AMERICAN BENEFITS COUNCIL

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Re: Request for Guidance on Certain COVID-19-Related Health Care Issues

Dear Ms. Weiser, Ms. Judson and Mr. Tackney,

I write on behalf of the American Benefits Council ("the Council") to request guidance from the U.S. Treasury Department and the Internal Revenue Service (IRS) on a number of key health care issues identified by our members. We are sincerely grateful for the significant efforts that the Treasury Department and the IRS have taken in response to the current crisis and appreciate the immense amount of work ahead. Notwithstanding other urgent Treasury and IRS priorities, we are submitting this request because guidance is needed to provide employers additional flexibility in their efforts to assist employees in response to the COVID-19 pandemic and related economic crisis.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

In that regard, our members play a vital role both in providing health care coverage during this unprecedented public health emergency and in mitigating the economic consequences of the pandemic for millions of Americans. As employers have made significant efforts to respond to the COVID-19 pandemic, a number of questions and issues have arisen that need additional guidance, flexibility and relief.

We understand and very much appreciate that the Treasury Department and the IRS are working diligently to address a host of issues related to the current pandemic, including developing guidance regarding the numerous tax provisions in the Families First Coronavirus Response Act (Pub. L. 116-127) ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136) ("CARES Act"). We submit this letter on additional issues because other guidance is also needed for employers as they seek to assist their employees and their employees' families in responding to the current crisis.

To that end, below we identify a number of significant COVID-19-related issues for your consideration. Our hope and request is that the Treasury Department and the IRS may be able to provide the employer community with clarifying guidance, safe harbors and/or certain good faith non-enforcement relief, as appropriate, to provide employers with additional flexibility to support their employees in this time of great need. We emphasize that all of our requests relate specifically to COVID-19 and are, accordingly, time-limited. Also, we intend to follow up separately on other health care issues arising with respect to COVID-19, including the employer shared responsibility provisions and the related reporting requirements.

Further, although it is certainly the case that many employers are making significant efforts to support their employees during this crisis, it is also the case that many employers are facing financial distress and/or must focus on addressing the operational needs of their businesses. Moreover, employers are in the process of making changes to their employee benefits, including health plans and paid leave policies, in response to the requirements, and new flexibility, provided in the FFCRA and the CARES Act. As such, making changes to employee plans mid-year, beyond the requirements of current law, could impose financial and administrative burdens which may not be feasible, or the best course of action, for some employers. Accordingly, we emphasize that we are requesting additional flexibility, rather than any new requirements, for employers.

CAFETERIA PLAN ELECTION CHANGES

COVID-19-Related Health FSA Election Changes

Due to the COVID-19 pandemic, many physicians, dentists and eye doctors have stopped performing non-emergent and/or elective procedures, either due to their own caution or because mandated by the state or local government. Thus, many employees'

expected health costs for 2020 will be significantly less than expected. Additionally, these employees may be looking for other financial means to assist in various personal expenses, such as mortgage payments, rent, etc. On the other hand, some employees will have significantly more out-of-pocket medical expenses than expected due to COVID-19 treatment. Of course, employees' health Flexible Spending Account (FSA) elections for 2020 plan years that began before the pandemic started did not, and could not have, taken these circumstances into account.

Although one of the permitted election change events under existing Treasury Department and IRS cafeteria plan regulations applies when health plan coverage is significantly curtailed (*e.g.*, a substantial decrease in the medical providers available in the coverage option), this change event does not apply with respect to a health FSA. Treas. Reg. § 1.125-4(f)(1). As such, under current guidance, employees are left in the position of being unable to adjust their health FSA contributions in order to respond to the COVID-19 pandemic.

In recognition of the extraordinary course of events, we ask that the Treasury Department and the IRS provide additional flexibility to employers to allow employees to change their health FSA elections to reduce, suspend or increase health FSA contributions at least once in the health FSA plan year in effect when the guidance is issued, as well as at least once in each of the following plan years through the plan year beginning in 2021, at the discretion of the employer, to account for the ongoing uncertainty.

