



# Blackout Notice information and distribution requirements

**A BLACKOUT PERIOD IS DEFINED AS A PERIOD OF MORE THAN THREE BUSINESS DAYS DURING WHICH A PARTICIPANT OR BENEFICIARY HAS BEEN TEMPORARILY SUSPENDED, LIMITED OR RESTRICTED FROM DIRECTING OR DIVERSIFYING ACCOUNT INVESTMENTS, OR OBTAINING A LOAN, DISTRIBUTION, OR WITHDRAWAL.**

A blackout notice is required disclosure put in place by the Sarbanes-Oxley Act of 2002. This requirement is intended to provide advance notice to participants and beneficiaries with account balances in "individual account" plans (i.e., 401(k) plan or 403(b) plan) when the plan will experience a blackout period.

A Department of Labor (DOL) penalty of up to \$169.00 per day, per participant from the date that the Plan Administrator fails to provide the notice through the ending date of the blackout period can be assessed if the requirement is not met. For example, the plan administrator of a plan with 100 participants may be assessed more than \$10,000 for every day that the notice requirement is not satisfied.

## Distribution requirements

### Who must receive the blackout notice?

By law, the blackout notice must be given to the following individuals with an account balance:

- plan participants
- terminated employees with an account balance
- alternate payees under a Qualified Domestic Relations Order (QDRO)
- any beneficiaries with an account balance

### When the blackout notice must be delivered

STATUS	TIMING FOR DELIVERY
Anyone with an account balance when the blackout notices are distributed	At least 30 but no more than 60 days prior to the beginning of the plan blackout period
Eligible employees enrolling after a blackout notice is distributed or during blackout period, beneficiaries of newly-deceased participants, new alternate payees under a QDRO	As soon as possible

## Changes to the beginning or ending date of your Plan's blackout — blackout modification notices

If the start date of your blackout period will change after you've distributed the blackout notice, or if the blackout period will continue beyond the end date stated in the notice, you must furnish a blackout modification notice to all affected participants and beneficiaries as soon as reasonably practicable, unless it's impracticable to furnish it before the blackout will end.

If you have the ability to furnish a modification notice to some individuals before the blackout period ends (for example, if electronic delivery is available), you must provide it to those who could receive it before the end of the blackout period.

The modification notice must:

- (1) Explain the reasons for the change in date(s); and
- (2) Identify all material changes in the information contained in the original notice.

If you need to furnish a blackout modification notice, ADP can work with you to prepare the notice. If the blackout period will end later than the date stated in the initial blackout notice, you must inform ADP of the change, the new ending date of the blackout period, and the reason for the change as soon as administratively practicable.

## Special language for limited late delivery situations

If you fail to provide a blackout notice at least 30 days before the blackout starts, you must also include a statement explaining (a) that federal law generally requires 30 days' advance notice, AND (b) why you could not meet this requirement. DOL regulations suggest the following model:

"Federal law generally requires that you be furnished notice of a blackout period at least 30 days in advance of the last date on which you could exercise your affected rights immediately before the commencement of any blackout period in order to provide you with sufficient time to consider the effect of the blackout period on your retirement and financial plans. [Insert explanation for inability to furnish 30 days advance notice here]."

The DOL has indicated that this language should be included when you provide the blackout notice to anyone who begins to participate in your Plan after blackout notices were initially distributed and cannot be given the notice 30 days in advance. ADP's sample blackout notice includes this language to cover this possibility.

There are two other situations in which the 30-day advance notice requirement does not apply that might apply to your conversion to ADP:

- If you conclude that it would violate ERISA's exclusive benefit or prudence rules not to immediately begin a blackout; or
- If events occur that are unforeseeable or beyond your reasonable control.

In either situation, DOL regulations require a plan fiduciary to make this determination in a signed, dated writing and that you include the late delivery paragraph in your blackout notice. If this happens, you must provide the blackout notice as soon as reasonably practicable, unless you cannot provide it before the end of the blackout period. The DOL takes the position that if you are able to provide the blackout notice to some participants and beneficiaries before the blackout period ends in these situations you must do so.

## Special requirements for plans with self-directed brokerage assets

Unless brokerage assets are liquidated into core funds and will be subject to the same blackout timing as the rest of your plan's assets, they will not be covered by ADP's sample blackout notice. If these conditions are not met, ADP will be unable to assist you with your blackout notice obligations as they relate to the transfer of these assets. In the unlikely event you will be unable to timely liquidate brokerage assets into core funds for affected participants and beneficiaries, you will need to determine your blackout notice obligations concerning those assets. This could require that you modify the sample blackout notice, or to issue a separate blackout notice covering those assets. It is your responsibility to resolve these matters with the broker and determine your blackout notice obligations regarding these assets.

## Mapping form (if applicable)

If participant investment elections will be mapped to like funds as part of your plan's conversion to ADP, we will provide you a Fund Mapping Form for distribution to affected participants and beneficiaries once you complete your plan's mapping. You should distribute the Mapping Form with the blackout notice. If your mapping is not yet complete when you distribute those documents, we strongly recommend you send the Mapping Form to all participants and beneficiaries who will be affected by the blackout at least 30 days before the blackout starts. Failure to do so could expose you to potential fiduciary liability for the performance of investments in the mapped funds.

## Special requirements: Plans with an Employer Stock Fund

If your Plan permits employer securities (such as an employer stock fund) as an investment option, you must provide a blackout notice to the agent for service of legal process for the issuer of your company's securities unless the issuer names another person to receive the notice. (If the issuer has designated the Plan Administrator to receive such notices, you will be treated as notifying the issuer when you provide the notice to participants and beneficiaries.) This notice must be furnished to the issuer in the same timeframe as the participant notice and be updated if the beginning or ending date changes. You can use the same notice that you give to your participants. The issuer, in turn, may be required to provide certain notices regarding the blackout. Consult your legal counsel regarding these obligations.

## Delivery methods

The blackout notice must be distributed using a method reasonably calculated to result in actual receipt. Delivery methods that meet the requirements include:

- First-class mail
- Hand delivery
- Electronic delivery such as email

You may use a combination of the above methods. For example, the blackout notice could be emailed using work email addresses to active plan participants and sent via first-class mail to terminated participants, alternate payees and beneficiaries of deceased participants with an account balance.

### Important Considerations for Electronic Delivery

While the DOL and IRS each have their own electronic delivery requirements, you may deliver any notice or disclosure by email to current employees using your business' email system, as long as:

- Using your email system is an "integral part" of their duties (i.e., they have a computer at their workstation). Merely having "access" to a computer at work (such as access to a computer kiosk on a warehouse floor or in a mailroom) is not enough.
- The email explains the importance of the document being delivered electronically and the right to receive a paper copy free of charge (and, if requested, you provide one).
- If you wish to use electronic delivery for any other participant group (such as terminated participants with an account balance) or use a different electronic delivery method (such as posting to your corporate intranet), please consult your tax or legal advisor regarding the requirements that apply.

For your protection, we recommend that you consider maintaining a record of document delivery. This could include, for example, copies of what was sent, an address list (physical or email) of all recipients, and evidence it was sent. You will also want to be able to document that you followed up on any materials that were returned as undeliverable.

**ADP RETIREMENT SERVICES** 71 Hanover Road, Florham Park, NJ 07932

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