation, we considered contact and services that were initiated within 90 days of last day worked, according to information recorded in OSOS, as timely. Beyond that time, employees would become inactive in OSOS, which would reduce the likelihood of them being offered or receiving Rapid Response services, and would not appear on OSOS reports used to monitor progress.

Of the 2,752 Notices that were dated during the period January 1, 2019 through April 27, 2022, covering a reported 280,302 reported employees, OSOS records reflected information for just 575 Notices (21%) and for 23,521 of the 69,454 employees (34%) reported on the 575 Notices. We reviewed activities that staff recorded in OSOS for a sample of 100 of the 23,521 employees to determine whether contact was timely (i.e., within 90 days of last day worked) and what steps staff took to address their needs, such as providing assistance with job matches or information about career fairs. Of the 100 employees, 40 were contacted timely, 57 were either not contacted at all or not contacted timely, and for the remaining three employees, Department outreach was discontinued prior to the three attempts considered standard practice. (Department partners, such as its Career Centers, provided services to 10 employees.) Table 2 summarizes our results by Pre-Pandemic, Pandemic, and Post-Pandemic Phases.

Table 2 – Outreach to Employees

Date of Notice	Pre-Pandemic Phase 1/1/19–3/16/20	Pandemic Phase 3/17/20–6/20/21	Post- Pandemic Phase 6/21/21–4/27/22	Totals 1/1/19–4/27/22
Employees not contacted by Regional Team (or other partners) or not contacted after attending orientation	2	26	3	31
Contact began > 90 days from last day of work	2	22	2	26
Fewer than 3 outreach attempts	1	1	1	3
Contacted timely	17	20	3	40
Totals	22	69	9	100

For the 26 affected employees whom staff did not contact within 90 days of their last day worked, there were 13 for whom 20 or more months elapsed before staff made initial contact. Of the 13, 12 employees' last day worked was during the Pandemic Phase; the other employee's last day worked was 1 month prior. Department officials said there were a few instances where Rapid Response staff were permitted to work on Notices during the Pandemic Phase; however, most Notices received were not given immediate attention, and many were not acted upon during the period we examined. They also said that, in August 2022 (during our audit), Rapid Response teams began using a standardized customer tracker, separate from OSOS, to manage their caseload.

In response to our preliminary findings, Department officials said that staff were still working to clear the backlog that accumulated during the period when Rapid Response staff were processing UI claims. They also indicated that they have taken steps to improve their oversight of WARN-related activities. These include holding training about appropriate recording of services in OSOS (in July 2022, during our audit) and implementing a standardized case management tracker (in August 2022). Other Department changes, begun during our audit, may improve its WARN services. These changes include deployment of the WARN portal, expected to go live in April 2023, that is part of its efforts to assist both employers and employees affected by closures covered by the WARN Act.

Recommendations

1. Implement a process to:
 - Substantiate that employers that file late Notices meet exemption criteria; and
 - Verify that employers pay affected employees when they cite past or planned payments in late-filed Notices.
2. Follow up on Notices that were not entered in OSOS, including those identified by our audit, and offer and provide Rapid Response services as appropriate.
3. Take steps to improve timely outreach to both employers and employees affected by employment changes covered by the WARN Act.
4. Assess current and anticipated WARN activity to determine and pursue appropriate WARN staffing levels.

Audit Scope, Objectives, and Methodology

The objectives of our audit were to determine whether the Department is providing appropriate and timely services to workers affected by closings and layoffs that are covered under the WARN Act, and is effectively overseeing employer compliance with the Act. The audit covered Notices received by the Department that were dated January 2019 through April 2022 and Department activities related to these Notices through January 2023.

To accomplish our objectives and assess related internal controls, we interviewed Department officials at the DEWS Central Office and at each of the 10 Regional Offices. We reviewed relevant State and federal laws and Department policies and procedures. We also analyzed data from the Department's WARN database to understand information about the Notices in our audit scope, such as their effective date, the number of employees reportedly affected, and the number that cited pandemic-related causes. We determined the data was reliable for the purposes of our testing. We selected two samples from the data: a statistical sample and a judgmental sample. For the statistical sample, we selected a random sample of 184 of the population of 2,752 Notices that were dated during the period January 2019 through April 2022 to evaluate the Department's WARN-related activities, including whether the sample Notices had been entered in OSOS. The sample included Notices from nine of the 10 Regional Offices (Southern Tier was not among the offices represented in the sample). We designed our statistical sample to project its results to the population. For the judgmental sample, we selected 50 Notices from the same population – five from each of the 10 regions – based on the number of affected employees reported per Notice. We did not design this sample to project to the related population and we did not project its results to the related population.

Additionally, we analyzed OSOS data to determine whether the Department contacted employers that filed Notices and provided appropriate and timely services to affected employees. We determined the OSOS data was incomplete with respect to WARN Notices and the related outreach to employers and employees, and we report this among our findings. In the absence of other source data, we relied on the information that had been entered in OSOS, in addition to discussions with Department personnel, to support our conclusions about this outreach. To evaluate the timing and content of attempted outreach to affected employees, we selected a random sample of 100 of the 23,521 affected employees reported in the OSOS data. We did not design this sample to project to the related population and did not project its results to the related population.

As part of our audit procedures, we used Geographic Information System (GIS) software for geographic analysis and imported the results of this analysis into Tableau to create visualizations (interactive map) to enhance the understanding of our report. To improve the ease of use, we made minor locational changes to these visualizations. These changes do not materially affect the accuracy or interpretation of the underlying data or visualizations.

Statutory Requirements

Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our professional judgment, these duties do not affect our ability to conduct this independent performance audit of the Department's services to workers who are affected by closings and layoffs that are covered by the WARN Act.