COVID-19-Related Dependent Care FSA Election Changes

Due to the COVID-19 pandemic, a great many child care centers, child care providers and camps are no longer providing services and will not be for the foreseeable future. Moreover, there is a significant amount of uncertainty with regard to whether child care services will be needed later this summer or later this year. Thus, employees generally made dependent care FSA elections based on completely different circumstances than the ones that currently exist.

Employers are grateful for the current cafeteria plan regulations allowing employers to permit employees to make a change in election upon a number of circumstances, including a change in cost of the dependent care provider or a change in the provider itself (for example the care provider closes or no longer watches the child, the employee changes or stops using the provider due to a reduction or change in the employee's or the spouse's work hours, or the provider's cost changes (for non-relatives)). Treas. Reg. § 1.125-4(c)(3)(ii), (f)(2)(ii) and (iv), (f)(3) and (f)(6), Examples 5, 6 &7. This regulatory flexibility has been incredibly helpful to employers and employees during this pandemic.

However, employers and employees are facing a host of fact patterns that may not squarely fit into the current regulations – such as circumstances in which summer camps are still open, but are providing optional refunds if parents no longer feel comfortable sending their children to camps or the child care providers are still available, but the employees decide they no longer want to use childcare providers so they can limit their and their child's potential COVID-19 exposure.

To allow employees to respond to the changing and uncertain child care needs during the COVID-19 crisis, we ask that the Treasury Department and IRS provide additional flexibility to employers to allow employees to change their dependent care FSA elections to reduce, suspend, or increase dependent care contributions at least once in the dependent care FSA plan year in effect when the guidance is issued, as well as in each of the following plan years through the one beginning in 2021, at the discretion of the employer, to account for the array of possible fact patterns and the ongoing likelihood of uncertainty.

COVID-19 Related Health Plan Issues

Mid-Year Enrollment Period

Due to the COVID-19 pandemic, some employers are considering whether to provide a mid-year enrollment period for their group health plans to allow employees and their family members who previously declined health coverage for the plan year to enroll mid-plan year. Similarly, some insurers are also opening the options for employers to allow mid-year enrollments with respect to insured group policies to allow employees to enroll themselves and their family members.

The existing cafeteria plan rules, however, generally do not allow an employer to permit an employee to change his or her cafeteria plan election during the plan year, subject to exceptions for certain enumerated changes in circumstances which do not clearly apply in this scenario. Accordingly, employers considering this option are concerned that allowing employees or their family members who declined coverage previously to now enroll in coverage (and pay for the coverage via pre-tax salary reduction) would result in a potential Internal Revenue Code ("Code") Section 125 violation.

Due to the public health crisis and the public policy need to help individuals access health coverage during this pandemic, we urge the Treasury Department and the IRS to issue guidance to permit employers, at the employer's election, to allow employees to elect into coverage on a pre-tax basis for themselves and their family members who previously declined coverage. More specifically, we request that this guidance allow employers to offer employees who previously declined coverage for themselves, their spouse or their dependents a one-time opportunity to enroll in the group health plan. We request that employers be provided the flexibility to decide which employees, if

any, are offered the mid-year enrollment opportunity and that employers be permitted to choose to offer the election period at different times for different categories of employees during the applicable plan year. The one-time opportunity could be limited to the plan year which began on or before the date the guidance is issued (since presumably employers would be able to provide a new enrollment opportunity for the subsequent plan year, if they so choose). We request that this guidance not only permit employers to allow employees to enroll themselves, but also their spouse and dependents, even if the employee was already enrolled.

We emphasize that we are making this request in order to enhance flexibility for, rather than impose requirements on, employers. As noted above, offering a mid-year enrollment period is a significant administrative and financial undertaking for employers, many of whom, due to the pandemic and the economic crisis, are in financial distress and/or must focus on the operational needs of their businesses. As such, while some employers may wish to consider a mid-year enrollment period, making such a change may not be feasible, or the best course of action, for other employers. Accordingly, we request that any responsive guidance provided make clear that the guidance provides new options for employers – rather than imposing additional requirements on employers (such as a new required special enrollment period under the Health Insurance Portability and Accountability Act (HIPAA)) – and that employers retain all of the flexibility provided under current law to determine health coverage eligibility and benefits both during the pandemic and in the plan years that follow.

