No. 26-8007

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHARD L. MEHLBERG and ANGELA R. DEIBEL, et al.,
Plaintiffs-Respondents,

v.

COMPASS GROUP USA, INC.,
Defendant-Petitioner

On Petition for Permission to Appeal from the United States District Court for the Western District of Missouri, No. 2:24-cv-04179-SRB
The Honorable Stephen R. Bough

MOTION FOR LEAVE TO FILE BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER AND REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The ERISA Industry Committee ("ERIC") and The American Benefits Council (the "Council") (collectively "Amici"), with consent of Plaintiff-Respondent and Defendant-Petitioner, request leave to file a brief as *amicus curiae* pursuant to Fed. R. App. P. 29, in support of Defendant-Petitioner's Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) and reversal. Amici respectfully state:

1. ERIC is a national non-profit business trade association representing the nation's largest employers in their capacity as sponsors of employee benefit plans for their workers, retirees, and families. ERIC member companies are leaders in every sector of the economy. ERIC remains the voice of large employer plan sponsors on public policies that affect their ability to provide benefits to millions of active workers, retired persons, and their families nationwide.

2. The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's members are primarily large, nationwide employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes.

3. Amici request leave to file a brief as *amici curiae* in support of Defendant-Petitioner, Compass Group USA, Inc. ("Compass" or "Petitioner").

4. Amici seek to provide the Court with necessary background regarding nationwide class action litigation involving tobacco surcharges and wellness programs in the context of employee welfare benefit plans regulated by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA").

5. Amici will explain the importance of wellness programs to participants, beneficiaries, and plan sponsors and demonstrate that immediate review of the District Court's class certification decision below is crucial because that decision may influence decisions in more than 75 other pending ERISA class action matters involving the same or similar issues. This Court may be the first, or one of the first, federal appellate courts to address these issues. Amici believe that this background information will assist the Court in deciding whether to grant the Defendant-Petitioner's Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f).

6. Amici contacted counsel for Plaintiffs-Respondents and Defendant-Petitioner, and both parties consent to the filing of the requested brief.

7. Amici herby tender a brief as *amici curiae* in support of Defendant-Petitioner's Petition for Permission to Appeal and supporting reversal.

Respectfully submitted: June 10, 2026.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 398 words, excluding the parts of the petition exempted by Federal Rules of Appellate Procedure and 32(f).

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

3. In accordance with 8th Cir. R. 28A(h)(2), this motion and attachment have been scanned for viruses and are virus-free.

Respectfully submitted: June 10, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2026, the foregoing was filed with the Clerk of Court for the U.S. Court of Appeals for the Eighth Circuit using the CM/ECF system. I also certify that copies of the foregoing Petition were served by email and via FedEx for delivery within 3 calendar days upon the following counsel of record:

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Local Appellate Rule 26.1A, the ERISA Industry Committee and the American Benefits Council state that they are not publicly held corporations, they do not have parent corporations, and no publicly held corporation owns 10% or more of their stock.

INTEREST OF AMICI CURIAE

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing approximately 100 of the nation's largest employers in their capacity as sponsors of employee benefit plans for workers, retirees, and families. ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit plan design or administration or affecting benefits plans.

The American Benefits Council (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 protecting and encouraging 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. The Council regularly participates as amicus curiae in cases affecting benefits plan.

ERIC and the Council have a strong interest in the outcome of this litigation because many of their members sponsor benefit plans regulated by the Employee Retirement Income Security Act ("ERISA"), and many of those plans include wellness programs that help participants by encouraging healthy practices, improving quality of life and longevity. Wellness programs reduce healthcare costs for plans, employers, and participants.

Amici's members are often targeted in ERISA class actions like this one. It is important to amici that courts carefully enforce Rule 23's requirements, both in ERISA cases and more generally. ERIC and the Council submit this brief to provide context regarding wellness programs, their importance in improving participant health and lowering healthcare costs, and the potential negative ramifications of the many tobacco surcharge class action cases pending nationwide. Not only do tobacco surcharge cases wrongly attempt to turn wellness programs backwards, but they potentially expose plan sponsors to hundreds of millions of dollars in liability. This liability may be shouldered by participants through increased premiums, decreased benefits, or no wellness programs at all – all of which is detrimental to participants' health.

All parties consent to the filing this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party authored this brief in whole or part, and no entity or person, aside amici, their members, or their counsel, made any monetary contribution intended to fund or prepare submitting this brief.

