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THE MILITARY'S WORKPLACE FLEXIBILITY FRAMEWORK

MARCY L. KARIN AND KATIE ONACHILA*

Abstract

Workplace flexibility is a tool the military may use to support its operations, improve the recruitment and retention of military personnel, and fulfill its obligation to support veterans and military families. The return of combat troops from Iraq provides a valuable catalyst to take stock of the use of workplace flexibility in the U.S. military and employers supporting the military community. While the unique critical needs of the military are an inescapable variable when creating laws and policies, the military must meet the workplace flexibility needs of its services members and their families to maximize the effectiveness and efficiency of the Armed Forces. This article provides an overview of the legal framework for workplace flexibility for the military community, and articulates themes evolving from those laws.

INTRODUCTION

On December 19, 2011, the last American combat troops left Iraq.¹ Over a million people served the United States in Iraq during Operations Iraqi Freedom and New Dawn.² This war consumed the lives of these service

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¹ See Tim Arango & Michael Schmidt, *Last Convoy of American Troops Leaves Iraq*, N.Y. TIMES, Dec. 18, 2011, http://www.nytimes.com/2011/12/19/world/middleeast/last-convoy-of-american-troops-leaves-iraq.html?_r=1&hp&pagewanted=all (describing the exit of American troops from Iraq). The drawdown of troops at the conclusion of Operation New Dawn does not mark the end of the War on Terror or American troops being stationed abroad. Operation Enduring Freedom continues, as does a continued U.S. military presence in other regions. See U.S. DEP'T OF DEFENSE, DEMOGRAPHICS 2010: PROFILE OF THE MILITARY COMMUNITY (2010) [hereinafter DEMOGRAPHICS 2010 PROFILE], available at http://www.militaryonesource.mil/12038/MOS/Reports/2010_Demographics_Report.pdf.

² Nick Schifrin, *Last U.S. Troops Leave Iraq, Ending Bloodiest War Since Vietnam*, ABC NEWS (Dec. 17, 2011), <http://abcnews.go.com/International/us-troops-leave-iraq-ending-bloodiest-us-war/story?id=15180860#.T0kjBK6bMRA> (stating that one and a half million Americans have served in Iraq since the current conflict began). Almost

members, their families, and their communities for almost a decade, and the effects will continue to be felt for years to come.

The impact of a decade of fighting multiple wars is also felt by the military as an employer. Every part of the Armed Forces is facing budget challenges. Recently, Secretary of Defense Leon Panetta outlined how the military can cut \$450 billion from its budget, and there are hints that Congress may cut another half trillion dollars down the line.³ What gets lost in these numbers, however, is that the military has been engaged in modest, but needed, experiments to increase the capacity and effectiveness of its most important asset — its people.⁴

Retention of key people is critical in an “up or out” system comprised of an all-volunteer force. The military needs to capture every ounce of expertise, enthusiasm, and loyalty of its men and women to keep on track with military preparedness and overall security. While careers in the

4,500 of those men and women died during combat and approximately 32,000 service members returned to American soil wounded. Frances Johnson, *Iraq troop withdraw complete, Service members home for the holidays*, WARRIOR CARE BLOG (Dec. 20, 2011), <http://warriorcare.dodlive.mil/2011/12/20/iraq-troop-withdrawal-complete-service-members-home-for-the-holidays/>; THE WHITE HOUSE, STRENGTHENING OUR MILITARY FAMILIES 1 (2011) [hereinafter STRENGTHENING OUR MILITARY FAMILIES], available at http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf (reporting that an additional million (and counting) have served in Afghanistan since 9/11). Service members who have separated from the military since 9/11 are called Gulf War-era II vets.

The current “operational tempo” is the fastest our military has ever seen. *See On the 2009 Budget for the Reserve Component: Hearing Before the Subcomm. on Defense of the S. Comm. on Appropriations*, 110th Cong. 519 (2008) (statement of Lt. Gen. Jack C. Stultz, Chief, U.S. Army Reserve & Commanding Gen., U.S. Army Reserve Command) (explaining that “the operational tempo that we’re under is something that we’ve never experience before”); BLUE STAR FAMILIES, 2010 MILITARY FAMILY LIFESTYLE SURVEY REPORT ANALYSIS 2, 4, 6 (2010), available at <http://bluestarfam.s3.amazonaws.com/42/af/8/569/2010surveyfindings.pdf> (including operational tempo as a top concern for military families).

In addition, for the first time since 1972, it is presumed that people who enlist in the military will be deployed. Recruits now get called up at least once every five years, with an average of five deployments over the course of a military career. Previously, deployments lasted for 14-24 months; typical deployments now last for a year including training time. *See* Gregg Maxon, *National Dialogue on Workplace Flexibility: Challenges and Solutions for Arizona’s Military Families*, ARIZONA STATE UNIVERSITY, (Apr. 20, 2011) http://online.law.asu.edu/events/2011/Workplace_flexibility/.

³ *See* Thom Shaker & Elisabeth Bumiller, *Weighing Pentagon Cuts Panetta Faces Deep Pressures*, N.Y. TIMES, Nov. 6, 2011, <http://www.nytimes.com/2011/11/07/world/panetta-weighs-military-cuts-once-thought-out-of-bounds.html?pagewanted=all> (explaining that the Pentagon could face additional reductions of \$500 billion over the next decade if the bipartisan super committee does not find \$1.2 trillion in deficit reductions).

⁴ *See, e.g.*, John Hudson, *U.S. Can’t Fight Two Wars at the Same Time Anymore*, THE ATLANTIC MONTHLY (Jan. 03, 2013), <http://www.theatlanticwire.com/global/2012/01/us-cant-fight-two-wars-same-time-anymore/46892/> (reporting that the military spends about one third of its budget on the salaries, health care, and retirement of personnel).

military have always been demanding, the recent wars have led to an increased operational tempo. Despite the resulting challenges outlined below, the military has a duty to create the most effective workplace possible in recognition of the sacrifice required of service members and their families. The fulfillment of this duty is essential to the continuing strength of the military, as members consistently list work and family imbalance as a key determinant in their decision not to reenlist in the military.⁵ Thus, to recruit and retain top talent, the military must work towards creating an environment in which members are able to meet both personal and career responsibilities. According to Admiral Mike Mullen, former Chairman of the Joint Chiefs of Staff, workplace flexibility is one of the military's "emerging issues" with respect to meeting these operational needs and competing with the private sector.⁶

Workplace flexibility realigns the time and location of work to meet the needs of a diverse workforce.⁷ It encompasses flexible work arrangements, time off, and career flexibility, all of which can be utilized in a way that supports military operations.⁸ Workplace flexibility provides a set of tools and practices to help adapt the military to 21st century realities — increased frequency of deployments for active duty personnel and reliance on the National Guard and Reserve, grim economic times for the country

⁵ See RESPONSES TO THE 2004 DACOWITS REPORT 5, available at http://www.dtic.mil/dacowits/docs/oct2006/ServicesResponses_2004Report.pdf (explaining that seventy one percent of active duty focus groups cited the work and family imbalance as a primary reason for failing to re-enlist).

⁶ See Mike Mullen: *New Workplace Flexibility Partnership*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Feb. 01, 2011), <http://www.weknownext.com/workplace/admiral-mike-mullen-new-workplace-flexibility-partnership> (noting that "whether in peace or war we know that . . . people are our absolutely most important resource"); see also Cheryl Pellerin, *Mullen: Military Workplace Needs More Flexibility*, U.S ARMY, (Nov. 20, 2010), <http://www.army.mil/article/48782/> (explaining that while improvements in workplace flexibility have been made, there is much more to be done). DoD's Social Compact confirms that there is a link between Quality of Life programs as a human capital management tool and the strategic goal of the Department--military readiness." REPORT OF THE FIRST QUADRENNIAL QUALITY OF LIFE REVIEW, MODERNIZED SOCIAL COMPACT, DEP'T OF DEF. (2004), available at http://www.militaryhomefront.dod.mil/mhf_reports/QQoLR/QQoLR-9Of13.pdf; see also RESPONSES TO THE 2004 DACOWITS REPORT, *supra* note 5 (containing responses from various branches to DACOWITS recommendation for "the services [to] provide for flexibility in addressing work/family balance" to be consistent with the DoD's Social Compact).

⁷ See Kathleen Christensen & Barbara Schneider, *Evidence of the Worker and Workplace Mismatch*, WORKPLACE FLEXIBILITY: REALIGNING 20TH CENTURY JOBS FOR 21ST-CENTURY WORKFORCE 4-7 (Kathleen Christensen & Barbara Schneider eds., 2010) (explaining the importance, for both employers and employees, of redesigning the workplace).

⁸ See *Policy Components*, WORKPLACE FLEXIBILITY 2010, http://workplaceflexibility2010.org/index.php/policy_components; Chai Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility*, *The State of Play*, in WORK-LIFE POLICIES 251-88 (Ann C. Crouter & Alan Booth eds., 2009).

and the military, and an increasingly diverse set of service members, veterans, and military families.⁹

Workplace flexibility reforms are often looked at as “feel good” measures or a side note to questions about military technology and front line tactics. But these reforms are critical. They cut to the heart of what we know — the military is working harder on fewer resources, and will be for the foreseeable future.¹⁰ As a result, workplace flexibility has started to be viewed as a “strategic imperative” to help address the structural mismatch between the requisite lifestyle that comes from military operations and the personal needs of military personnel and their families.¹¹

Throughout these wars, there has been an ongoing national conversation and evaluation of the existing framework of legal, regulatory, and policy supports that specifically govern the use of workplace flexibility to help employees of the Total Force, veterans and their families navigate the social, political, and economic challenges that the country is facing.¹² There also has been a demonstrated effort over a number of years to adapt the military itself to the demands of the workforce and its needs.¹³ As a result,

⁹ See Lieutenant Colonel Darrel Duckworth, *Affects of Multiple Deployments on Families*, U.S ARMY WAR COLLEGE, at 2 (March 11, 2009), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA498029> (observing the pressure that increased rates of deployment has placed on active duty and National Guard members); see Shaker & Bumiller, *supra* note 3 (outlining budget cuts to DoD budget); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-935, ACTIVE DUTY BENEFITS REFLECT CHANGING DEMOGRAPHICS, BUT STILL ROOM TO IMPROVE (2002) (increasing diversity in the U.S. military).

¹⁰ Shaker & Bumiller, *supra* note 3.

¹¹ See Stephen Miller, *Thought Leaders Call Flexible Workplaces 'Strategic Imperative'*, SOCIETY FOR HUMAN RECOURSE MANAGEMENT (Feb. 14, 2011), <http://www.weknownext.com/workplace/thought-leaders-call-flexible-workplaces-strategic-imperative> (stating that the military “can’t afford” to lose its “stars” to retirement because of familial stress).