Significant Improvement in Benefits

One of the mid-year permitted election change events under the current cafeteria plan regulations applies when the coverage under an existing benefit option is significantly improved. *See* Treas. Reg. § 1.125-4(f)(3)(iii). As such, an employer may choose to provide in its cafeteria plan that if a significant improvement occurs, the employee may elect into coverage for himself or herself and/or his or her family members on a pre-tax basis or the employer may allow employees to change their benefit option election. Further, as permitted by the current regulations, the employer may determine, in its discretion, which of those improvements give rise to a change in election event under the cafeteria plan.

Notably, effective beginning March 18, 2020, as required by Section 6001 of the FFCRA, group health plans must provide coverage for COVID-19 testing (including the related visit) with no cost share. In addition to this mandated coverage change, some plan sponsors are electing to make other enhancements to their group health plan coverage, or to certain benefit options within their group health plan, in response to the current pandemic, including providing enhanced benefits for treatment of COVID-19 and coverage without cost-sharing for telemedicine visits, often regardless of whether related to COVID-19. These improvements – each by themselves or collectively – would

appear to constitute a significant improvement in benefits under the current cafeteria plan regulations. As such, it is our understanding that an employer whose cafeteria plan allows for election changes upon a significant improvement in benefits could choose to interpret its cafeteria plan to allow a new election opportunity to employees who previously declined coverage or did not enroll their spouse or dependents and/or an opportunity to change benefit options. We request that the Treasury Department and the IRS confirm this is indeed the case.

As noted above, this is a request for additional flexibility for employers and we ask that the Treasury Department and the IRS make clear in any responsive guidance that the Treasury Department and the IRS are not imposing any new requirements on employers (for a special enrollment period, or otherwise). Further, we request that any responsive guidance make clear that employers have the discretion to determine, consistent with the existing regulations, whether any improvement in benefits constitutes a change in election event under the employer's particular cafeteria plan.

We also request that any responsive guidance provide that, if an employer determines it would like to treat a change in coverage as an improvement in a benefit option and allow a mid-year change in election, it may choose which group/groups of employees are able to make that election change (*i.e.*, it could limit the change to employees who have already elected coverage, or who have not elected coverage, or some other criteria without violating the rule in the proposed regulations that the terms of the cafeteria plan must apply uniformly to all participants (*see* Prop. Treas. Reg. § 1.125-1(c)(1))).

Opportunity to Change Coverage Option Due to Hours Reduction or Other Hardships

In addition, many employers are being forced by current circumstances (such as state and local stay-at-home orders and orders to cease business operations) to reduce the hours (and accordingly, the pay) of their employees. Many employers want to continue to allow these employees to participate in the group health plans, but given the economic strain this may put on the employees, would like to give employees the option to elect a different coverage option. Oftentimes the different coverage option is a less expensive coverage option, but could also be a different coverage option that, although not less expensive, may be preferable for these workers given the current situation and their current medical needs. More generally, even employees whose hours are not reduced may be facing extreme economic hardship due to changes in their family income and expenses due to the pandemic and related economic crisis.

To enable employees in these circumstances to retain coverage and/or to obtain coverage that best suits their circumstances, we request that the Treasury Department and the IRS provide enabling guidance to allow employers the flexibility to provide employees with an opportunity to change their coverage election at least once for each employee during the plan year in effect when the guidance is issued and each following

plan year through the plan year beginning in 2021, to account for ongoing uncertainty and workforce changes. The employer would have the discretion to determine which coverage options would be available for election. We also request that the Treasury Department and the IRS provide employers the discretion to determine which employees would be eligible to change their coverage options (without violating the rule in the proposed regulations that the terms of the cafeteria plan must apply uniformly to all participants (see Prop. Treas. Reg. § 1.125-1(c)(1)). For the reasons noted above, we are requesting additional flexibility for employers, rather than a requirement that employers provide any such election opportunity.

Further, if only a narrow exception is feasible, we request that the Treasury Department and the IRS at least confirm that employers are able to provide their employees the opportunity to change their coverage election to the employer's lesser expensive option if their hours of work are reduced due to COVID-19, based on Notice 2014-55.

