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July 28, 2020

W. Rodney McMullen  
Chairman and Chief Executive Officer  
The Kroger Co.  
1014 Vine Street  
Cincinnati, OH 45202

Dear Mr. McMullen:

I am writing to seek information about whether Kroger's attendance policies provide accurate information regarding workers' rights under federal, state, and local laws (where relevant) to take time off without punishment. A new report released in June by A Better Balance found that some of the nation's largest employers have attendance policies that "reliably fail to inform workers about their legal rights to take time off without punishment for certain illnesses, health conditions, or disabilities, or for the need to care for an ill loved one under state, local, or federal law."<sup>1</sup> As a result, workers are being disciplined and fired for legally protected workplace absences, such as leave related to pregnancy or qualifying disability-related absences. This is a particular concern during the novel coronavirus disease 2019 (COVID-19) pandemic, because workers may feel pressured to go to work sick if they believe, or are told, they will be punished for taking leave when they (or a loved one) are sick, even if that leave is legally protected. Punishing workers for exercising their workplace rights is a violation of the law, and I am seeking to ensure that your company's attendance policies clearly explain workers' rights and do not knowingly or unknowingly lead to the illegal discipline or termination of workers taking legally-protected leave.

According to A Better Balance, as stated in their *Misled & Misinformed* report, your company has a "no fault" attendance policy.<sup>2</sup> These policies generally operate by having workers accumulate "points" or "occurrences" for missing work, arriving late, or other attendance-related matters; after accumulating a certain number of "points," workers face discipline up to and including termination.<sup>3</sup> A new review of dozens of companies' "no fault" attendance policies found that "frequently, these attendance policies are used to infringe on workers' rights by punishing them ... for absences that are legally protected, including time off for serious medical needs."<sup>4</sup> The report found that companies with these attendance policies regularly provide

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<sup>1</sup> A Better Balance, "Misled & Misinformed: How Some U.S. Employers Use 'No Fault' Attendance Policies to Trample on Workers' Rights (And Get Away With It)," Dina Bakst, Elizabeth Gedmark, and Christine Dinan, June 2020, pp. 2, [https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled\\_and\\_Misinformed\\_A\\_Better\\_Balance-1-1.pdf](https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf).

<sup>2</sup> Id., pp. 7.

<sup>3</sup> CNN Money, "How 'no-fault' attendance policies can put companies and workers at risk," Kathryn Vasel, May 16, 2018, <https://money.cnn.com/2018/05/16/pf/no-fault-attendance-policy/index.html>.

<sup>4</sup> A Better Balance, "Misled & Misinformed: How Some U.S. Employers Use 'No Fault' Attendance Policies to Trample on Workers' Rights (And Get Away With It)," Dina Bakst, Elizabeth Gedmark, and Christine Dinan, June

incomplete or incorrect information about workers' federally-protected rights to leave under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA), as well as rights under state and local sick leave and pregnancy accommodation laws.

Federal civil rights and labor laws provide workers with the right to take leave from their jobs for certain medically-necessary needs. The FMLA provides eligible employees the right to 12 weeks of unpaid leave for specific circumstances, including the birth and care of a newborn, caring for a family member with a serious health condition, or when an employee has a serious health condition that makes them unable to work.<sup>5</sup> The FMLA is clear that “employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies.”<sup>6</sup> The ADA provides that, “an employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it” – even if the employee is ineligible for leave under the existing policies or the employer does not offer leave.<sup>7</sup> The ADA also requires that, “An employer may not penalize an employee for using leave as a reasonable accommodation.”<sup>8</sup> The Families First Coronavirus Response Act provided that some employers must offer up to two weeks of paid sick leave, and up to twelve weeks of emergency family leave, to workers under certain conditions related to COVID-19.<sup>9</sup> And many local and state policies provide for paid sick leave and pregnancy accommodations for workers.<sup>10</sup>

A Better Balance reviewed “no fault” attendance policies from 66 companies, finding that more than 80% of those policies “failed to make clear that employees will not receive points for qualifying disability-related absences;” only one policy “made clear that FMLA leave can be used during pregnancy,” and “the vast majority ... indicate that workers will incur points when they miss work because they are sick.”<sup>11</sup> Even when attendance policies mention workers’ rights under federal law, A Better Balance found the information “is often misleading, inaccurate, or incomplete.”<sup>12</sup> The report warns that this can “mislead workers into believing they have no legal protections when it comes to medical absences.”<sup>13</sup> The report cites several examples, including:

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2020, pp. 1, [https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled\\_and\\_Misinformed\\_A\\_Better\\_Balance-1-1.pdf](https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf).

<sup>5</sup> 29 CFR §825.100 - The Family and Medical Leave Act.

<sup>6</sup> 29 CFR §825.220 - Protection for employees who request leave or otherwise assert FMLA rights.

<sup>7</sup> U.S. Equal Employment Opportunity Commission, “Employer-Provided Leave and the Americans with Disabilities Act,” May 9, 2016, <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>.

<sup>8</sup> Id.

<sup>9</sup> Department of Labor, “Families First Coronavirus Response Act: Employee Paid Leave Rights,” <https://www.dol.gov/agencies/whd/pandemic/ffcr-employee-paid-leave>.

<sup>10</sup> A Better Balance “Fact Sheet: State and Local Pregnant Workers Fairness Laws,” June 29, 2020, <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/>.

