

New “Blackout Period” Notice Requirements

A change in the investments/record keeping of individual account plans (such as 401(k) plans) generally requires a period of time during which all account activity (contributions, distributions and investment changes) is suspended. This **Blackout Period** is to enable the transfer of records from the old platform to the new platform. The U.S. Department of Labor (DOL) recently released interim final rules that will affect blackout periods of three or more consecutive business days that start on or after January 26, 2003, with a transition rule for periods beginning before February 26, 2003.

Blackout Period - The blackout period begins on the earliest date that any of a participant’s affected rights are limited. For example, if loan requests must be made two weeks before the date investment changes will be frozen, the blackout period starts when loans are first restricted.

Advance Notice - A minimum of 30 (but not more than 60) days advance notice must be given to all employees affected by the blackout period to enable them to make appropriate changes to their account investments, or request a loan or distribution. It must also be given to issuers of employer securities that may be affected by the blackout period (assuming the stock is an investment option under the Plan).

Form of Notice - The Notice may be written or transmitted electronically.

Notice Content - The regulation provides a Model Notice which is optional. However, all Notices must be understandable and include at least the following:

1. Reason for the blackout period.
2. What investment options and other rights (e.g., loans) are affected.
3. Expected beginning and ending dates of the blackout period.
4. If changes to investments will be limited, an alert to employees to review their investments and make any appropriate changes before the blackout period begins.
5. If the Notice is not given at least 30 days in advance, a statement that federal law generally requires a 30 day advance, and the reason why the Notice was not given timely.
6. Name, address and telephone number of the Plan Administrator or Representative to contact with questions on the blackout period.

Penalties - A \$100 per day per participant penalty may be assessed by DOL for failure to provide a complete, timely Notice . **The penalty period begins on the date the Notice should have been given, and ends on the last day of the blackout period.**

*This is potentially a significant penalty, since the length of the blackout period can often run three to six weeks, or even more. Thus, assuming the Notice was given just one day late (i.e. 29 days before the blackout period) a Plan with 100 participants and a 20 day blackout period could be assessed a penalty of \$490,000 (i.e., \$100 per day **times** 100 participants **times** 49 days).*

Exceptions - The 30 day advance Notice does not apply if:

1. The failure to provide the Notice is due to:
 - a. prudence in protecting participants' interests (e.g., if an investment option such as company stock is no longer prudent), or
 - b. due to unforeseeable events or circumstances beyond the control of the Plan Administrator.

In such cases the Plan Administrator must sign and date a written determination as to the circumstances that prevent compliance.

2. The blackout period only applies to a group of participants/beneficiaries in connection with their participation in the Plan due to a merger, acquisition, divestiture or other such business transaction.

In all of the above situations the Notice must still be given as soon as is reasonably possible under the circumstances.