

Congress of the United States
Washington, DC 20510

March 3, 2022

The Honorable Martin Walsh
Secretary of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Charlotte Burrows
Chair of the Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Secretary Walsh and Chairwoman Burrows:

We are writing regarding our concerns that Amazon’s attendance policy may not be in compliance with federal laws protecting workers’ rights to take time off without punishment, and to urge the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) to investigate this matter. A detailed legal analysis by A Better Balance found that Amazon’s attendance policy appears to penalize workers for taking legally protected leave by allocating points to an employee’s record for each absence, regardless of the reason – while also failing to inform workers of their rights.¹ Absent action by the department and commission, Amazon will doubtlessly continue to discourage workers from taking the leave to which they are entitled and punish them for doing so, contributing to a culture of exploitation and fear.

Amazon’s Attendance Points Policy punishes workers for missing work unexpectedly, regardless of the reason. Under the policy, which appears to have taken effect in October 2021, workers are penalized in two ways for missing work: absence submission infractions (“ASIs”) and attendance points.² Accruing ASIs or attendance points is serious and potentially job threatening, and Amazon does not appear to be assigning them in a rational fashion. Workers who are unable to report absences “at least 2 hours before shift start” receive one ASI and two attendance points; those who need to drop a shift less than 16 hours in advance receive two attendance points; and those who are late for a shift receive one attendance point.³ Three ASIs or eight attendance points will cause Amazon to consider firing a worker.⁴ Amazon policy also punishes workers for working below a minimum number of hours per week, requiring that

¹ 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, [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).

² A Better Balance, “Letter to Amazon re: Attendance Points Policy,” January 10, 2022, Appendix A, p. 4-5, <https://www.abetterbalance.org/wp-content/uploads/2022/01/January-10-2022-A-Better-Balance-Letter-to-Amazon-1.pdf>.

³ *Id.*, pp. 6-7.

⁴ *Id.*

workers on a purportedly “flexible schedule model” receive points for failing to meet that minimum.⁵ This type of policy is often referred to as “no fault” attendance policy because it punishes workers for unplanned absences, regardless of the reason.⁶

Amazon’s attendance policy raises serious concerns under federal, state, and local laws protecting workers’ rights to take leave under certain circumstances. On the federal level, the *Family and Medical Leave Act* (FMLA) and the *Americans with Disabilities Act* (ADA) provide workers protected sick, family, and medical leave, pregnancy accommodations, and disability accommodations.⁷ It is common sense that emergency time off usually cannot be predicted. Accordingly, the FMLA entitles workers to emergency time off without advance notice, and only requires workers to provide notice for an unforeseeable need for leave “as soon as practicable.”⁸ In the case of a medical emergency, like a visit to the emergency room, the soonest practicable notice a worker may be able to give might be less than two hours depending on the severity of their emergency. This is correctly permissible under FMLA but punishable at Amazon with an ASI and two attendance points.⁹

For example, if a worker’s child had a severe asthma attack the night before a shift, and the worker took the child to the emergency room, then, under the FMLA, Amazon cannot require the worker to leave the child to report the absence while the child is receiving emergency treatment.¹⁰ Amazon’s policy, however, appears to punish this legally-protected right if it results in delayed notice of an absence.¹¹ Similarly, it appears that a worker who wakes up the morning of a shift with coronavirus disease 2019 (COVID-19) symptoms, or learns just before a shift that they have tested positive for COVID-19, would be at risk of accruing ASI or attendance points unless they come to work and put themselves and their colleagues at risk.

This Amazon policy also punishes workers for falling below a minimum weekly work hour threshold which also appears to violate federal law. Under the FMLA, a worker’s 12-week leave may be broken up and taken intermittently due to a single qualifying reason, such as occasional medical treatments.¹² Alternatively, a worker can have a reduced leave schedule where their usual number of working hours per workweek or hours per work day are reduced due

⁵ *Id.*

⁶ 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. 8, https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf.

⁷ U.S. Department of Labor, “Family Medical Leave (FMLA),” <https://www.dol.gov/general/topic/benefits-leave/fmla>; U.S. Department of Labor, “Americans with Disabilities Act”, <https://www.dol.gov/general/topic/disability/ada>.

⁸ 29 C.F.R. § 825.303(a).

⁹ A Better Balance, “Letter to Amazon re: Attendance Points Policy,” January 10, 2022, Appendix A, p. 6 <https://www.abetterbalance.org/wp-content/uploads/2022/01/January-10-2022-A-Better-Balance-Letter-to-Amazon-1.pdf>.

¹⁰ U.S. Department of Labor: Wage and Hour Division, “Fact Sheet #28E: Employee Notice Requirements under the Family Medical Leave Act.” February, 2013, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28e.pdf>.

¹¹ A Better Balance, “Letter to Amazon re: Attendance Points Policy,” January 10, 2022, Appendix A, p. 6 <https://www.abetterbalance.org/wp-content/uploads/2022/01/January-10-2022-A-Better-Balance-Letter-to-Amazon-1.pdf>.