<sup>11</sup> A Better Balance, “Misled & Misinformed: How Some U.S. Employers Use ‘No Fault’ Attendance Policies to Trample on Workers’ Rights (And Get Away With It),” Dina Bakst, Elizabeth Gedmark, and Christine Dinan, June 2020, pp. 7, [https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled\\_and\\_Misinformed\\_A\\_Better\\_Balance-1-1.pdf](https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf).

<sup>12</sup> Id., pp. 2.

<sup>13</sup> Id., pp. 14.

- Many companies’ policies fail to make clear that employees will not receive points for covered leave. For example, Walmart’s policy “does not make clear that employees will not be punished for absences protected by the FMLA and ADA.”<sup>14</sup>
- Some company policies implied points would be assessed for FMLA leave if it was not approved in advance,<sup>15</sup> despite the fact that the FMLA regulations provide instructions on how employers should handle workers taking “unforeseeable leave.”<sup>16</sup>
- Many company policies “unequivocally indicate that workers will incur points when they miss work because they are sick,” even though some of those companies operate in states or localities with the right to paid sick leave.<sup>17</sup>
- Few of the company policies made any mention of workers’ rights during pregnancy. Only one of the policies reviewed mentioned that FMLA leave could be used for absences during pregnancy, and only two mentioned the right to accommodations under a state Pregnant Worker Fairness Act.<sup>18</sup>

Compounding this problem, many workers don’t have access to the attendance policies that govern their employment. In fact, A Better Balance reports that, of workers contacting their legal helpline, “only a very small percentage of those workers actually had a copy of the policy or were able to access it.”<sup>19</sup> These policies should provide information about what leave is legally protected so workers understand their rights; not being able to access written policies makes it even harder for workers to know that their rights may have been violated, and to challenge illegal discipline or termination.

In order to better understand whether your company attendance policies comply with federal law, and do not punish workers for taking federally-protected leave, I request you provide responses to the following questions no later than August 11, 2020. In addition, I ask that you provide a copy of your company’s attendance policy for review.

1. Does your company have a “no fault” attendance policy, or a policy in which workers accumulate points, occurrences, or other demerits for missing work, arriving late, or other attendance-related matters? If so, please provide a copy of your nationwide attendance policy (and any state-specific policies, if applicable) and describe the consequences for workers who accumulate points, occurrences, or other demerits. If you do not maintain a single nationwide attendance policy, please provide a sample policy that is currently operative at one or more of your locations and describe how your policies differ by location.

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<sup>14</sup> Id., pp. 19.

<sup>15</sup> Id., pp. 15.

<sup>16</sup> 29 CFR §825.303.

<sup>17</sup> A Better Balance, “Misled & Misinformed: How Some U.S. Employers Use “No Fault” Attendance Policies to Trample on Workers’ Rights (And Get Away With It),” Dina Bakst, Elizabeth Gedmark, and Christine Dinan, June 2020, pp. 22, [https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled\\_and\\_Misinformed\\_A\\_Better\\_Balance-1-1.pdf](https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf).

<sup>18</sup> Id., pp. 28.

<sup>19</sup> Id., pp. 7.

2. How are workers informed of your company's attendance policy?
  - a. Is it posted for workers in a common workplace area?
  - b. Is it publicly posted on the internet?
  - c. Is it made available in a printed copy to workers when hired?
  - d. Is it made available in a printed copy to workers upon request?
  - e. Is the policy available in multiple languages, including languages your workers understand?
  - f. Are workers informed when your company makes changes to the policy? How are they informed?
  - g. If your company maintains more than one attendance policy, please specify which policies are made available to workers by the means described above.
3. Before a worker is assigned a point/occurrence, what steps does your company take to ensure their absence is not covered by local, state, or federal law?
4. If a worker provides medical documentation related to an absence, what steps do you take to review that documentation and assess whether it indicates that the worker's absence was legally protected? Are there instances where you will not accept medical documentation? If so, why?
5. Does your attendance policy inform workers of their rights to take leave under the Family and Medical Leave Act? How?
6. Does your attendance policy inform workers of their rights to take leave under the Americans with Disabilities Act? How?
7. Does your attendance policy inform workers of their rights to take paid sick leave under local or state law, if applicable? How?
8. Does your attendance policy inform workers of their rights to take leave for pregnancy-related medical conditions under local or state law, if applicable? How?
9. Has your attendance policy changed since the beginning of the COVID-19 pandemic, to reflect new local, state, or federal policy providing guaranteed paid sick leave, or for other reasons? If so, how has it changed and for how long will these changes remain in effect?
10. Does your attendance policy include a list of absences that would not subject workers to points/occurrences? If so, does this list include all legally-protected reasons for worker absences in clear language, including spelling out acronyms? What efforts do you take to ensure that your policy is regularly updated to reflect new protections under federal, state, or local laws? How is this list made available to workers?

11. How many workers at your company have received points/occurrences since January 2020 for the following reasons, and how many of those workers were eventually terminated due to accumulation of points/occurrences?
- a. Leave related to pregnancy protected under the FMLA
  - b. Leave related to disability protected under the ADA
  - c. Leave to care for an ill family member protected under the FMLA
  - d. Sick leave protected under state or local law, or the CARES Act
  - e. Because they or a family member has, or may have, coronavirus, in a case that is not covered by (a), (b), or (c) above.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Warren", written over a horizontal line.

Elizabeth Warren  
United States Senator