¹² See *Notable Moments in U.S. Work-Life Policy*, CORPORATE VOICES FOR WORKING FAMILIES, <http://www.cvworkingfamilies.org/best-of-congress/work-life-timeline> (charting the development of work-life policies in the United States); see also Valerie Jarrett, *A Conversation on Workplace Flexibility*, THE WHITE HOUSE, COUNCIL ON WOMEN AND GIRLS (Apr. 01, 2010), <http://www.whitehouse.gov/blog/2010/04/01/a-conversation-workplace-flexibility> (discussing the importance of workplace flexibility and the need to directly engage with communities on this subject); *National Dialogue on Workplace Flexibility*, DEP'T. OF LABOR, WOMEN'S BUREAU, <http://www.dol.gov/wb/media/natldialogue3.htm> (discussing the Women's Bureau's involvement in promoting workplace flexibility, including its role in the National Dialogue on Workplace Flexibility); *Continue the Conversation on Workplace Flexibility*, THE WHITE HOUSE, COUNCIL ON WOMEN AND GIRLS, <http://www.whitehouse.gov/administration/eop/cwg/work-flex-kit/home> (noting that the President and First Lady hosted the White House Forum on Workplace Flexibility, which brought together a variety of stakeholders to explore the importance of workplace flexibility); *Recently Completed Programs*, ALFRED P. SLOAN FOUNDATION, <http://www.sloan.org/program/32/page/81>; Feldblum, *supra* note 8, at 251-88 (chronicling the development of workplace flexibility public policy from 2000-2008).

¹³ See Duckworth, *supra* note 9, at 9-14 (outlining high divorce rates and different attempts the military has used to address this issue).

a laboratory of laws, policy initiatives, and pilot programs involving flexibility for military personnel has been created.

The end of the Iraq war provides a ripe opportunity to move beyond some of the recent rhetoric about supporting our troops and take stock of workplace flexibility in the military. Part I of this article provides a snapshot of the military structure and community.¹⁴ Part II describes the legal authority for the military's existing workplace flexibility policies and supports of the military community in the civilian workforce.¹⁵ Finally, in Part III, thematic observations about the state of workplace flexibility in the military are provided.¹⁶

To date, no other article has documented the range of laws, policy reforms, and experiments on workplace flexibility in the military or established a baseline of what we know. This is the first in what we hope will be a series of articles looking at workplace flexibility in the military—including the opportunities, challenges, and public policies needed to adapt this framework to the needs of the military as an employer and protector as well as to the needs of the military community at large.

I. THE MILITARY STRUCTURE

The military's unique structure provides both opportunities and challenges to the implementation of workplace flexibility common in other workplaces. To understand flexibility – and the absence of it – in military careers, it is first necessary to understand the makeup of the military community, the characteristics of its members, and the composition of military families.

The military community includes full and part-time personnel of the Department of Defense (“DoD”), veterans, and military families.¹⁷ The DoD's Total Force consists of “active and reserve military components, its civil servants, and its contractors.”¹⁸ A little over a quarter of the DoD's workers are civilian employees in the Departments of the Army, Navy (including the Marine Corps), and Air Force.¹⁹ The rest of the DoD

¹⁴ See *infra* Part I.

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

¹⁷ *About the Department of Defense (DOD)*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/> (outlining the different individuals that make up the DoD community).

¹⁸ U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 75 (2006), <http://www.defense.gov/qdr/report/Report20060203.pdf> (noting that with over 3 million employees, the DoD is the world's largest employer).

¹⁹ U.S. DEP'T OF DEF., EMPLOYEE ENGAGEMENT AND SATISFACTION 2 (2010) [hereinafter DOD ENGAGEMENT INITIATIVE], *available at* http://www.cpms.osd.mil/ASSETS/18D3059B2s1044D23B40E6CAA86835677/Employee_Engagement_Histori

workforce consists of 1.4 million active duty service members who serve in one of the aforementioned branches or another Defense Agency created to support military operations.²⁰ Civilian part-time members of the National Guard and Reserve are called up to augment enlisted and officer ranks as needed.²¹ The interplay between the DoD's expansive jurisdiction and the individual branches of the military create opportunities for leveraging groundbreaking workplace flexibility policies as the larger DoD can only function by delegating control over much of the sub-agency workforces to each sub agency.²² The long and rigid chain of command, however, acts as an obstacle to the development of these policies and constrains some of the creativity possible in many civilian workplaces.

On a more individual level, the members of the military are and have been overwhelmingly homogeneous. Nearly half of all active duty service members are 25 years old or younger,²³ just over half are married,²⁴ and 70 percent identify themselves as white.²⁵ Additionally, more than half of service members care for dependants, such as spouses, children, or aging parents.²⁶ In fact, 44 percent of service members have children.²⁷ Unlike

cal_Info_-6-28-101.pdf (“[T]here are approximately 760,000 civilian appropriated fund employees which equates to 26 percent of DoD’s total workforce.”).

²⁰ U.S. DEP’T OF DEF., *supra* note 17 (noting that an additional “1.1 million serve in the National Guard and Reserve forces”); *see also Active Duty Military Personnel Strengths By Regional Area and by Country*, U.S. DEP’T OF DEF., 4 (Sept. 30, 2011) <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1009.pdf> (showing that there were 1,430,985 people in the active component of Armed Forces on September 30, 2011). *See generally* DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at 11 (noting that 83.4 percent of active duty personnel are enlisted and the rest are officers).

²¹ Reservists are under Federal control. *See* 10 U.S.C. § 12301. The National Guard, which is the Army and Air National Guards, may be called upon by the President to serve in the same positions as active duty. 10 U.S.C. § 10103; *see Military Personnel and Compensation Matters Before the H. Armed Services Subcomm. On Military Personnel*, 112th Cong. 17 (2011) (statement of the Military Commission) (“Since Sept. 11, 2001, more than 793,853 Guard and Reserve service members have been called up, including over 250,000 who have served multiple tours. There is no precedent in American history for this sustained reliance on citizen-soldiers and their families.”).

²² *See* DOD ENGAGEMENT INITIATIVE, *supra* note 19, at 2 (explaining how each agency implements its own programs); *see also* DoD Organizational Chart, U.S. DEP’T OF DEF. <http://www.defense.gov/orgchart/#v> (last visited Apr. 11, 2012) (outlining all agencies and sub-agencies of the DoD and with explanations of the role of each).

²³ DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at 29 (showing that only 5.6 percent of active duty servicemen are over 41, and less than a quarter are between 31 and 39).

²⁴ *Id.* at 35 (stating that 53.7 percent of active duty members are married).

²⁵ *Id.* at 20 (explaining that African Americans make up 17 percent of all active duty service members, while “Asian, American Indian or Alaska Native, or Native Hawaiian or other Pacific Islander members make up 3.7, percent, 1.7 percent, and 0.6 percent, respectively,” with an additional 2.1 percent viewing themselves as multi-racial).

²⁶ *See* Shelley MacDermid Wadsworth & Kenona Southwell, MILITARY FAMILIES: EXTREME WORK AND EXTREME ‘WORK-FAMILY,’ 4 (2010), *available at* http://workplaceflexibility.org/images/uploads/program_papers/wadsworth_-_military_families.pdf (exploring the importance of different work-family policies to

the civilian workforce where women now outnumber men, men in the military continue to outnumber women by more than five to one.²⁸

This historical homogeneity is one constraint on the growth of workplace flexibility within the military. The diversification of the civilian workforce led to advanced workplace flexibility policies because people of different cultures, genders, and communities need flexibility for different reasons. The reality of these varying needs bred innovation, and the workplace flexibility developments over the past few decades have been a solution to the ubiquitous mismatch between home and work demands for many civilian workers. Because two-thirds of the military are white, male, and married – and only half of these marriages have both spouses in the workplace – the military today resembles the general civilian workforce of fifty years ago.²⁹ Nonetheless, the military is increasingly becoming more diverse, a trend that is likely to continue in these economic times.³⁰ And members – regardless of age, race, gender, or marital status – are seeking flexibility in return for their service.³¹

A military career requires complete workplace immersion. Because of this, it is impossible to talk about workplace flexibility for service members without discussing their families. When service members are abroad or away from home for trainings, “the burden . . . is borne by families.”³² Like their partners, military spouses are young.³³ On average, active duty service members have two minor children.³⁴ A small percentage (just under seven

maintain effectiveness and retain members in an all-volunteer military).

²⁷ DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at 59. Workplace flexibility is important to child development. *See, e.g.*, JEAN FLATLEY MCGUIRE et al., PROMOTING CHILDREN'S WELL-BEING: THE ROLE OF WORKPLACE FLEXIBILITY, WORKPLACE FLEXIBILITY 2010, 1, 2, http://workplaceflexibility2010.org/images/uploads/FF_Color_CD_Facts.pdf (claiming that parental involvement, which is a byproduct of workplace flexibility, contributes to higher academic achievement for children).

²⁸ Compare Maria Shriver, *A Woman's Nation*, THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 1, 6 (2009), http://www.americanprogress.org/issues/2009/10/pdf/awn/intro_shriver.pdf (explaining that half of U.S. workers are female), with DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at 15 (noting that of all active duty members, 14.4 percent are female and 85.6 percent are male).

²⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9 (detailing U.S. military demographics over the last four decades and how they compare to U.S. general labor demographics).

³⁰ *Id.*

³¹ RESPONSES TO THE 2004 DACOWITS REPORT, *supra* note 5.

³² Press Release, The White House, Remarks by the President and First Lady on the End of the War in Iraq (Dec. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/14/remarks-president-and-first-lady-end-war-iraq> (addressing the end of the war in Iraq).

³³ See DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at 56 (noting that the average age of a military spouse is 30.9 years, with about half of all spouses over age 30).

³⁴ *Id.* at 59. Of those with children, almost 42 percent are under the age of five, about 25 percent are between the ages of six and eleven, and about 20 percent are between

percent of active duty service members) is married to another member of the military; these families encounter their own unique difficulties in balancing the demands of two military careers and family.³⁵

The top reason service members give for their decision to enlist, reenlist, or separate from the military is the level of their spouse's and family's contentment with the military as an employer.³⁶ As the nation's Armed Services continue to evolve and struggle to recruit and retain the best candidates, it is becoming even more important to address the inherent dichotomy between military families and military careers. Addressing this dichotomy will require the military to be receptive to the needs of military families because they are indivisible from the needs of its members.

II. WORKPLACE FLEXIBILITY LAWS FOR THE MILITARY COMMUNITY

The DoD is a large, structurally complicated employer with offices of various sizes across the world.³⁷ It “maintains centralized control and decentralized implementation of its human capital programs.”³⁸ All departments and branches of the military have the same legal foundation of workplace flexibility, which stems from the U.S. Code and DoD rules.³⁹ In

the ages of 11 to 18. *Id.* at 61. Less than five percent of active duty military has children between ages 19 and 22. *Id.* This means that the United States has been at war during the entire lives of the majority of service members' kids. *See* Mullen, *supra* note 6.