Health FSA Excess Amounts

As mentioned above, many employees are subject to stay-at-home orders and many medical professionals have suspended elective/non-COVID-related procedures for the time being. However, due to the current uncertainty and prevalence of COVID-19 infections, many employees may be hesitant to cease health FSA contributions, even if the relief requested above is provided. As such, many employees who elected to contribute to health FSAs for the plan years affected by the public health emergency expect to have substantial amounts remaining at the end of the plan year.

Under existing rules, an employee's unused health FSA balance remaining at the end of the plan year generally must be forfeited unless the plan allows a carryover of up to $500 from one plan year to the next. Prop. Treas. Reg. § 1.125-5(c); Notice 2013-71. Health FSAs are allowed, however, to provide a grace period of up to 2.5 months after the end of a plan year in which participants can incur expenses and use their prior year's remaining FSA balance. Prop. Treas. Reg. § 1.125-1(e). Under current rules, however, a health FSA is not permitted to have both a carryover and a grace period. Notice 2013-71.

To avoid a situation in which substantial numbers of employees forfeit their health FSA balances due to the pandemic, for the plan year in effect when the guidance is issued and each following plan year through the plan year beginning in 2021, we request that the Treasury Department and the IRS, at the discretion of the employer: (1) provide additional flexibility to allow employees to carry over more than $500 in unused health FSA amounts, such as allowing the full balance to carry forward, (2) to extend the grace period past 2.5 months after the end of the applicable plan year, for example to provide a grace period of 6 months and (3) to permit plans to have both a carryover and a grace period.

This flexibility, which employers would have the option to allow in whole or in part, would ensure that participants have sufficient time and ability to utilize the FSA contributions that they were unable to use during the public health emergency. We also note that this flexibility would generally be consistent with Executive Order 13877, "Improving Price and Quality Transparency in American Healthcare To Put Patients First," which although it was issued in a different circumstance, directed the Treasury Department and the IRS to issue guidance to increase the amount of health FSA funds that can carry over without penalty at the end of the year.

We also note that some employees are experiencing extreme financial hardship and access to any additional funds is vital. Further, for employees who will experience a termination of employment, additional carryover or longer grace periods will not address the issue of forfeiture of accumulated amounts. As such, we also request that employers be permitted to allow employees who are terminated from employment during the public health emergency to cash-out their health FSA balances.

Dependent Care FSA Excess Amounts

As noted above, due to the COVID-19 pandemic, a great many child care centers, child care providers and camps are no longer providing services and will not be for the foreseeable future. Thus, many employees will incur substantially less dependent care expenses than they could have reasonably anticipated when they made their elections for the current dependent care FSA plan year. Although, as previously noted, these individuals generally are permitted to change their elections to reduce their contributions going forward, many have accumulated a balance related to their contributions from the beginning of the plan year until now and some are hesitant to reduce contributions due to uncertainty about the rest of the year (for example because it is unclear whether summer camps will be in session). Employees may also be experiencing financial hardship due to a loss of their job or a reduction in pay.

Per Proposed Treasury Regulation § 1.125-5(c), an employee's unused dependent care FSA balance remaining at the end of the plan year generally must be forfeited – i.e., no amounts may be carried forward into the next year. Dependent care FSAs are allowed, however, to provide a grace period of up to 2.5 months after the end of the plan year in which participants can incur expenses and use their prior year's remaining FSA balance. Prop. Treas. Reg. § 1.125-1(e).

Due to the drastic change in child care expenses for many families and ongoing uncertainty with regard to the foreseeable future, we request that the Treasury Department and the IRS allow employers to elect to provide carryovers of unused dependent care FSA balances and allow the grace period to extend past 2.5 months, for example for up to 6 months, for the plan year in effect when the guidance is issued and each following plan year through the plan year beginning in 2021. We also request that

employers be permitted to allow employees who experience a termination of employment during the public health emergency to cash out their dependent care FSA balances.

Commuter Benefit Excess Amounts

Due to the pandemic and the widespread stay-at-home orders, many employees are no longer commuting to work. Employers appreciate the current flexibility with regard to pre-tax salary reductions for commuter benefits that allow employers to permit an employee to change his/her election for commuter benefits at any time and an employee to carry over unused amounts to the next plan year. However, some employers would like to be able to provide employees the option to cash-out their accumulated commuter benefit balances, because the employees are unlikely to need the benefits for the foreseeable future and the cash-out could help the employees cover other expenses (*e.g.*, rent, mortgage, groceries), due to the unprecedented economic crisis.