INTRODUCTION

The importance of this case transcends the interests of the parties, implicating the health of American workers and the cost and availability of health plan benefits. To ensure protection of those interests, amici urge this Circuit to grant the Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) ("Petition") filed by Compass Group USA, Inc. ("Compass" or "Petitioner").

This is one of at least 75 tobacco surcharge class action cases pending nationwide, including several in this Circuit.[1] This case was one of the first tobacco surcharge cases filed, presenting novel ERISA questions. As these six dozen cases move through the courts, with recurring and similar questions of law, this case has been watched especially closely, cited in more than 17 opinions across at least 15 jurisdictions. This is only the second tobacco surcharge case to reach the class action certification stage. Significantly, Petitioner argues that the case was certified without meaningful consideration of arguments concerning individualized liability and defenses, accrual of the applicable limitations period, and an incompatible and unmanageable class structure with overlapping opt-in and opt-out classes. If this Court does not review the District Court's Order, the decision will provide a playbook for certifying ERISA tobacco surcharge class actions without

[1] More than 25 new cases have been filed thus far in 2026.

considering threshold liability issues and limitations defenses and imposing a practically unworkable class structure.

The harm from that outcome would be far-reaching. Wrongful certification of large ERISA class actions creates enormous pressure for defendants to settle even meritless claims so health plans and businesses are not harmed by immense defense costs and adverse judgments. Case in point, the first case to receive class certification, *Lipari-Williams v. The Missouri Gaming Company, LLC*, 5:20-cv-06067-SRB (W.D. Mo. November 16, 2021), was decided by the same judge as this matter. *Lipari* escaped review because the defendant settled for $5.5 million. This case carried *Lipari's* reasoning forward and is ground-zero for protecting Congressionally-authorized wellness programs, long-term health of participants, and employer-sponsored health plans relied upon by nearly half the U.S. population.[2]

This Court should grant review under Rule 23(f) and reverse the District Court's decision.

BACKGROUND

Tobacco use is the leading cause of preventable death in the United States, killing more than 1 in 5 people annually.[3] For every smoking-related death, at least 30 people live

[2] *See* Tax Policy Center, *Who Has Health Insurance Coverage*, https://taxpolicycenter.org/briefing-book/who-has-health-insurance-coverage

[3] *See* CDC, *Tips from Former Smokers, Know the Facts*, https://www.cdc.gov/tobacco/campaign/tips/groups/general-public.html

with a serious tobacco-related illness (including cancer, asthma, heart disease, stroke, diabetes, or lung disease).[4] Smoking results in annual healthcare spending of more than $200 billion.[5] Tobacco users consume more healthcare resources, costing about 30% more to insure.[6] Dangers of tobacco are well established, with warnings required on tobacco products for over 60 years.[7]

Because unhealthy lifestyles—such as those involving tobacco use—cause illness, premature death, and medical expense, Congress gave plan sponsors flexibility to implement "wellness programs" as part of HIPAA, which amended ERISA. Wellness programs encourage healthy lifestyles, resulting in long-term health improvements and cost savings.[8] Congress authorized plan sponsors to establish rewards, such as the absence of premium surcharges, "in return for adherence to programs of health promotion and disease prevention." 29 U.S.C. § 1182(b)(2)(B). Given the undeniable link between tobacco use and disease, many plan sponsors incorporated tobacco-focused wellness

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[4] *Id.*
[5] *Id.*
[6] University of Wisconsin-Madison Center for Tobacco Research and Intervention, *Save on Health Insurance Premiums with Smoke-Free Policies*, https://ctri.wisc.edu/employers/business-case/premiums/
[7] American Lung Association, *Tobacco Control Milestones*, https://www.lung.org/research/sotc/tobacco-timeline
[8] Soeren Mattke et al., Rand Health, *Workplace Wellness Programs Study: Final Report* xiii, 1-2 and xvii (2013) (*RAND Report*).*; id.* at xix, xxvi, 53-65.

programs into health plans, including tobacco cessation programs and increased premiums as encouragement to quit.

