NYSBA

Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #16

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Commercial & Federal Litigation Section and the Labor and Employment Law Section to amend the New York Worker Adjustment and Retraining Notification Act ("NY WARN") §§ 598; 860-a; 860-b; 860-c; 860-d; 860-g; and 860-h.

Attached are proposed legislative language and a joint report from the Commercial & Federal Litigation Section and the Labor and Employment Law Section. The sections of NY WARN proposed for amendment are §§598; 860-a; 860-b; 860-c; 860-d; 860-g; and 860-h.

The amendment to §598 would add the language "plant closing" in place of "facility closure" as there is no concept of the "facility closure" in either the federal or the state law. This change would prevent damages paid as a consequence of an employer failing to give notice in a mass layoff situation where no facilities are closed as compensation.

The amendment to §860-a would remove the words "mass" from the Definitions section of this article so as to distinguish NY WARN from Fed WARN, as the triggering of NY WARN can occur when less than half the number of employees triggering Fed Warn suffer an unemployment loss. The words "mass" and "plant" are removed from the relevant language of the following paragraph, and the words "moving or" replace "relocation or" to ensure that the number of employment losses are accurately accounted for.

The amendment to §860-b would replace the language "employment loss" with "plant closing" so as to avoid ambiguity in litigation resulting from direct lawsuits without the involvement of the Department of Labor. This change also remedies an error where, technically, the statute requires employers to provide governmental agencies with notification before the termination of *anyone*, even a single employee, without cause, on pain of a daily civil penalty (subject to a cap).

The amendment to §860-c contemplates the repositioning of the language "in the case of a plant closing" to avoid limiting the faltering company exception and the unforeseen business circumstances exceptions to instances of plant closings. There is a disparity of opinion between the Labor and Employment Section members representing primarily

management and those representing primarily employees as to whether such changes are strictly necessary.

The amendment to §860-d would remove every instance of the word “mass” from the section, consistent with Fed WARN from which this section was borrowed, so as to ensure that certain layoffs are not counted as employment losses regardless of extending beyond six months.

The amendment to §860-g would substitute “plant closing” for “employment loss” to accurately define the scope of this section. The language “facility closure” would also be removed from the phrase “the advance notice of a facility closure required by this article” to ensure that the likely intent of the law of the law is followed where the concept of “facility closure” does not exist in either state or federal law. A typographic error in a citation to Fed WARN would also be corrected.

The amendment to §860-h would substitute “plant closing” for “employment loss” to accurately define the scope of this section.

The report will be presented by Gerald T. Hathaway, co-chair of the Commercial and Federal Litigation Section’s Committee on Employment and Labor Relations, and Jonathan Weinberger, co-chair of the Labor and Employment Law Section’s Committee on Legislation and Regulatory Developments.