Accordingly, we request that the Treasury Department and the IRS allow employers to offer employees the ability to cash-out pre-tax commuter expense balances during the plan year in effect when the guidance is issued. If a narrower request is more feasible, we request that guidance at least allow employers to provide cash-outs of these benefits upon termination of employment during the plan year in effect when guidance is issued.

NON-DISCRIMINATION RULES FOR SELF-INSURED MEDICAL ARRANGEMENTS

In the current environment, employers need to make quick decisions regarding whether enrollment or benefit plan changes are needed for their company and workforce. These decisions, including some of the added flexibility requested in this letter, may apply to the workforce as a whole in some cases, but in other cases may be based on distinctions in location, job description or other factors. There is generally a lack of clarity regarding precisely how the rules under Code Section 105(h) apply in practice and it is often difficult for an employer to determine with 100% confidence whether the rules are satisfied even when that employer has time to do so. For this reason, the Treasury Department and the IRS should articulate in applicable guidance that because these changes are being made in the context of a pandemic and with the intent to provide relief to impacted employees, a good faith compliance standard will apply to Code Section 105(h).

PAID TIME-OFF CASH OUTS DURING THE PUBLIC HEALTH EMERGENCY

Due to the COVID-19 pandemic and the related unprecedented restrictions on travel and the economic crisis, some employees may be unable to use their paid time off (PTO) benefits during the public health emergency. Additionally, for many employees, the cash value of their accrued PTO could significantly assist them in providing for themselves and their families during this time of crisis.

Under existing rules, once the tax year begins, employees generally may not elect to receive cash in lieu of accrued PTO benefits without triggering constructive receipt concerns. *See, e.g*., PLR 200130015.

To help support employees during the public health and resulting economic crisis, some employers would like the option to allow employees an opportunity to cash out some or all of their unused PTO benefits, even if the employees do not separate from service. Accordingly, we request that the Treasury Department and the IRS adopt rules to permit employers to allow employees to elect to cash out accrued but unused PTO benefits during the public health emergency, or, if later, through the end of 2020, without triggering constructive receipt concerns.

DISASTER RELIEF AND NON-DISCRIMINATION RULES

Given the unprecedented financial strain the COVID-19 pandemic has and will continue to have on employees, many employers want to provide financial assistance to employees impacted by the pandemic with the least tax impact on employees. For example, many employees are incurring unexpected out-of-pocket medical or funeral costs and child care costs now that schools are closed, are having difficulties paying rent or their mortgage because their spouses have been furloughed or lost their jobs, or, for those in an essential profession, must now drive to work and pay for parking rather than take public transportation.

Under Code Section 139, employers can make qualified disaster relief payments to employees that are excluded from the employees' income. These payments include "reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster." Code § 139(b)(1). "Qualified disaster" includes a federally declared disaster, as defined by Code Section 165(i)(5)(A). Code § 139(c)(2). On March 13, 2020, President Trump issued a Proclamation declaring a national emergency concerning the COVID-19 outbreak, stating in a letter that the ongoing COVID-19 pandemic warrants an emergency determination under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 – 5207. Thus, the COVID-19 pandemic is a "federally declared disaster" under Code Section 165(i)(5)(A). *See COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs*, Q&A-58.

In Rev. Rul. 2003-12, the IRS said that qualified disaster relief payments can include payments for medical expenses. Another Section of the Code - Code Section 105(h) – sets forth non-discrimination rules that apply to self-insured medical payments. It is unclear whether, and if so to what extent, the Code Section 105(h) rules interact with the Code Section 139 rules. In other words, questions have arisen regarding whether, and if so under what circumstances, medical expense payments made pursuant to Code Section 139, including (1) disaster relief payments intended only for medical expenses and (2) disaster relief payments that can be used for medical expenses and other types of expenses as well, are subject to the Code Section 105(h) non-discrimination rules. We request that the Treasury Department and the IRS issue clarifying guidance.