Research shows that war has a range of health and wellness effects on these children. For example, children, particularly those ages three to five, experience increased aggression and depression levels during a parent's deployment. Children between the ages of three and eight show an almost 20 percent increase in stress disorders during the time of a parent's deployment. *See* STRENGTHENING OUR MILITARY FAMILIES, *supra* note 2, at 7 (citation omitted). The rates of child mistreatment also rise with the extended length of a parent's deployment. Wadsworth & Southwell, *supra* note 26, at 6; *see also* Kathy Roth-Douquet, *The Scientific Study of the Military Family*, JOINING FORCES (Dec. 12, 2011, 4:00 PM), <http://www.whitehouse.gov/blog/2011/12/12/scientific-study-military-child> (noting the reasons why the impact of military service on children needs further study).

³⁵ DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at iv; Rod Powers, *Military Married to Military*, ABOUT.COM, http://usmilitary.about.com/od/familydomestic/a/military_couples.htm (explaining the “JOIN SPOUSE” program, whereby the military attempts to place spouses at the same base are near each other, but also pointing out that this is not guaranteed).

³⁶ *See* BLUE STAR FAMILIES, *supra* note 2, at 10 (noting that successful recruiting and retention of the active duty force is very much dependent on how much their spouses are satisfied with their life in the military); *see also* Amy Reinkober Drummet, Marilyn Coleman, & Susan Cable, *Military Families Under Stress: Implications for Family Life Education*, 52 FAM. REL. 279, 279-80 (2003) (“satisfaction with the military way of life” is “the best predictor of retention”) (citation omitted).

³⁷ DOD ENGAGEMENT INITIATIVE, *supra* note 19, at 2 (DoD “has . . . one of the largest workforces in the world”).

³⁸ *Id.*

³⁹ *See infra* Part II.A-C (outlining authority for workplace flexibility).

addition, each military branch (and sometimes subdivisions therein) is able to expand and supplement this foundation to target programs towards the specific workforce's needs.⁴⁰

There are laws that authorize (and in some cases require) the military as an employer to provide each type of workplace flexibility to the Total Force, including active duty personnel and civilian employees.⁴¹ There are also workplace flexibility laws that non-military employers must comply with to support the Total Force.⁴² An overview of these laws follows.⁴³

A. Authority for Flexible Work Arrangements

Flexible work arrangements are any number of a spectrum of work structures that alter the time and/or place that work gets done on a regular basis.⁴⁴ Flexible work arrangements include flexibility in the: (1) *scheduling of hours* worked (e.g., alternative work schedules like non-traditional start and end times, flex time, or compressed workweeks; worker control and predictability over scheduling of hours, including overtime, shift and break schedules); (2) *amount of hours* worked (e.g., part time or year work; job sharing); and (3) *location* of work (e.g., working at home, at a satellite location, or at different locations at different times).⁴⁵ Generally, laws authorize each type of flexible work arrangement for the DoD's civilian employees, and location flexibility for military personnel.⁴⁶

With respect to the *scheduling of hours* worked, the DoD allows certain civilian employees to use alternative work schedules or compressed workweeks at the discretion of their commander and subject to certain restrictions.⁴⁷ Alternative work schedules are statutorily defined and

⁴⁰ See DOD ENGAGEMENT INITIATIVE, *supra* note 19, at 2 (explaining that according to the Human Capital strategy "individual DoD components continue to pursue various [human capital] initiatives and strategies to address the numerous, unique issues.").

⁴¹ See discussion *infra* Part II.A - C.

⁴² See discussion *infra* Part II.C.ii, Part II.D.

⁴³ See discussion *infra* Part II.A - D. These Parts provide an overview and not an exhaustive list of every relevant law, regulation, and/or interpretation related to workplace flexibility for the military community.

⁴⁴ WORKPLACE FLEXIBILITY 2010, FLEXIBLE WORK ARRANGEMENTS PUBLIC POLICY PLATFORM 11 (2009), [hereinafter WORKPLACE FLEXIBILITY 2010] *available at* http://workplaceflexibility2010.org/images/uploads/reports/report_1.pdf (last visited Dec. 29, 2011) (noting that flexible work arrangements must be voluntary).

⁴⁵ *Id.* at 11.

⁴⁶ *Id.*

⁴⁷ See 5 U.S.C. §§ 6101 - 6133 (2011); 5 C.F.R. § 610 (2011); U.S. DEP'T OF DEF., INSTR. NO. 1400.25 v. 610, DO D CIVILIAN PERSONNEL MANAGEMENT SYSTEM: HOURS OF DUTY 7 (2009). Branches may voluntarily provide military personnel with access to scheduling flexibility. See, e.g., COAST GUARD COMMANDANT INSTR. 5330.10 5 (Mar.

include core hours during which employees may be required to be present at a specific worksite and a window of hours limiting the time during which employees may elect to work.⁴⁸ Compressed work schedules condense an employee's work time into a period of time shorter than the traditional 10-day work period.⁴⁹ Employees cannot work both an alternative work schedule and a compressed work schedule.⁵⁰ Despite some early conflicts with scheduling flexibility,⁵¹ policies have been implemented at different locations, thereby improving worker efficiency, enhancing recruitment and retention, reducing absenteeism and commuter traffic, and furthering job satisfaction and employee morale.⁵²

With respect to flexibility in the *amount of hours* worked, the DoD has a Part-Time Career Employment Program that allows civilian employees to work alternative or shorter work hours.⁵³ The DoD's program also allows

31, 2009) ("While military members are not specifically covered under [laws authorizing schedule flexibility for civilian employees], they should be included . . . when implementing an [Alternative Work Schedules] program" if it helps meet "organizational goals, missions or needs . . .").

⁴⁸ See, e.g., 5 U.S.C. § 6122 (2011) (providing that each agency may establish programs that allow the use of flexible schedules).

⁴⁹ 5 U.S.C. § 6121(5) (2011); 5 C.F.R. § 610.102 (2011); 5 C.F.R. § 610.111(d) (2011).

⁵⁰ Federal Employees Flexible and Compressed Work Schedules Act (FEFCWA), 5 U.S.C. § 6120 et seq., see COMPTROLLER GENERAL REPORT B-179810 (Dec. 4, 1979), <http://www.archive.gao.gov/d46t13/111062.pdf>; see also *General Services Administration v. National Federation of Federal Employees*, 50 FLRA No. 28 (1995) (holding that the FEFCWA prohibits combining compressed and flexible work schedules); WORKPLACE FLEXIBILITY 2010, *supra* note 44, at 7 (observing that some types of "hybrid work schedules" are banned).

⁵¹ After FEFCWA authorized (but did not require) federal agencies to use flexible work arrangements, conflicts over the implementation of flexibility policies arose during collective bargaining negotiations at various military worksites. See, e.g., *Local 2040, AFGE*, 42 F.L.R.A. 1196, 1205 (1991) (finding that an agency may exclude certain employees from using flexible schedules if the exclusions were explicitly negotiated in a collective bargaining agreement); *Local 1776, AFGE*, 86 F.S.I.P. 3 (1986) (upholding the agency's decision to not implement a 4-day compressed work week given the agency's past difficulty delivering needed services when employees were able to utilize compressed workweeks). These disputes typically involved difficulty with implementing scheduling flexibility where only one person provided a service for the particular worksite. See, e.g., *Local R4-106, Nat'l Ass'n of Gov't Empls., SEIU*, 91 F.S.I.P. 129 (1991).

⁵² See, e.g., Fort Belvoir Policy Memorandum No. 45 Alternative Work Schedules (2010) (setting forth the Fort Belvoir Alternative Work Schedules policy). Fort Belvoir officials have also extolled the virtues of flexible scheduling to alleviate traffic issues inherent during BRAC (Base Realignment and Closure). See Andrew Sharbel, *Working Group Helping to Alleviate Traffic Issues*, BELVOIR EAGLE (Apr. 27, 2010), http://www2.belvoireagle.com/news/2010/apr/22/working_group_helping_to_alleviate_traffic_issues-ar-1518422/ (explaining that alternative work schedules were instituted as part of a larger plan to lessen the impact of single-occupancy vehicles traveling through the installation gates).

⁵³ U.S. DEP'T OF DEF., INSTR. NO. 1400.25 v. 340, DOD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: OTHER THAN FULL-TIME EMPLOYMENT 1 (1996) (directing each organizational entity within the DoD to promote career part-time employment

“mixed tours of duty” (annually recurring periods of full-time, part-time, or intermittent service), and job sharing.⁵⁴ Pursuant to federal law, the DoD creates “annual goals and timetables” to create and identify jobs that can expand the number of part-time career opportunities.⁵⁵ Two goals of the program are to make the DoD an employer of choice and to reduce both turnover and absenteeism.⁵⁶

With respect to flexibility in the *location of work*, the DoD recently updated its telework policies to comply with the Telework Enhancement Act.⁵⁷ Under this law, each federal agency – including the DoD – is required to create a plan to implement telework.⁵⁸ Pursuant to its plan, the DoD actively promotes and encourages telework that maintains the effectiveness of all operations.⁵⁹ This plan is premised on the DoD’s understanding that telework can improve worker efficiency, assist with continuing operations planning, accommodate natural disasters and other emergencies and improve employee quality of life.⁶⁰ The DoD also has documented the role telework can play in improving employment for people with disabilities, and lowering costs associated with office space, parking, utility use, and expenditures related to transit subsidies.⁶¹

Under the DoD policy, flexible work arrangements are to be “incorporated into the design and implementation of civilian personnel

opportunities).

⁵⁴ *See id.* at 2 (“Whenever feasible, [DoD] approve[s] requests for career employees to change from full-time to part-time if it is determined that the effectiveness and efficiency of [DoD] will not suffer.”).

⁵⁵ Federal Employees Part-Time Career Employment Act of 1978, 5 U.S.C. §§ 3401-3408 (directing the head of each agency to establish and maintain a program for part-time career employment); U.S. DEPARTMENT OF DEF., *supra* note 53, at 5; *see also* WORKPLACE FLEXIBILITY 2010, FEDERAL EMPLOYEES PART-TIME CAREER EMPLOYMENT ACT OF 1978: OVERVIEW, *available at* <http://workplaceflexibility2010.org/images/uploads/Part%20Time%20Law%20Overvie w.pdf> (outlining which individuals are eligible, what agencies are covered, the effects on benefits, and the standards for establishing regulations under this law).

⁵⁶ 5 U.S.C. 3401 et seq.; *see* U.S. DEPARTMENT OF DEF., *supra* note 67, at 1. There are also branch specific policies that further the goal of the DoD’s overall program. For example, the Navy provides members with the opportunity to reduce their scheduled hours to 60 percent time while maintaining full benefits and allows community managers to adjust career milestones in response to use of flexible work arrangements. *See* Capt. Ken Barrett, *Human Capital Management for Defense*, at 17 (presented Feb. 15, 2011), <http://www.public.navy.mil/bupersnpc/support/tflw/Documents/Life%20Work%20Integration.ppt>.

⁵⁷ Telework Enhancement Act of 2010, 5 U.S.C. § 6501.

⁵⁸ *See* 5 U.S.C. § 6502(a)(1) (requiring every agency to create a telework policy).

⁵⁹ *See* U.S. DEP’T OF DEF., INSTR. NO. 1035.01, TELEWORK POLICY 2 (2010), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/103501p.pdf> (asserting that telework is not an entitlement).

⁶⁰ *See id.* (outlining the benefits of telework).