Congress added requirements for wellness programs through the Affordable Care Act. As relevant here, when a wellness program has "conditions for obtaining" a "reward" that are "related to a health status factor," certain requirements apply. 42 U.S.C. § 300gg-4(j)(1)(C), (3). These wellness programs must, among other things, ensure that the "full reward … shall be made available to all similarly situated individuals." 42 U.S.C. § 300gg-4(j)(3)(B)-(D). To satisfy this requirement, wellness programs must provide either a waiver or a "reasonable alternative standard" for participants for whom it is "unreasonably difficult due to a medical condition" or "medically inadvisable to attempt to satisfy the otherwise applicable standard." 42 U.S.C. § 300gg-4(j)(3)(D). (This standard is referred to herein as the "Medical Condition Requirement.")

This statutory structure makes sense considering Congress' goal to incentivize healthy lifestyles and lower healthcare costs while preventing wellness programs from discriminating based upon health status. The Medical Condition Requirement might be used, for example, if a sponsor started a wellness program encouraging a BMI range, but achieving the goal was "unreasonably difficult due to a medical condition" or "medically inadvisable" for a particular employee. In that instance, the employer might offer that employee an alternative (such as walking a certain distance per day) to obtain the same

reward. In effect, the Medical Condition Requirement served to level the playing field for those with health constraints but was never meant to end-run wellness programs.

Beginning around 2024, the plaintiffs' bar began filing dozens of lawsuits attacking tobacco surcharges in wellness programs. Most of these cases were filed by participants who did not allege that they *could* have satisfied the Medical Condition Requirement or wanted to quit tobacco. Instead, the complaints generally alleged that plaintiffs participated in a health plan with a wellness program, used tobacco, paid a surcharge, and were not offered or adequately informed of a reasonable alternative standard. None of the complaints identify any actual (or even hypothetical) circumstances where it was "medically inadvisable" or "unreasonably difficult" to quit tobacco. Many also seek retroactive reimbursement of surcharges paid for periods when participants used tobacco.

I. Improper certification of ERISA tobacco surcharge class actions harms businesses and workers.

Ignoring Rule 23's parameters and individualized defenses can inflict serious harms on employers and the American worker's health and pocketbook. "Nothing in ERISA requires employers to establish employee benefits plans." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Congress tried to encourage employers to offer benefit plans by creating a streamlined and less expensive system through ERISA. *See e.g., Conkright v. Frommert*, 559 U.S. 506, 517 (2010). An incomplete Rule 23 analysis does the opposite,

while simultaneously discouraging employers from improving worker health through wellness programs.

Class actions are expensive. American companies' total spending on class action defense totaled more than $4.53 billion in 2025.[9] Combined with huge damages exposure upon class certification, this reality often forces defendants to settle meritless claims. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). For these reasons, the Supreme Court has long recognized the "risk of 'in terrorem' settlements that class actions entail." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011)); *see also* Daniel Aronowitz, Assistant Secretary, Dep't of Labor, Keynote Address at the 2026 Nat'l Ass'n of Plan Advisors Conf. (Apr. 19, 2026) ("Plaintiff law firms have significant settlement leverage in ERISA class action litigation because it costs millions of dollars to defend these cases," and "[m]ost companies choose to settle these cases to make the lawyers go away.")[10] Defense costs and settlements injure businesses that pay them *and* employees who participate in and contribute to ERISA plans. Indeed, the Supreme Court has remarked that one goal of enacting ERISA was Congress' "desire not to create a system that is so complex

[9] Carlton Fields, *2026 Carlton Fields Class Action Survey*, 6-7 (2026), https://www.carltonfields.com/getmedia/1ff719d2-dfec-46d3-8994-b88809435444/2026-carlton-fields-class-action-survey.pdf.

[10] The full text of the Assistant Secretary's address is available at https://fcwpol.files.cmp.optimizely.com/download/64c01f6c3e5f11f1b0e666070aa60a63.

that … litigation expenses[] unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Certification of ERISA class actions may incentivize employers to eliminate wellness programs Congress wanted to encourage. That result may jeopardize the health of American workers and increase healthcare costs for participants and plan sponsors.

The District Court's class certification order should be reviewed under Rule 23(f) before the other 75 (and rising) plan sponsors defending tobacco surcharge cases spend millions of dollars in potentially unnecessary defense costs, settlements, or judgments. Similar challenges to tobacco surcharge wellness programs continue to be filed, and the issues presented here are likely to recur. Early appellate guidance promotes consistent application of Rule 23, reduces uncertainty, and provides clarity regarding individualized defenses in this emerging category of ERISA class actions.