¹² 29 C.F.R. § 825.202(a).

to a condition or that of incapacitated family member.¹³ Under the ADA, workers are entitled to reasonable accommodation for disabilities, including leaves of absence or limited hours per week as a “part-time or modified work schedule.”¹⁴ Amazon’s policy, however, states that it will penalize workers with points for failing to work a minimum amount of hours each week, and provides no clear exceptions.¹⁵

Assigning an ASI or attendance point for a legally-protected absence is unlawful,¹⁶ yet this Amazon policy appears to do just that. It punishes workers, and fails to inform them of their FMLA—or ADA—protected right to emergency time off without advance notice, intermittent leave, reduced schedule leave, and continuous leave. Similarly, many states have laws protecting workers’ right to leave. Massachusetts’ *Paid Family Medical Leave Act of 2018*, for example, provides all Massachusetts workers paid protected leave for family and medical reasons.¹⁷ Amazon’s policy directs workers experiencing hardship or unexpected circumstance that cause them to be unable to report their absence to speak with their manager or HR,¹⁸ and contains only a cursory mention that ASIs and points “do not apply when absences are covered by... applicable law.”¹⁹

Amazon is clearly failing to inform workers of their right to take their protected leave. It does not inform workers of what the “applicable law” is, and how it applies to their situation, keeping workers in the dark about the existing protections to which they are entitled, and intimidating them from exercising these rights by threats of termination. Many Amazon workers have indicated that they have never received information about the federal, state, and local laws that entitle them to legally protected time off.²⁰ Additionally, they describe that even when they have learned their rights and try to explain that their absences are legally protected, their line managers themselves do not understand the laws and continue to misassign points or even terminate workers.²¹ Thus, even when workers comply with Amazon’s requirement that they

¹³ 29 C.F.R. § 825.202(b).

¹⁴ 42 U.S.C. § 12111(9)(B); Equal Employment Opportunity Commission, “Employer-Provided Leave & the Americans with Disabilities Act,” May 9, 2016, <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americansdisabilities-act>.

¹⁵ A Better Balance, “Letter to Amazon re: Attendance Points Policy,” January 10, 2022, Appendix A, p. 7, <https://www.abetterbalance.org/wp-content/uploads/2022/01/January-10-2022-A-Better-Balance-Letter-to-Amazon-1.pdf>.

¹⁶ 29 C.F.R. § 825.220(c) (stating “nor can FMLA leave be counted under no fault attendance policies”).

¹⁷ Mass.gov, “How PFML is different than FMLA,” <https://www.mass.gov/info-details/how-pfml-is-different-than-fmla#:~:text=PFML%20is%20a%20state%20law,that%20was%20enacted%20in%201993>.

¹⁸ A Better Balance, “Letter to Amazon re: Attendance Points Policy,” January 10, 2022, Appendix A, p.4 <https://www.abetterbalance.org/wp-content/uploads/2022/01/January-10-2022-A-Better-Balance-Letter-to-Amazon-1.pdf>.

¹⁹ *Id.*

²⁰ A Better Balance, “Letter to Amazon re: Attendance Points Policy,” January 10, 2022, <https://www.abetterbalance.org/wp-content/uploads/2022/01/January-10-2022-A-Better-Balance-Letter-to-Amazon-1.pdf>.

²¹ A Better Balance, “Letter to Amazon re: Attendance Points Policy,” January 10, 2022, <https://www.abetterbalance.org/wp-content/uploads/2022/01/January-10-2022-A-Better-Balance-Letter-to-Amazon-1.pdf>; The New York Times, “Inside Amazon’s Worst Human Resources Problem,” Jodi Kantor, Karen Weise, and Grace Ashford, October 24, 2021, <https://www.nytimes.com/2021/10/24/technology/amazon-employee-leave-errors.html>.

inform their manager of the rights that Amazon has tried to hide from them, Amazon still violates those rights.²²

There are many more questions about Amazon's policy and its implementation, in part because of the company's lack of transparency. Amazon's current policy, which appears to have taken effect in October 2021, was only published after A Better Balance received the policy through their confidential legal helpline. The company has not provided any statistics on how this policy is being implemented, or compliance by its workers and managers. And there have been multiple prior complaints about Amazon punishing workers for taking protected leave, raising additional questions.²³

DOL should use its authority to investigate Amazon's Attendance Points Policy and its compliance with the FMLA, and EEOC should investigate Amazon's policy and its compliance with the ADA. Amazon's troubling attendance policy negatively impacts hundreds of thousands of Amazon workers and is also part of a larger corporate trend, making DOL and EEOC enforcement all the more important.²⁴ In July 2020, Senator Warren's office wrote letters to retailers Walmart, Conagra, FedEx, 3M, and Kroger because of her concerns about these companies' attendance policies,²⁵ and their responses did not allay concerns. DOL has referred numerous similar policies to its Wage and Hour Division for investigation,²⁶ and should do so again here. Such action would also be consistent with DOL's existing Employer's Guide to the FMLA which states that "counting FMLA leave under 'no fault' attendance policies" is an example of discrimination or retaliation against an employee attempting to exercise their FMLA rights.²⁷ We are pleased to see the Wage and Hour Division's new directive to ensure that workers are not prevented from taking time off from work under the FMLA,²⁸ but call for the department to investigate and target absence control policies specifically. The EEOC has