⁶¹ *See id.* at 2.

policies, procedures, and programs at all organizational levels” whenever mission requirements allow them.⁶²

B. Authority for Time Off

Time off provides flexibility to step away from work responsibilities for a period of time. It may be taken in short-term, episodic, or extended increments.⁶³ Short-term time off includes things like leave to deal with an illness, unexpected home repair, or passes and liberty from the military.⁶⁴ Episodic time off is reoccurring time away from work for the same reason such as for treatment for a chronic disease, regular volunteering in the community, monthly drills or continuing education or training.⁶⁵ Extended time off may be provided for an individual’s own serious illness that renders a worker temporarily unable to perform his or her job; arrival of a newborn, newly adopted or placed foster child who needs care and time to bond with parents; the serious illness of a family member who is in need of care; or time away from civilian employment for active duty service.⁶⁶

Unlike civilian employers, the military is required to provide time off to all employees, including service members.⁶⁷ Each Commander must establish leave policies and encourage service members to use “frequent [leave] and, when possible, at least one extended leave period [of at least fourteen days] within the constraints of operational requirements.”⁶⁸ To facilitate this, active duty members are granted “regular” leave at a rate of two and a half days per month, and may get “advance” leave to deal with urgent personal situations.⁶⁹ Leave must be approved by a Commander to

⁶² U.S. DEP’T OF DEF., INSTR. NO. 1400.25 v. 100, DoD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: GENERAL PROVISIONS 2 (2009).

⁶³ See Workplace Flexibility 2010, *Time Off*, http://www.workplaceflexibility2010.org/index.php/policy_components/time_off/ (last visited Jan. 2, 2011) (categorizing types of time off by length of time).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See 10 U.S.C. § 701 (2012); see also U.S. DEP’T OF DEF., INSTR. NO. 1327.06, LEAVE AND LIBERTY POLICY AND PROCEDURES (2011), <http://www.dtic.mil/whs/directives/corres/pdf/132706p.pdf> [hereinafter INSTR. NO. 1327.06] (interpreting Congressional mandates regarding time off and containing the DoD’s policies and procedures for leave).

⁶⁸ See *id.*, at 2. Branches have further supplemented this policy; see, e.g., Army Regulation 600-8-10. 2-1 (2011) (“*b.* The frequent use of leave will make a positive contribution to morale, level of performance, and career motivation . . . *d.* Leave will be granted within the constraints of operational military requirements and to the degree of support for leave provided . . .”).

⁶⁹ See 10 U.S.C. § 701(a); see also 10 U.S.C. § 701 (b) (allowing up to 60 days of regular leave may be accrued each year); *id.* at (d) (until Sept. 2013, up to 75 days of leave may be accrued annually); 10 U.S.C. § 704 (b)(1) (2012) (requiring “equal treatment of officers and enlisted members”); INSTR. NO. 1327.06, *supra* note 67, at 7,

ensure that mission critical security and operational needs are met.⁷⁰ Similarly, a Commander may end someone's leave if business needs requires the service member to return early.⁷¹ When possible, however, Commanders are directed to encourage leave after returning from deployment, when transitioning to or from Reserve status, for holidays, reasons of health, morale, or religious observation, and to deal with natural disasters.⁷² In implementing this requirement, the DoD explicitly directs employees to take the maximum amount of leave earned.⁷³ If the recommended amount of leave is not taken, the DoD requires the service member to attend counseling to evaluate his or her ability to perform critical duties.⁷⁴

i. Family and Caregiving Leave for Active Duty Personnel

Military policies authorize different types of leave for family and caregiving purposes. Maternity leave consists of six weeks paid leave and prevents deployment for months after the birth of a child.⁷⁵ Ten days of paternity leave is granted to married fathers;⁷⁶ and twenty-one days is provided to both men and women after the adoption of a new child.⁷⁷

Members also may utilize "emergency" leave for caregiving purposes. Once during a military career, a member may get "emergency" leave to

11, 42 (finding rank and position should not matter in terms of leave accrual).

⁷⁰ INSTR. NO. 1327.06, *supra* note 67, at 23.

⁷¹ *See id.* (stating that the local commander shall establish a liberty and/or pass recall policy that meets organizational readiness requirement); *id.* at 30 (finding that it may "become[] necessary to recall [a member on authorized leave] to duty for reasons of military necessity. . .").

⁷² *Id.* at 6 (explaining that the leave is paid and that research shows that paid time off improves the health and well-being of employees, their children and families, secures financial security for workers, and produces better business outcomes for employers).

⁷³ *See* INSTR. NO. 1327.06, *supra* note 67, at 2.

⁷⁴ *Id.*

⁷⁵ 10 U.S.C. § 701(i)(1); *see also* INSTR. NO. 1327.06, *supra* note 67, at 19; DEP'T OF DEF., INSTR. NO. 1315.18, PROCEDURES FOR MILITARY PERSONNEL ASSIGNMENTS 15 (2005). *See generally* Sara M. Root, *Capitalizing "F" Is Not Enough: The Army Should Revise Its Postpartum Leave Policies To Better Support The Army Family*, 201 MIL. L. REV. 132 (2009) (detailing the Army's parental caregiving leave, comparing it to FMLA requirements, and arguing for an expansion to include 12 weeks of maternity leave for birth of a child, four weeks of paternity leave for birth of a child, and six weeks of parental leave for adoption of a child); Barrett, *supra* note 56, at 17 (describing the Navy's implementation of Ten days non-chargeable leave for any service member whose wife gives birth to a new child useable anytime within the first year after birth and extended operational leave time for new mothers from 6-12 months to ensure maternal bonding with new babies).

⁷⁶ 10 U.S.C. § 701(j)(1); *see also* INSTR. NO. 1327.06, *supra* note 67, at 19 (granting leave only if the service member is married to the child's mother).

⁷⁷ *See* 10 U.S.C. § 701(i)(1) (stating that only one parent may use the 21 days of adoptive leave if both parents are in the military); INSTR. NO. 1327.06, *supra* note 67, at 19.

cope with the death or serious illness of a family member during times of deployment or other service that does not make it feasible for the member to utilize his or her regularly accrued leave.⁷⁸ Emergency leave also may be granted for situations where regular or parental leave is normally used – such as a spouse’s pregnancy, childbirth, serious health conditions involving a non-immediate family member, or when the return of the service member may alleviate the need for institutionalization of a family member struggling with a severe psychotic episode.⁷⁹

ii. Other Leave for Active Duty Personnel

The military also provides time off to address a range of needs beyond family care. In recognition that transition times are challenging, sixty days of leave is given after someone graduates from a military academy.⁸⁰ Similarly, members who elect to reenlist for at least one year are granted up to ninety days of leave and may opt for additional leave instead of a pay bonus.⁸¹ Paid leave also is provided to help members transitioning to active duty from the Guard (and vice versa).⁸² In the other direction, members transitioning from active duty to reserve status are eligible for leaves of absence to find employment or housing, and to address other personal responsibilities.⁸³ Other policies focus on extended time off after lengthy deployments and for extended training programs. For example, both enlisted members and officers are eligible to take a leave of absence to obtain professional training that helps the military meet operational needs.⁸⁴

The military also recognizes the benefits of short-term time off, including short-term rest and recuperation for personnel in high fire or imminently dangerous locations.⁸⁵ Service members may take this “rest and

⁷⁸ 10 U.S.C. §709 (2012); *see also* INSTR. NO. 1327.06, *supra* note 67, at 21 (providing time off to attend to a terminally ill family member during what is anticipated to be the family member’s last month to live, after the death of an immediate family member, or when the service member is needed to attend to personal responsibilities stemming from the serious illness, surgery, or injury of a family member).

⁷⁹ *See* INSTR. NO. 1327.06, *supra* note 67, at 11. If a service member is stationed somewhere that prevents him or her from communicating with family, the member’s family may submit requests for such emergency leave through the American Red Cross. *Id.*

⁸⁰ 10 U.S.C. § 702(a) (2012); INSTR. NO. 1327.06, *supra* note 67, at 20.

⁸¹ INSTR. NO. 1327.06, *supra* note 67, at 20.

⁸² *Id.*, at 25, 27-28, 44.

⁸³ *Id.*

⁸⁴ *See* 10 U.S.C. § 708 (2012) (providing up to two years for an education leave of absence and up to three years to study health care. This leave is only approved “when in the best interest of the Government”); INSTR. NO. 1327.06, *supra* note 67, at 26. It may be cancelled if national security requires it. 10 U.S.C. § 708(d)(1). In addition, members must agree to extend service time by two months for every one-month of leave granted. § 708(A)-(B).

⁸⁵ *See* INSTR. NO. 1327.06, *supra* note 67, at 14; ARMY REG. 600-8-10, Leaves and

recuperation” leave twice in a twelve-month period.⁸⁶ A commanding officer may also grant “special” passes of three or four days to members for leave beyond any accumulated by the member.⁸⁷ Another type of short-term time off is “convalescent” leave, which consists of non-chargeable leave of up to thirty days for members who cannot work due to illness, injury, or childbirth.⁸⁸ Short term sick leave – “sick-in-quarters” – and short term hospitalization leave – “sick-in-hospital” – may be available for absences expected to be less than seventy-two hours.⁸⁹ Up to fourteen days of emergency leave also may be taken to address a family hardship after a natural disaster, to harvest crops, or to address financial problems.⁹⁰ Finally, service members who are not deployed may take leave to participate in court hearings over paternity or child custody provided it does not harm military operations.⁹¹

ii. Leave for the DoD's Civilian Workforce

Leave policies for DoD's civilian employees are designed to “develop a shared sense of mission and responsibility amongst civilian employees and military personnel.”⁹² Consequently, civilian employees have some of the same leave policies as service members.⁹³ They also generally have the same leave policies as other federal employees.⁹⁴ Maintaining the military's dedication to further education, employees may be granted leave to engage in further training or sit for a professional certification exam.⁹⁵

Passes 1, 5-6 (2011).

⁸⁶ See INSTR. NO. 1327.06, *supra* note 67, at 14; ARMY REG. 600-8-10, 19, 44 (2011).

⁸⁷ See INSTR. NO. 1327.06, *supra* note 67, at 29; ARMY REG. 600-8-10, 33. This leave may be granted to recognize exceptional performance, for voting, when a member had duty on an otherwise recognized public holiday, or when a length of duty is particularly long. This is called a pass or liberty depending on the branch.

⁸⁸ See INSTR. NO. 1327.06, *supra* note 67, at 19; ARMY REG. 600-8-10, 22-24 (2011).

⁸⁹ See INSTR. NO. 1327.06, *supra* note 67, at 30-31, 44; ARMY REG. 600-8-10 25-26 (2011).

⁹⁰ INSTR. NO. 1327.06, *supra* note 67, at 21 (noting that emergency leave may only be taken once during a military career).

⁹¹ *Id.*, at 18. A stay of civil proceedings may be available if leave is not feasible. See 50 U.S.C. App. §§ 521, 522.

⁹² INSTR. NO. 1327.06, *supra* note 67.