II. Review is warranted to consider whether the District Court erred by not adequately considering the Medical Condition Requirement.

This Court should consider whether the District Court erred by failing to consider the Medical Condition Requirement's impact when certifying the class. Skipping this threshold statutory inquiry is no small thing. This case—and nearly all the 75 others (and counting) behind it—will collapse if the Medical Condition Requirement need not be available to all participants. Plaintiffs effectively conceded as much, saying that if they

were required to prove a medical condition, "that would simply end the case, as Plaintiffs, like most other tobacco users, do not have a requisite medical condition." [Petition, pg. 10.]

Compass argued to the District Court that the Medical Condition Requirement is required *only* for individuals for whom it is "unreasonably difficult due to a medical condition" or "medically inadvisable" to satisfy the health standard. 42 U.S.C. § 300gg-4(j)(3)(D)(i)(I)-(II). Given the statutory text, Petitioner contended that Plaintiffs' lack of a qualifying medical condition subjected them to a unique defense, destroying typicality under Rule 23(a). Moreover, determining whether absent class members satisfy the Medical Condition Requirement appears to require individualized inquiries and evidence about medical conditions.

Despite the centrality of individualized inquiries, there does appear to be substance to Petitioner's contention that the District Court did not engage with the Medical Condition Requirement or participant-specific defenses. It also appears that the District Court did not assess how individualized inquiries concerning medical conditions would affect predominance, typicality, or manageability under Rule 23. Instead, borrowing heavily from its *Lipari* decision, the District Court appears to have largely adopted Plaintiffs' position without meaningful consideration of whether Petitioner's defenses could be adjudicated on a class-wide basis. [Doc. 78.] Rule 23 does not permit courts to ignore individualized defenses, simply because the parties dispute the merits. *See Harris v. Union Pac. R.R. Co.*,

953 F.3d 1030, 1038 (8th Cir. 2020). This Circuit should review class certification to ensure it includes the analysis mandated by Rule 23 and is consistent with ERISA.

III. Review is warranted to determine if the District Court erred by not considering Petitioner's statute of limitations arguments.

This Court should also consider whether the District Court erred by not fully analyzing Petitioner's statute of limitations arguments, which present threshold issues that could impact or even destroy class certification. Specifically, if the timeliness of class members' claims turns on individualized facts, those issues may bear directly on predominance, typicality, and the manageability of the proposed class. Again, there does appear to be substance to Petitioner's contention that the District Court did not fully engage with the limitations defenses or their impact on the Rule 23 analysis.

First, this Circuit should consider Petitioner's argument that ERISA's statutory limitations period accrued three years after the earliest date on which the Plaintiffs had actual knowledge of the breach per 29 U.S.C. § 1113(2). Petitioner's argument implicates not only timing issues but also that the "actual knowledge" inquiry requires individualized evidence potentially barring class certification. Second, consideration of Petitioner's arguments about the District Court's use of continuing violation theory to expand classes beyond prior rulings is warranted to ensure participants with time-barred claims are not included in the classes. Third, Petitioner's arguments related to accrual of claims only after

knowledge of a legally actionable injury also warrant review to ensure consistency with federal common law.

These are common issues among tobacco surcharge cases, will be repeated in other cases, and this Court should consider Petitioner's arguments given the importance of these threshold class certification issues to the more than 75 tobacco surcharge cases pending behind this one. For the reasons more fully explained in Section I, above, class certification has enormous industry-wide ramifications. This Circuit should verify that issues potentially impacting certification were fully considered.

IV. This Court should review potentially incompatible overlapping opt-in and opt-out classes.

Review of Petitioner's argument that the District Court did not consider the implication of potentially incompatible opt-in and opt-out classes under both Fed. R. Civ. P. 23(b)(1) and (b)(3) should be granted. If the District Court proceeds with opt-in and opt-out classes covering functionally identical claims, the result may be logistically challenging, confusing for all parties, and could result in inconsistent rulings concerning wellness programs. Clarification from this Court would promote consistent administration of Rule 23 and help ensure participants receive clear notice regarding their rights and obligations. This Circuit should consider whether the overlapping class structure is compatible with the claims and relief sought before other tobacco surcharge cases repeat the same analysis.

CONCLUSION

This Court should grant the Petition and review the District Court's class action certification.

Respectfully submitted: June 10, 2026.

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Dated: June 10, 2026

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