OVER-THE-COUNTER DRUGS AND MENSTRUAL CARE PRODUCTS UNDER THE CARES ACT

The CARES Act amended Code Section 106(f) to effectively reverse the Affordable Care Act rule that only *prescribed* medicines and drugs are qualifying medical expenses. Accordingly, over-the-counter drugs and medicines generally are now reimbursable from health FSAs and health reimbursement arrangements (HRAs). Additionally, the CARES Act amended Code Section 106(f) to provide that menstrual care products are also qualifying medical expenses that can be reimbursed from health FSAs and HRAs. The CARES Act made similar amendments to the rules for health savings accounts (HSAs) and Archer medical savings accounts (Archer MSAs).

Notably, the statutory language of the CARES Act indicates that these changes in law are effective beginning on January 1, 2020 (*i.e.*, for HRAs and health FSAs, expenses incurred after December 31, 2019 and for HSAs and Archer MSAs, for amounts paid after December 31, 2019). While the effective date provision is clear for HSAs, Archer MSAs and HRAs, clarification is needed with regard to health FSAs. Specifically, a cafeteria plan generally can only be amended prospectively. Prop. Treas. Reg. § 1.125-1(c)(5). Thus, it is unclear whether an employer can amend its cafeteria plan to allow a health FSA to reimburse medicine/drugs without a prescription and/or menstrual care products that were incurred between January 1, 2020 and the date of the cafeteria plan amendment. We request that the Treasury Department and the IRS confirm that, notwithstanding Proposed Treasury Regulation § 1.125-1(c)(5), employers can (but are not required to) amend their cafeteria plans retroactively back to January 1, 2020 so that their health FSAs can reimburse medicine/drugs and/or menstrual care expenses incurred on or after January 1, 2020. For the sake of certainty, we also request confirmation that the CARES Act changes do not require that any health FSA or HRA reimburse over-the-counter medicines and drugs or menstrual care products if not permitted by the terms of the plan.

Although a more technical point, we also request that the Treasury Department and IRS confirm that the analysis in Rev. Rul. 2003-102 (which confirms that self-insured

employer-provided plans may choose to reimburse over-the-counter drugs notwithstanding the limitation in Code Section 213(b) on deducting expenses for those drugs) still applies, even though it was previously rendered obsolete by the enactment of the ACA.

COVID-19-RELATED MEDICAL EXPENSES

In light of the COVID-19 pandemic, many employees and their families have purchased and will continue to purchase items such as medical-grade face masks and anti-bacterial hand sanitizers to protect themselves and their families from illness. Employees may wish to seek reimbursement for these items from account-based plans in which they participate, such as HRAs, HSAs and health FSAs. However, reimbursements from those accounts are limited to medical care expenses, among other requirements.

Per Code Section 213(d), "medical care" means amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting a structure or function of the body. An expense that is merely beneficial to the general health of an individual is personal and is not for medical care. Treas. Reg. § 1.213-1(e)(1)(ii). However, the IRS has indicated that, depending on the circumstances, expenses for medical grade face masks and anti-bacterial hand sanitizers could be medical or could be personal. *See, e.g.*, IRS Info. Ltr. 2009-0209.

To provide certainty and support for employees who wish to seek reimbursement for these essential items used to prevent the spread of COVID-19, we request that the Treasury Department and the IRS confirm for expenses incurred during the COVID-19 public health emergency, these and similar items may be considered medical care under Code Section 213 without regard to whether they may also be personal expenses.

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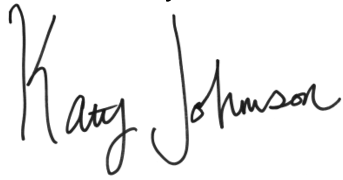
We commend you for your efforts to address the current crisis and we understand the immense amount of work ahead. We greatly appreciate your attention to this request among the many other essential matters before you.

This letter is part of the Council's ongoing effort to do our part by identifying and suggesting solutions to address regulatory barriers that are hindering the ability of employers and employees to respond effectively during the pandemic. Our efforts in this regard are continuing and we will be in touch with additional issues as appropriate.

As always, please contact us to let us know how we can best assist you in your important efforts. Thank you again.

Sincerely,



Katy Johnson
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