⁹³ *Id.*; 5 U.S.C. § 630 (explaining that civilian employees may accumulate up to 45 days of leave each year).

⁹⁴ See 5 U.S.C. § 63 (defining “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency...”). In addition, short-term leave may be granted to facilitate the employee's voting, to donate blood, and to search and interview for new positions upon notice of transfer. INSTR. NO. 1400.25 v. 610, *supra* note 47.

⁹⁵ See 5 U.S.C. § 630.

Among other reasons for leave, civilian employees serving abroad may qualify for “Home Leave,” which allows employees to return to the U.S. during periods of service abroad.⁹⁶ Once accumulated, there is no limit on the amount of leave an employee can earn or the length of leave an employee may take.⁹⁷

C. Authority for Career Flexibility

Career flexibility addresses the reality that many people will, due to responsibilities outside of the workplace, accelerate or decelerate the pace of their career over their lives.⁹⁸ For some workers, this means exiting the workplace entirely for a period of time. For others, it means answering a call to serve our country or participating in an experience that will allow someone to return to an earlier work experience with renewed vigor. Regardless of the reason or mechanism through which individuals “ramp down” their careers, this type of flexibility emphasizes the importance of maintaining connection – through personal contacts, professional training, or any number of ways – to the workforce by easing the transition for individuals who need to change the pace of their career. It also emphasizes the role these connections and other programs may have in helping people “ramp up” their careers as well. Over the years, the military has created innovative career flexibility policies to support non-linear career paths for active duty and reserve personnel.

i. Career Flexibility for Active Duty Personnel

Federal law recognizes a need for active duty personnel to have a degree of career flexibility. One such law allows discharged prior service members to re-enlist and return to active ranks.⁹⁹

Efforts also have been made to embrace career flexibility as a value to the military as an employer. For example, the Navy now uses a “Continuum of Service concept” to allow members to transition between

⁹⁶ See generally INSTR. NO. 1327.06, *supra* note 67 (explaining that home leave is earned separate from other types of leave and must be taken in at least 1-day increments).

⁹⁷ *Id.* at 3 (explaining that employees may not be eligible for home leave until after their first 24 month period of continuous service is completed).

⁹⁸ See Workplace Flexibility 2010, *Career Flexibility*, http://workplaceflexibility2010.org/index.php/policy_components/career_flexibility/.

⁹⁹ See 10 U.S.C. § 508(b) (2012) (authorizing reenlistment of someone who has been discharged pursuant to branch regulations). See generally Rod Powers, *Prior Service Enlistments*, <http://usmilitary.about.com/od/joiningthemilitary/a/priorservice.htm>. (explaining that each branch has its own regulations governing this type of “broken service”). In practice, penalties may result from using this type of career flexibility, as promotions after broken service are rare. *Id.*

active duty and reserve status without gaps in service.¹⁰⁰ By allowing individuals to “make lane changes” between different levels of commitment, the Navy is acknowledging the reality of different priorities and demands on members during different life stages.¹⁰¹ Facilitating “seamless” transitions between active and reserve status allows the Navy to “Recruit Once, Retain for Life,” and to address the unique needs of personnel and their families as they move in, out, and around the workforce at large.¹⁰²

Another career flexibility initiative created to retain top talent in critical mission positions is the Career Intermission Pilot and Leave Program (“CIPP”).¹⁰³ Rather than requiring employees to exit the military, CIPP provides extended sabbatical leave to participants for almost any reason.¹⁰⁴ Created in the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,¹⁰⁵ CIPP allows up to eighty officers and eighty enlisted members to “off-ramp” from service for up to three years while retaining military benefits for themselves and dependents, as well as receiving a monthly stipend of about two days’ pay.¹⁰⁶ The Navy was the first branch to implement CIPP.¹⁰⁷ Under the Navy’s instruction, participating service members commit themselves to a “two for one” service ratio (if a sailor

¹⁰⁰ See LaTunya Howard, *Continuum of Service Initiatives Give Sailors More Options*, NAVY.MIL, Feb. 12, 2012, http://www.navy.mil/search/display.asp?story_id=52342 (explaining the Navy’s continuum of service policy).

¹⁰¹ *Id.*

¹⁰² *Defense Authorization: Active, Guard, Reserve and Civilian Personnel, Before the Subcomm. on Personnel of the S. Armed Services Comm.* 112th Cong. (2011) (statement of Rick D. West, Master Chief Petty Officer, U.S. Navy); see also DEP’T OF ARMY, CONTINUUM OF SERVICE (COS) (Apr. 15, 2012) [https://secureweb2.hqda.pentagon.mil/vdas_armyposturestatement/2010/information_papers/Continuum_of_Service_\(COS\).asp](https://secureweb2.hqda.pentagon.mil/vdas_armyposturestatement/2010/information_papers/Continuum_of_Service_(COS).asp) (describing the Army’s COS goal); Rob McIlvaine, *Army planning ‘Continuum of Service’ between components* (Nov. 15, 2011), <http://www.army.mil/article/69397>; U.S. Air Force, *‘Continuum of Service’ video promotes total force options*, AIR FORCE PRINT NEWS TODAY, May 7, 2009, <http://www.af.mil/news/story.asp?id=123147873>.

¹⁰³ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417 §533 (2008) (creating a pilot program for career flexibility); see, e.g., OPNAV INSTR. 1330.2A, “Navy Career Intermission Pilot Program Guidelines” (2010).

¹⁰⁴ See OPNAV INSTR. 1330.2A, *supra* note 103; DEP’T OF DEF., REPORT TO THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS 6 (2009); Kevin Baron, *Navy: Wanna get away? Apply by May 1*, STARS & STRIPES (Mar. 30, 2009) (presuming CIPP will be used to “head back home to care for a sick mother . . . to start a family, or head off law school”).

¹⁰⁵ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417 § 533 (2008) (creating a pilot program for career flexibility).

¹⁰⁶ 10 U.S.C. § 701; INSTR. NO. 1327.06, *supra* note 67, at 46.

¹⁰⁷ OPNAV INSTR. 1330.2A, *supra* note 103 (authorizing 20 officers and 20 enlisted per year). All enlisted are eligible to apply, officers must have met their first career milestone first (e.g., must have finished technical qualification like having your wings or nuclear qualifications). *Id.*

leaves for two years, he or she must return for at least four years).¹⁰⁸ While in CIPP, the military career is put “on pause.”¹⁰⁹ When participants are no longer on pause, they will be judged for promotion in line with a new-year group in hopes of ensuring equitable promotion and decreasing any stigma associated with gaps in service.¹¹⁰

Similarly, the Coast Guard created “temporary separation” in an effort to counter stigma from broken service and improve retention of top people.¹¹¹ This program allows an eligible enlisted member to temporarily leave service once during the course of his or her career, for up to two years.¹¹² The member is guaranteed a position once he or she returns to the Coast Guard.¹¹³ Originally conceived as a program for new mothers to care for newborn children, it has evolved in a way that makes the reason for separation irrelevant.¹¹⁴ Without programs like this, members are only rehired after separation from service based on staffing needs.

ii. Career Flexibility for Civilian Employees

Career flexibility that allows breaks from non-military employment is a core component of the Guard and Reserves. Guard and Reserve personnel are regularly required to hit pause on civilian employment to fulfill military obligations, and civilian employers are required to support that responsibility. The key requirements are found in the Uniformed Services Employment and Reemployment Rights Act (“USERRA”).¹¹⁵ USERRA provides career flexibility to citizens who volunteer to step away from their own lives to protect the country by giving employees up to five years of job

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.* at 2, 6-8.

¹¹⁰ *Id.* at 10.

¹¹¹ See COAST GUARD PERSONNEL MANUAL, § 12.F.

¹¹² See *id.* (explaining that the program is sometimes called TEMPSEP). To be eligible, members must be at least an E-4 and have been on active duty for more than six years. Members seeking separation under the Care for Newborn Children leave are only required to have four years of active duty service. *Id.*

¹¹³ See *id.* (describing that TEMPSEP does not allow the separated member to continue advancing his or her pay grade until return). *Id.*

¹¹⁴ See *id.* (pointing out that applications for TEMPSEP are taken seriously; cancelled applications result in an extension of active duty by two years).

¹¹⁵ The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 – 4335 (2011) (describing the requirements that civilian employers must follow for members of the Guard and Reserves); see generally Work-Life Policy Unit, Civil Justice Clinic, Arizona State University College of Law, *Overview Of The Uniformed Services Employment And Reemployment Rights Act*, (2011), <http://www.law.asu.edu/LinkClick.aspx?fileticket=AbJ00ecGFeo%3d&tabid=2606> (summarizing “the rights and obligations related to the employment, reemployment, and retention of service members under USERRA”).

protection if they take time off from work to serve in the military.¹¹⁶ At the end of service, with a few exceptions,¹¹⁷ civilian employers must timely reinstate a returning service member at his or her escalator position.¹¹⁸ In addition, employers must provide reasonable accommodations to assist members who develop a service-related disability or have a disability that is aggravated by service to re-qualify for work.¹¹⁹

The intent behind USERRA was to “encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment[, including] the disruption to the lives of persons performing service . . . as well as to their employers, their fellow employees, and their communities”¹²⁰ Mobilizations and deployments during the Global War on Terrorism have kept people away from their civilian jobs for longer than any time since World War II.¹²¹ In addition, this War is the first time since USERRA was enacted that large numbers of employers, Guard, and Reservists learned about USERRA.¹²² One

¹¹⁶ USERRA also provides service members with the ability to continue health care benefits for themselves for up to two years while on duty. 38 U.S.C. § 4317(a); 20 C.F.R. § 1002.164; *see also* 38 U.S.C. § 4318(a)(2)(A) and 20 C.F.R. §§ 1002.259–1002.260 (describing other protections that must be afforded related to benefits). USERRA also protects against discrimination in (re)employment and conditions of employment). 38 U.S.C. § 4311; 20 C.F.R. §§ 1002.18, 1002.19.

¹¹⁷ *See* 38 U.S.C. § 4312(d)(1)(A)-(C) (explaining the exceptions to reinstatement).

¹¹⁸ 38 U.S.C. § 4313(a)(2)(A) (labeling an escalator position as the job the person would have had with reasonable certainty absent military service). Once reinstated, USERRA also provides an exception to traditional at-will employment by protecting the reemployed service member from being terminated without cause for a defined period of time. 38 U.S.C. § 4316(c). The length of protection depends on the length of service and ranges from 180 days to a year. 38 U.S.C. §§ 4316(c)(1)-(2).

¹¹⁹ 38 U.S.C. § 4313(a)(3). *See also* *Overcoming Barriers to the Employment of Veterans with Disabilities Public Meeting of the Equal Employment Opportunity Commission* (Nov. 16, 2011) (video at <http://www.eeoc.gov/eeoc/meetings/11-16-11/index.cfm>) [hereinafter *Overcoming Barriers*] (statement of George M. Parker, Director, Office of Compliance and Investigations, VETS, U.S. Dep’t of Labor) (observing that USERRA’s reasonable accommodation provision is broader than the ADA’s requirements because USERRA does not define “disability”).