Reporting Requirements

We provided a draft copy of this report to Department officials for their review and formal written comment. We considered their response in preparing this report and have attached it in its entirety at the end of the report. In their response, Department officials indicated the steps they are taking or plan to take to address our recommendations.

Within 180 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Labor shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Exhibit

System Entry Results for Sample of 184 Notices

Regional Office	Notices in OSOS		Notices Not in OSOS		Totals		% Not in OSOS	
	# of Notices	# of Affected Employees	# of Notices	# of Affected Employees	# of Notices	# of Affected Employees	% of Notices	% of Affected Employees
New York City	46	5,134	71	5,074	117	10,208	61%	50%
Hudson Valley	18	2,235	1	36	19	2,271	5%	2%
Long Island	10	528	14	1,652	24	2,180	58%	76%
Western New York	6	1,799	1	40	7	1,839	14%	2%
Capital Region	5	260	–	–	5	260	0%	0%
Central Region	1	77	3	96	4	173	75%	55%
Finger Lakes	5	136	–	–	5	136	0%	0%
Mohawk Valley	1	42	1	10	2	52	50%	19%
North Country	1	52	–	–	1	52	0%	0%
Totals	93	10,263	91	6,908	184	17,171	49%	40%

Agency Comments

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Kathy Hochul, Governor
Robertta Reardon, Commissioner

May 26, 2023

Re: Draft Report – 2022-S-11, Issued 4/27/2023

Heather Pratt
Office of the State Comptroller
Division of State Government Accountability
110 State Street - 11th Floor
Albany, NY 12236-0001

Dear Ms. Pratt,

The New York State Department of Labor (Department) has reviewed the Office of the State Comptroller's (OSC) Draft Report related to Audit Report Number 2022-S-11 titled Services to Workers Under the Worker Adjustment and Retraining Notification Act, for the period January 1, 2019 through April 27, 2022. The report contained four recommendations, below are the Department's responses:

Recommendation #1:

Implement a process to:

- Substantiate that employers that file late Notices meet exemption criteria; and
- Verify that employees pay affected employees when they cite past or planned payments in late-filed Notices.

NYS DOL Response:

As part of the Department's 4-year strategic modernization plan, we implemented an electronic WARN Act portal for the submission of WARN notices. The enhanced WARN portal allows employers to submit documentation, provide lists of impacted workers, and send other important information – such as claimed exemptions – directly to the Department in real time. Each submission is reviewed by WARN unit staff for completeness and accuracy. The new portal allows for better case management of notices, including ensuring that late filers meet the exemption criteria and/or that employers pay affected workers when they cite past or planned payments.

On March 13, 2023, Governor Hochul announced¹ the portal and new proposed regulations to help ensure compliance with the WARN Act. The proposed regulations clarify how remote work impacts WARN Act compliance and simplifies language to ensure businesses better understand their obligations. The public comment period on these regulations ends next week and the Department looks forward to adopting these strengthened measures.

¹ See <https://www.governor.ny.gov/news/governor-hochul-announces-new-technology-and-regulations-help-workers-facing-layoffs>.

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Recommendation #2:

Follow up on Notices that were not entered in OSOS, including those identified by our audit, and offer and provide Rapid Response services as appropriate.

NYSDOL Response:

The Department entered all notices identified by OSC into the One Stop Operating System (OSOS) and reviewed them for completeness. The Department also conducted follow-up to discuss Rapid Response services, where appropriate. Additionally, the Department implemented a quarterly review process for OSOS data entry to ensure data quality and mitigate future risks.

Recommendation #3:

Take steps to improve timely outreach to both employers and employees affected by employment changes covered by the WARN Act.

NYSDOL Response:

It should be noted that the Department immediately engages businesses and impacted workers whenever a potential layoff is identified, even before determining whether the layoff is covered by the WARN Act.

The new WARN portal allows the Department to collect accurate and complete information from the employer to rapidly facilitate outreach efforts. Upon submission, the employer is notified that our dedicated Rapid Response staff will be engaging them to discuss the free services available to support both the employer and the affected workers. The Department also upgraded our WARN and Rapid Response websites to inform both employers and affected workers about the enhanced services available in an effort to increase utilization of services. Additionally, the Department implemented a uniform tracking method that is used throughout all 10 regions to improve consistent and timely employee outreach. Finally, the Department tracks employer outreach with mechanisms in place to ensure that information collected is reviewed timely and compliant with outreach expectations.

Recommendation #4:

Assess current and anticipated WARN activity to determine and pursue appropriate WARN staffing levels.

NYSDOL Response:

The Department continues to analyze current and anticipated WARN activity. Multiple vacancies have been posted and positions have been filled in the past six months. Additional positions will be posted to ensure adequate staffing in the event of increased WARN activity. Hiring to fill critical needs continues to be a priority for the Department. It

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should also be noted that there would have been no way to anticipate the amount of WARN activity experienced during the COVID-19 pandemic.

If you have any comments, please contact Donald Temple, Director of Internal Audit (518) 457-7332.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott B. Melvin". The signature is written in a cursive style with a large initial "S" and "M".

Scott B. Melvin
Executive Deputy Commissioner

Cc: Roberta Reardon, Commissioner
Christopher White, Deputy Commissioner, Workforce Development
Dana Politis, Associate Commissioner, Workforce Development
Vicki Mockler, Deputy Bureau Chief, Workforce Development
Beau Duffy, Deputy Commissioner, Strategic Communications
Donald Temple, Director, Internal Audit
Samantha Doran, Auditor 3, Internal Audit

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