²²The Guardian, "Revealed: Amazon told workers paid sick leave law doesn't cover warehouses," Sam Levin, May 7, 2020, <https://www.theguardian.com/technology/2020/may/07/amazon-warehouse-workers-coronavirus-time-off-california>; The New York Times, "Inside Amazon's Worst Human Resources Problem," Jodi Kantor, Karen Weise, and Grace Ashford, October 24, 2021, <https://www.nytimes.com/2021/10/24/technology/amazon-employee-leave-errors.html>.

²³ A Better Balance, "Our Issues: Abusive Attendance Policies," <https://www.abetterbalance.org/our-issues/abusive-attendance-policies/>.

²⁴ *Id.*

²⁵ The Office of Senator Elizabeth Warren, "Warren Investigates Report that 'No Fault' Attendance Policies at Large Corporations Punish Workers for Taking Legally-Protected Leave," press release, July 30, 2020, <https://www.warren.senate.gov/oversight/letters/warren-investigates-report-that-no-fault-attendance-policies-at-large-corporations-punish-workers-for-taking-legally-protected-leave>.

²⁶ Letter from Rosemary E. Sumner, DOL FMLA Team, to unnamed complainant, July 29, 2003, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2003_07_29_4_FMLA.pdf; Letter from Bryan Jarrett, Acting Administrator, DOL Wage and Hour Division, to unnamed complainant, August 28, 2018, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_08_28_1A_FMLA.pdf.

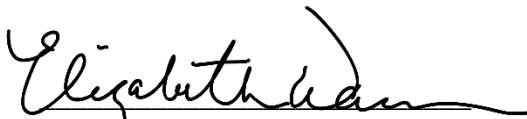
²⁷ U.S. Department of Labor, Wage and Hour Division, "The Employer's Guide to The Family and Medical Leave Act," <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>.


²⁸ U.S. Department of Labor, "US Department of Labor Announces Worker Initiative to Safeguard Rights, Ensure Protections for Workers in Warehouse, Logistics Industries", February 8th, 2022, <https://www.dol.gov/newsroom/releases/whd/whd20220208-1>.


conducted ADA investigations and enforcement against private employers,²⁹ and should do so here. For example, after one employer fired a worker for violating its attendance points policy, the EEOC sued the employer for violating the worker’s ADA right to request intermittent unpaid leave as an accommodation to receive treatment for her disabilities.³⁰ In another suit, the EEOC stated that an employer violated the ADA by implementing an attendance policy that assigned points to employees’ absences, regardless of reason, and terminated a worker after they accumulated a certain number of points.³¹ Amazon should not get away with similar behavior.

We ask that you conduct this investigation expeditiously to ensure that workers at Amazon and other companies that maintain such cruel attendance policies are protected from abusive employers. We also ask that you provide my office with a staff-level briefing on DOL and EEOC authorities to investigate and end these harmful policies, no later than March 17, 2022.

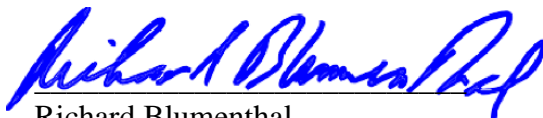
Sincerely,

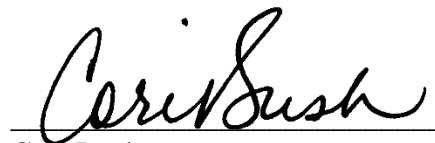

Elizabeth Warren
United States Senator


Bernard Sanders
United States Senator


Cory A. Booker
United States Senator


Alexandria Ocasio-Cortez
Member of Congress


Richard Blumenthal
United States Senator


Cori Bush
Member of Congress

CC: The Honorable Merrick Garland, Attorney General

²⁹ U.S. Department of Justice, Civil Rights Division, “Memorandum of Understanding Between The U.S. Equal Employment Opportunity Commission and The U.S. Department of Justice- Civil Rights Division Regarding ADA and GINA Employment Discrimination Charges Against State and Local Governments,” July 23, 2015, https://www.ada.gov/mou_eecoj.html.

³⁰ U.S. Equal Employment Opportunity Commission, “Treehouse Foods to Pay \$50,000 and Provide Benefits to Settle EEOC Disability Discrimination Suit,” press release, June 8, 2021, <https://www.eeoc.gov/newsroom/treehouse-foods-pay-50000-and-provide-benefits-settle-eeoc-disability-discrimination-suit>.

³¹ U.S. Equal Employment Opportunity Commission, “Mueller Industries Settles EEOC Class Disability Discrimination Lawsuit For \$1 Million,” press release, July 17, 2018, <https://www.eeoc.gov/newsroom/mueller-industries-settles-eeoc-class-disability-discrimination-lawsuit-1-million>.