¹²⁰ 38 U.S.C. § 4301(a)(1)-(2); *see also* Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 HASTINGS L.J. 773, 778-79 (2010) (discussing USERRA’s legislative intent).

¹²¹ Sean M. Hardy, *A Fighting Chance: The Proposed Servicemembers Access To Justice Act & Its Potential Effects On Binding Arbitration Agreements*, 10 PEPP. DISP. RESOL. L.J. 329, 329-30 (2010); *see* Sparks, *supra* note 120, at 781-82 (reservists are no longer “weekend warriors” and “the long-term strategy of increasing reliance on reserve forces [means that] disruptions to reservist’ work and family lives will likely continue”); MILITARY.COM, DEPLOYMENT: MOBILIZATION AND DEPLOYMENT, (Apr. 15, 2012) <http://www.military.com/benefits/resources/deployment/mobilization-and-deployment> (defining the various types of mobilizations); Edward G. Phillips, *Tennessee Employers Should Know the Law as Soldiers Return from War to Their Old Jobs*, 42 MAY TENN. B.J. 13 (2006) (describing the problems veterans face upon return which may lead to challenges in the workplace).

¹²² USERRA was enacted in 1994 after Gulf War I. Regulations were not promulgated until 2005. *See* 70 Fed. Reg. 75,246 (Dec. 19, 2005).

consequence from this is that case law interpreting USERRA's provisions is still developing. Further, as the law's limitations surface, calls to expand the scope of USERRA are increasing.¹²³ One thing is clear however; USERRA is a core flexibility law for large numbers of Guard and Reserve returning from Iraq and attempting to reintegrate into civilian employment.

D. Authority for Veterans and Families

In addition to the workplace flexibility provisions provided by the military as an employer of active duty and civilian personnel, federal laws authorize workplace flexibility for veterans and military families to assist with a variety of needs. For example, veterans who have recently separated from service may be able to utilize USERRA's protections as described above.¹²⁴ In addition, the Secretary of Defense is tasked with assisting spouses of members of the Armed Forces with finding and maintaining employment.¹²⁵ The remainder of this section describes the other major flexibility laws for veterans and military families, including: (1) the Americans with Disabilities Act ("ADA"),¹²⁶ (2) the Family Medical Leave Act ("FMLA"),¹²⁷ and (3) various hiring preferences, incentives, and affirmative action requirements.¹²⁸

¹²³ See, e.g., Sparks, *supra* note 120, at 775, 80, 94-95 (describing enforcement issues that have prevented USERRA from protecting all service members' jobs and arguing that USERRA's protections should not be lost if a service member fails to properly apply for its protections and offering ideas on how to fix this); Katie Belpedio Schreiber & Abizer Zanzi, *Unraveling USERRA*, 24-MAY CBA REC. 48 (2010) (finding that "USERRA has generated little attention in the first decade of its existence . . . but that is certain to change . . . [G]iven that the U.S. is in the midst of its first major military conflict since USERRA was enacted and is also experiencing one of the worst economic downturns in its history . . ."); Servicemembers Access to Justice Act, S. 3233, 112th Cong. (2012) (enhancing remedies for enforcing USERRA's protections); Wounded Veteran Job Security Act, H.R. 2875, 112th Cong. (2011) (prohibiting employers from firing veterans due to the veterans time away from the workplace to receive treatment or rehabilitation for service connected injuries). In addition, USERRA has been expanded recently. See National Defense Authorization Act for Fiscal Year 2012, § 575, Pub. L. No. 112-81, 125 Stat. 1298 (2011) (expanding coverage from a Guard or Reservist called to active duty on orders to "respond[] to a national emergency").

¹²⁴ See *supra* Part II.C.ii.

¹²⁵ See 10 U.S.C. § 1784(a) (describing efforts to help military spouses obtain employment).

¹²⁶ Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.; see DEP'T OF DEF., ACCESS FOR PEOPLE WITH DISABILITIES (Oct. 31, 2008) (explaining the goal to make facilities accessible).

¹²⁷ Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §2601 et seq.; see DEP'T OF DEF., MILITARY FAMILY LEAVE PROVISIONS OF THE FMLA, *available at* <http://www.dol.gov/whd/fmla/finalrule/MilitaryFAQs.pdf> (answering common questions about the new FMLA provisions).

¹²⁸ See, e.g., 10 U.S.C. § 1784 (2001); Exec. Order No. 13474, 73 Fed. Reg. 57229 (Oct. 1, 2008).

Many service members are coming home from the current conflicts with disabilities, some of which may be permanent and impact members' transition into veteran status and job searches.¹²⁹ These veterans may qualify for ADA protections.¹³⁰ The ADA prevents employers with at least fifteen employees from discriminating against any qualified employee or job applicant on the basis of disability.¹³¹ A qualified employee or applicant is any individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job that he or she holds or desires.¹³² An individual with a disability is any person who has a physical or mental impairment that substantially limits one or more major life activities – such as hearing, walking, speaking, concentrating, or other major bodily function – has a record of such an impairment, or is regarded as having such an impairment.¹³³

¹²⁹ A significant number of Gulf War II-era veterans are returning home with TBI or PTSD – the “signature injuries” of the Global War on Terrorism. *Overcoming Barriers*, *supra* note 119, at 17 (statement of Heather Ansley, Director of Veterans Policy, VetsFirst and Co-Chair CCD Veterans Task Force) (citing *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans*, RAND RESEARCH BRIEF (2008), http://www.rand.org/pubs/research_briefs/RB9336/index1/html) (“18.5 percent of returning servicemembers have PTSD or depression and 19.5 percent have sustained a TBI.”); Susan Okie, *Traumatic Brain Injury in the War Zone*, 352 NEW ENG. J. MED. 2043, 2047 (2005) (approximately sixty percent are returning with TBI); *see also* Shelley MacDermid Wadsworth, *Workplace Flexibility 2010 Briefing: Supporting our Nation's Military Families: The Role of Workplace Flexibility* (Dec. 18, 2008), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=690> (noting that returning war veterans are more often diagnosed with depression and anxiety than PTSD) [hereinafter *2008 Families Briefing*].

¹³⁰ A veteran with a disability is not automatically a “qualified individual with a disability” under the ADA. He or she still must meet the ADA’s definition. *See infra* notes 131-133 and accompanying text; NATIONAL RESOURCE DIRECTORY, https://www.nationalresourcedirectory.gov/home/about_us/frequently_asked_questions/employment/What_are_some_of_the_employment-related_laws_that_protect_me_as_a_Veteran_and_what_are_my_rights_and_responsibilities_under_each?/ (explaining the differences amongst disability definitions related to military protections and why they may matter); *see also* Michael Waterstone, *Returning Veterans And Disability Law*, 85 NOTRE DAME L. REV. 1081, 1096-1108 (2010) (comparing the legal frameworks for people with disabilities and veterans with service-connected disabilities); *id.* at 1082-84 (describing the “popularity”, “public consciousness” raising, and “political clout” of veterans with disabilities as compared to the general population of people with disabilities).

¹³¹ 42 U.S.C. § 12112(a) (2009); EQUAL EMP’T OPPORTUNITY COMM’N, VETERANS WITH SERVICE-CONNECTED DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT (ADA): A GUIDE FOR EMPLOYERS (modified on Mar. 17, 2011), <http://www.eeoc.gov/facts/veterans-disabilities-employers.html> (explaining protections for veterans with service-connected disabilities under the ADA and USERRA).

¹³² 42 U.S.C. § 12111(8) (2009).

¹³³ 42 U.S.C. § 12102(1) (2009); *see* GUIDE FOR EMPLOYERS, *supra* note 131, at 2; *Overcoming Barriers*, *supra* note 119, at 13 (statement of Joyce Walker Jones, Senior Attorney Advisor, Office of Legal Counsel, U.S. Equal Employment Opportunity Commission) (the ADA Amendments Act means that “more veterans with service-

Employers must provide reasonable accommodations to qualified individuals with a disability unless doing so would impose an undue hardship.¹³⁴ Reasonable accommodations are changes to the work environment that enable an individual with a disability to have an equal employment opportunity, such as: providing scheduling flexibility; using part-time schedules; making existing facilities and equipment readily accessible; and adjusting training materials.¹³⁵ These reasonable accommodations help keep veterans attached to the workforce in a way that also provides notice and support to employers.¹³⁶

The ADA does not apply to the federal government as an employer.¹³⁷ Rather, the ADA's predecessor law, Section 501 of the Rehabilitation Act ("Rehab Act"), requires federal agencies to afford the same non-discrimination and reasonable accommodations protections.¹³⁸ Under the Rehab Act, agencies are also required to promote the recruitment and retention of people with disabilities, including veterans with service-connected disabilities.¹³⁹ Every agency must designate a senior official to spearhead efforts to improve the retention and recruitment of veterans with disabilities.¹⁴⁰ This official must ensure that the agency maintains evolving

connected disabilities than ever" will be protected and have access to reasonable accommodations). *See generally* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 208 (2010) (discussing the expanded protection of people with disabilities in the ADA Amendments Act).

¹³⁴ 42 U.S.C. §§ 12112-13; 29 C.F.R. § 1630.2(o); EQUAL EMP'T. OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, Notice Number 915.002, (Oct. 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.htm>. An undue hardship is something that requires significant difficulty or expense in light of the employer's size, industry, and resources. 42 U.S.C. § 12111(10). An interactive process or conversation between employer and employee should be used to find an appropriate accommodation. *See, e.g.*, Adam Reich, *One Guard Member's Flexibility Story*, Sloan Work and Family Network Blog (June 13, 2011), <https://workfamily.sas.upenn.edu/content/one-guard-member's-flexibility-story> (describing one veteran's successful experiences using an interactive process to obtain various scheduling flexibility that helped him reintegrate back to work at a hospital after being injured in Iraq).

¹³⁵ 42 U.S.C. § 12111(9); *see also* Guide for Employers, *supra* note 131, at 4; Job Accommodation Network, <http://askjan.org> (providing additional information about and ideas for reasonable accommodations). It is not a required reasonable accommodation to provide a veteran with a service-connected disability a preference in the application process. *See* NATIONAL RESOURCE DIRECTORY, *supra* note 130.

¹³⁶ *See generally* *Overcoming Barriers*, *supra* note 119.

¹³⁷ 29 U.S.C. § 12111(5)(B)(1).

¹³⁸ Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.

¹³⁹ 29 U.S.C. § 791.

¹⁴⁰ 75 Fed Reg. at 45,040. This official must create a plan for targeting veterans with disabilities during recruiting activities and work to create mechanisms for aligning veterans with disabilities' career goals with positions offered within the federal agency. *Id.*; *see, e.g.*, DEP'T OF THE AIR FORCE, PLAN FOR EMPLOYMENT AND DEVELOPMENT OF PEOPLE WITH DISABILITIES AND REASONABLE

assessment schemes to accurately reflect the needs of the agency and the capabilities of all employees.¹⁴¹

Military family members cannot utilize the rights granted under the ADA or Rehab Act, but recent amendments to the FMLA provide them with the right to time off in certain situations related to military service.¹⁴² These new provisions were created during the War on Terror to offer families support in meeting their workplace flexibility needs.¹⁴³ Since 1993, the FMLA has provided up to 12 weeks of job-protected time off to certain employees who work for some employers for the birth or adoption of a child, to care for one's own serious health condition, or to care for the serious health condition of an immediate family member.¹⁴⁴ In 2008, the FMLA was expanded to create two types of military-related FMLA leave: (1) *qualifying exigency leave*, which provides covered employees up to twelve weeks of unpaid leave to deal with circumstances that arise from having a deployed family member;¹⁴⁵ and (2) *military caregiver leave*, which provides up to 26 weeks of job-protected leave to care for a covered

ACCOMMODATION PROCEDURES IN THE DEPARTMENT OF THE AIR FORCE (2011), <http://www.af.mil/shared/media/document/AFD-110209-053.pdf>.

¹⁴¹ See 75 Fed Reg. at 45,040.

¹⁴² National Defense Authorization Act for Fiscal Year 2010, § 565, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (codified at 29 U.S.C. § 2611 (14)(A)); National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 4356 (2008); See DEP'T OF LABOR, WAGE AND HOUR DIVISION, FAMILY AND MEDICAL LEAVE ACT NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2010 AMENDMENTS, (2010), <http://www.dol.gov/whd/fmla/2010ndaa.htm>.

¹⁴³ See Marcy Karin, *Time Off For Military Families: An Emerging Case Study In A Time Of War . . . And The Tipping Point For Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46, 46 (2009).

¹⁴⁴ 29 U.S.C. §§ 2601-2654. Covered employees have worked at least 1,250 hours in the previous 12 months. *Id.* at § 2611(2); 29 C.F.R. § 825.110(a). See Samuel F. Wright, *Enhanced Leave Entitlements for Family Caregivers of Wounded Warriors*, L. REV. 816 (2008), http://www.servicemembers-lawcenter.org/LAW_REVIEW_816.html (calling for an end to the one year rule for the FMLA's military provisions given the realities of the impact on military service and required moves on spouse employment).

Covered employers include those with at least 50 employees in a 75-mile radius. 29 U.S.C. § 2611(4); 29 C.F.R. § 825.110 (2009). If the service-connected injury arose to the level of a serious health condition (29 U.S.C. § 2611(11)), family members may take leave pursuant to traditional FMLA. 29 U.S.C. § 2612(a)(c).

¹⁴⁵ 29 U.S.C. § 2612(a)(1)(E). There are eight types of qualifying exigencies, all of which arise from or are related to active duty or a call to active duty status: (1) any issue involving a short-notice deployment of up to seven days; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling that is provided by someone other than a health care provider; (6) up to five days of time to spend with a covered service member who is home for R&R during deployment; (7) post-deployment activities; and (8) any other activity for which the employer and employee agree. 29 C.F.R. § 825.126(a)(1)-(8) (2009). See DEP'T OF LABOR, FACT SHEET #28A: THE FAMILY AND MEDICAL LEAVE ACT MILITARY FAMILY LEAVE ENTITLEMENTS (2010), <http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf>; Karin, *supra* note 143.

service member with a serious injury or illness.¹⁴⁶ In 2009, these provisions were expanded. First, eligibility for qualifying exigency leave was broadened to include active duty service for the regular Armed Forces.¹⁴⁷ Second, a “covered service member” for military caregiver leave was redefined to include veterans who served within five years of the date of treatment.¹⁴⁸ Finally, “serious injury or illness” was changed to include members with pre-existing injuries aggravated during active duty.¹⁴⁹ To date, neither the Department of Labor nor the Office of Personnel Management has promulgated regulations interpreting the 2009 expansions.

Over the years, the government has also created a range of special employment supports for veterans and certain military family members. Some of these laws help veterans create and sustain small businesses.¹⁵⁰ Once created, other laws and programs support these veteran-owned businesses through the contracting process.¹⁵¹ Veterans may also receive hiring preference when applying for government jobs.¹⁵² In essence, certain veterans are given additional points on their application scores, which allow them to move higher in the applicant ranks when “external competitive hiring procedures” are used.¹⁵³ Government agencies may also

¹⁴⁶ 29 U.S.C. § 2612(a)(3)-(4); FACT SHEET #28A, *supra* note 145. Employees may not take more than 26 workweeks of leave for any FMLA-qualifying reason. 29 U.S.C. § 2612(a)(4).

¹⁴⁷ National Defense Authorization Act for Fiscal Year 2010, § 565, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (codified at 29 U.S.C. § 2611 (14)(A)); *see also* Wage and Hour Division, *supra* note 142.

¹⁴⁸ 29 U.S.C. § 2611(15)(B); FACT SHEET #28A, *supra* note 145.

¹⁴⁹ § 2611(18)); FACT SHEET #28A, *supra* note 145.

¹⁵⁰ *See, e.g.*, 38 U.S.C. § 8127; *See* U.S. DEP’T OF VETERANS AFFAIRS, <http://www.vetbiz.gov/>; U.S. SMALL BUS. ADMIN., *EXPRESS & PILOT PROGRAMS*, <http://www.sba.gov/content/express-programs>. Veterans own approximately four million small businesses. *See* DEP’T OF LABOR, VETS, TRANSITION ASSISTANCE PROGRAM, PARTICIPANT MANUAL, http://images.military.com/transition/tap5_6.pdf.

¹⁵¹ *See, e.g.*, Veterans Benefits, Healthcare, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 (2006); Exec. Order 13,360, 69 Fed. Reg. 62549 (Oct. 20, 2004); *see also* VETS, *supra* note 150, at 157 (the Center for Veterans Enterprise “helps locate procurement opportunities through a network of corporate and intergovernmental veterans business advocates.”).

¹⁵² 5 U.S.C. §§ 2108, 3309. *See* U.S. OFFICE OF PERSONNEL MGMT., FEDSHIREVETS: SPECIAL HIRING AUTHORITIES FOR VETERANS, <http://www.fedshirevets.gov/job/shav/> (summarizing the key requirements of five hiring authorities); U.S. DEP’T OF LABOR, VETERANS’ PREFERENCE ADVISOR, <http://www.dol.gov/elaws/vets/vetpref/vetspref.htm>; NATIONAL RESOURCE DIRECTORY, *supra* note 130; Matthew Cullimore & Marcy Karin, *Hiring Preferences for Veterans and Spouses of Servicemembers*, Work-Life Policy Unit, Civil Justice Clinic, Arizona State University Sandra Day O’Connor College of Law, (2011), <http://www.law.asu.edu/LinkClink.aspx?fileticket=aUkKu5KCshQ%3d&tabid=2606>.

¹⁵³ §§ 2108, 3309. *See* FEDShireVETS, *supra* note 152 (summarizing the key requirements of five hiring authorities); Veterans’ Preference Advisor, *supra* note 152. NATIONAL RESOURCE DIRECTORY, *supra* note 130; Cullimore, *supra* note 152.

appoint eligible veterans to certain positions without using the “external competitive hiring procedures.”¹⁵⁴ For example, the “Coming Home to Work” Initiative allows agencies to bypass the usual hiring procedures and select veterans for open jobs.¹⁵⁵ These tools are especially important because “[t]he Federal government hires three times the percentage of veterans as the private sector.”¹⁵⁶

There are also federal hiring preferences for military spouses and, in limited situations, other family members. The Military Spouse Preference gives points to military spouses of active duty service members who seek work after moving with a spouse pursuant to a permanent change of station (“PCS”) order.¹⁵⁷ Similarly, the Family Member Preference Program provides a “derived preference” by adding points to the applications of spouses, widows, widowers, or mothers of certain veterans who are no longer able to use the preference themselves.¹⁵⁸ These preferences do not require that the government hire veterans or spouses or offer jobs to less qualified individuals.¹⁵⁹ Rather, they offer a bump up in the ranks to qualified applicants and, therefore, increase the likelihood they will get hired.¹⁶⁰

Government support of hiring preferences for veterans is further leveraged through the federal contracting process.¹⁶¹ Since 1974, laws have

¹⁵⁴ FEDShireVETS, *supra* note 152.

¹⁵⁵ See U.S. OFFICE OF PERSONNEL MGMT., VETGUIDE APPENDIX D: A BRIEF HISTORY OF VETERANS PREFERENCE, <http://www.opm.gov/staffingportal/vghist.asp>. Eligible veterans at a GS-11 or lower grade may be hired for two-year terms. Veterans must be disabled, have been on active duty during a war, or have earned an Armed Forces Service Medal, and be within three years of separation from active duty. *Id.* Authority also exists to hire eligible candidates to positions, regardless of their grade level, for initial appointments of 60-days or less. *Id.* Hiring managers may, however, convert the veterans to permanent employee status at any time during this 60-day window. *Id.*; see also NATIONAL RESOURCE DIRECTORY, *supra* note 130.

¹⁵⁶ *Status of Veterans Employment: Before the Subcomm. on Econ. Opportunity of the H. Comm. On Veterans' Affairs*, 111th Cong. (2010) (statement of Tim S. Embree, Legislative Associate, Iraq and Afghanistan Veterans of America). About a third of Gulf War-era II veterans have found public sector work after service. Samuel Wright & Greg Rinckey, *The Job War Rages On*, 47-OCT TRIAL 32 (2011) (veterans are “twice as likely as nonveterans to work in the public sector”).

¹⁵⁷ 10 U.S.C. § 1784; see also FAS, Staffing & Development Branch, Military Spouse Preference Program, Information Sheet, ST-006 (2002), <http://www.cpms.osd.mil/fas/staffing/pdf/st006.pdf> (detailing the program’s eligibility requirements); Exec. Order No. 13,474, 73 Fed. Reg. 57,229 (October 1, 2008) (explaining the ability to bypass competitive employment barriers when hiring military spouses if certain conditions are met); Exec. Order 12,568 (Oct. 2, 1986) (giving the military authority to hire qualified military spouses for certain positions).

¹⁵⁸ 5 U.S.C. §§ 2108, 3309; see VETGUIDE, *supra* note 155.

¹⁵⁹ See 5 U.S.C. §§ 2108, 3309.

¹⁶⁰ VETGUIDE, *supra* note 155.

¹⁶¹ See *Overcoming Barriers*, *supra* note 119 at 13 (statement of Claudia Gordon, Special Assistant to the Director, OFCCP, U.S. DoL); see also 10 U.S.C. § 1784(g)

required these employers to implement hiring preferences for veterans.¹⁶² These employers also have an affirmative duty to ensure equal employment opportunities to veterans.¹⁶³ This requires “federal contractors and subcontractors to take affirmative steps to hire and promote qualified, targeted veterans.”¹⁶⁴

Finally, tax credits have been created – and recently expanded – to incentivize private employers to hire veterans. From November 22, 2011 to December 31, 2012, the Work Opportunity Tax Credit (“WOTC”) allows private-sector employers to receive a credit of up to \$9,600 for each hire of a veteran with a service-connected disability who has been unemployed for at least six months.¹⁶⁵ The Wounded Warrior Tax Credit extends a tax credit of \$4,800 to businesses that hire veterans with service-connected disabilities.¹⁶⁶ In addition, the Returning Heroes Tax Credit encourages the hiring of unemployed Gulf War-era II veterans.¹⁶⁷ The goal for these tax credits is to get employers to help the government support targeted groups (unemployed veterans and veterans with service-connected disabilities) transition back into work.¹⁶⁸

(Department of Defense shall “seek ways for incorporating hiring preferences for qualified spouses of members of the armed forces into [federal] contracts”).

¹⁶² 38 U.S.C. § 4212 (originally passed in 1974).

¹⁶³ *Id.*; 41 C.F.R. Part 61–300 (requirements for veterans’ affirmative action programs); VETS, *supra* note 150; see Ann O’Leary, Center for American Progress, Making Government Work for Families (2009), http://www.americanprogress.org/issues/2009/07/making_government_work.html (calling for further use of the contracting process to promote work-life policies).

¹⁶⁴ Groups of veterans targeted include: “special disabled veterans, Vietnam veterans, any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, and any veteran during the one-year period beginning on the date of such veteran’s discharge or release from active duty.” 38 U.S.C. § 4212 (3)(A); see 41 C.F.R. § 60-250.40(a)-(b).

¹⁶⁵ 26 U.S.C. §§ 51 (d)(3)(A)(i)-(iv). Before the VOW to Hire Heroes Act, the maximum was \$4,800. Press Release, THE WHITE HOUSE, FACT SHEET: RETURNING HEROES AND WOUNDED WARRIOR TAX CREDITS (Nov. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/21/fact-sheet-returning-heroes-and-wounded-warrior-tax-credits>.

¹⁶⁶ 26 U.S.C. § 51 (d)(3)(B)(i)(II).

¹⁶⁷ This credit, which originally sunsetted in 2010, provides up to \$2,400 for someone out of work for at least four weeks and up to \$5,600 for a veteran unemployed for more than six months. *Id.*; FACT SHEET: RETURNING HEROES AND WOUNDED WARRIOR TAX CREDITS, *supra* note 165.

¹⁶⁸ Employment & Training Administration, U.S. Department of Labor, VOW TO HIRE HEROES ACT, THE WORK OPPORTUNITY TAX CREDIT (WOTC): AN EMPLOYER-FRIENDLY BENEFIT FOR HIRING VETERANS MOST IN NEED OF EMPLOYMENT (2011), http://www.doleta.gov/business/incentives/opptax/PDF/veterans_fact_sheet12_1_2011.pdf.

E. Evaluating and Changing the Framework

Study, evaluation, and adjustment to changing environments are common tasks for the military community. Every year, the DoD, DoL, Department of Veterans' Affairs ("VA"), and other agencies are required to report on the impact of various programs to Congress.¹⁶⁹ The transition home of combat troops from Iraq will only intensify the scope with which Congress and other stakeholders evaluate these reports and take stock of the military structures, policies, and practices under their jurisdiction. As the impact of the drawdown materializes, there will be multiple, ongoing, and sometimes conflicting legislative and regulatory proposals to alter the legal framework governing workplace flexibility. In the words of Admiral Mullen, the reality is that the military has "got to continue to change."¹⁷⁰

Admiral Mullen is not alone in this thinking. Proposals are pending in Congress to change the military's workplace flexibility framework. In addition to the new laws described above, in the 112th Congress alone, there has been a steady stream of calls to increase access to workplace flexibility for Active Forces, Guard, Reserve, veterans, and military families.¹⁷¹ A close reading of defense appropriations bills in the last few years—all of which contain workplace flexibility provisions—further demonstrates this activity.¹⁷²

¹⁶⁹ See, e.g., 38 U.S.C. § 4107 (b).

¹⁷⁰ Cheryl Pellerin, *Mullen: Military Lags in Support of Women Warriors*, AMERICAN FORCES PRESS SERVICE (Nov. 4, 2010) <http://www.defense.gov/news/newsarticle.aspx?id=61559>.

¹⁷¹ See, e.g., National Guard and Reserve Soft Landing Reintegration Act, S. 1839, 112th Cong. (2011) (proposing to retain and allow Reservists to use accrued leave for 45 days after active duty to participate in reintegration programs); Ready Employers Willing to Assist Reservists' Deployment Act of 2011, H.R. 1948, 112th Cong. (2011) (proposing a tax credit for employers who supplement the pay of mobilized employees in the Reserve or Guard); Veterans Opportunity to Work Act of 2011, H.R. 2433, 112th Cong. (2011) (proposing reforms to improve programs helping veterans transition to civilian employment); Military Family Leave Act of 2011, S. 1112, 112th Cong. (2011) (proposing to amend USERRA to provide up to two weeks of leave for military families to take in preparation for or during a loved one's deployment); Military Spouses Employment Act, H.R. 687, 112th Cong. (2011) (proposing to amend WOTC to include spouses as a targeted group for which employers may get a credit for hiring); Military Family-Friendly Award Act, S. 90, 112th Cong. (2011) ("designed to encourage employers to create a work environment that is friendly to military families and recognize those that already make this effort"); Designating October 2011 as 'National Work and Family Month', S. Res. 299, 112th Cong. (2011) (recognizing that "military families have special work-family needs that often require robust policies and programs that provide flexibility . . .").

¹⁷² See, e.g., National Defense Authorization Act for Fiscal Year 2012, § 1122, Pub. L. No. 112-81, 125 Stat. 1298 (2011) (granting USERRA protections to Guard called up for "homeland security missions"); Ike Skelton National Defense Authorization Act for Fiscal Year 2011, §§ 516, 583, Pub. L. No. 11-383, 124 Stat. 4137 (2011) (allowing Guard members to carry over leave earned in one period to the next if it is done in

In addition, there has been significant regulatory activity recently. For example, in 2011, the DoL issued a Notice of Proposed Rulemaking to update the affirmative action requirements for veterans in a host of ways, including establishing annual hiring benchmarks for government contractors.¹⁷³ On November 16, 2011, the EEOC announced that it would be updating its guidance on compliance with the ADA for veterans with service-connected disabilities.¹⁷⁴ The federal agencies mentioned above, as well as some others, also have workplace flexibility-related regulations or instructions on their regulatory agendas.¹⁷⁵ This activity serves as a reminder of the need to remain vigilant in updating regulations and agency interpretations, particularly given the influx of members reintegrating to civilian life with the Iraq drawdown.

This reevaluation of the workplace flexibility framework is important to keep the military structured in a way that meets its operational needs as well as advances the employment and life supports for (current and former) employees and their families. A “key enabler” of the DoD’s ability to operate at its best is a human capital strategy that “require[s] updated, appropriate authorities and tools from Congress to shape it and improve its sustainability.”¹⁷⁶

III. OBSERVATIONS ABOUT THE MILITARY’S WORKPLACE FLEXIBILITY FRAMEWORK

The preceding section described a robust legal framework that recognizes the needs of the military as an employer and the role of other public and private stakeholders in assisting military personnel and their

conjunction with a reenlistment and expanding the Yellow Ribbon Program to target service members and their families’ mental and emotional fatigue related to deployment); National Defense Authorization Act for Fiscal Year 2010, §§ 564-5, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (including provisions to expand internship opportunities for spouses of service members and expanding the FMLA leave provisions for service members’ families); Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, §§ 532-33, Pub. L. 110-417, 122 Stat. 4356 (2008) (providing 10 days of paternity leave and creating the CIPP to allow some members to take a break in service without career penalties).

¹⁷³ 76 Fed. Reg. 23357-23425 (Apr. 26, 2011); *see also Overcoming Barriers*, *supra* note 119 (statement of Claudia Gordon, Special Assistant to the Director, OFCCP, U.S. Dep’t of Labor).

¹⁷⁴ *Overcoming Barriers*, *supra* note 119.

¹⁷⁵ For example, the Small Business Administration plans to continue expanding regulations on the Military Reservist and Veteran Small Business Reauthorization and Opportunity Act of 2008 to toll statutes of limitations on programs for small businesses owned by veterans. Semiannual Regulatory Agenda, SBA, 77 Fed. Reg. 8020 (proposed Feb. 12, 2011), <https://federalregister.gov/a/2012-1660>.

¹⁷⁶ DEP’T OF DEF. QUADRENNIAL DEF. REV. REP. 76 (2006), <http://www.defense.gov/qdr/report/Report20060203.pdf>.

families. This framework acknowledges the critical role of supporting those that volunteer to protect the country. A full exploration of these themes, and how thoughtful public policy should be shaped to address them, is outside the scope of this paper. The following section, nonetheless, provides select observations on some of these themes in hopes of facilitating further study of the utility of flexibility authorized under the existing framework and to see what fixes (if any) are needed.

A. *Workplace Flexibility to Recruit and Retain a Diverse Workforce*

The military is trying to adapt its workplace flexibility policies to its changing—military and civilian—workforce as part of a larger recruitment and retention effort.¹⁷⁷ Over the course of the War on Terror, the size of the military has expanded and contracted to meet changing operational and budgetary needs.¹⁷⁸ Unlike other employers, Congress directly controls the military's "strength," meaning the number of people that it may employ.¹⁷⁹ The military has to report its manpower calculations at least annually, and Congress uses that information to debate what constitutes permissible "end strength" at the time.¹⁸⁰ The military in turn uses Congress' delegation to set target goals for recruitment and retention of different ranks and status in the different branches.¹⁸¹ At various points in time, certain branches have had trouble recruiting new members or retaining experienced members to meet their needs, which include obtaining a diverse workforce.¹⁸²

¹⁷⁷ See Wadsworth, *supra* note 129; Karin, *supra* note 143;

¹⁷⁸ See 10 U.S.C. § 115 (requiring Congress to "authorize personnel strength levels for each fiscal year" for active duty and select reserve personnel). Compare National Defense Authorization Act for Fiscal Year 2001, § 401, Pub. L. 106-398, 114 Stat. 1654 (2000) (containing the end strength authorizations for active duty and reserve personnel as well as appropriations to cover the same for the year) with National Defense Authorization Act for Fiscal Year 2008, § 401, Pub. L. 110-181 (same). The end strength of active duty personnel is one-third smaller today than it was in 1990. See Wadsworth, *supra* note 129 (further observing there was a draft the last time we had force of this size).

¹⁷⁹ 10 U.S.C. § 115.

¹⁸⁰ 10 U.S.C. § 115(a) (requiring the DoD to submit a Defense Manpower Requirements Report annually).

¹⁸¹ See, e.g., 10 U.S.C. § 523 (prescribing permissible manpower for officers on active duty); 10 U.S.C. § 115 (b)(1) ("Congress shall annually authorize the maximum number of members of a reserve component permitted to be on active duty or full-time National Guard duty at any given time" who are called into active duty); see also DEP'T OF DEF., INSTR. NO. 1120.11 (containing definitions that explain the types of strengths used in calculating military manpower); DEP'T OF DEF. INSTR. 1336.07 (2009); DAVID F. BURRELLI, CHARLES A. HENNING, DON J. JANSEN & LAWRENCE KAPP, CONG. RESEARCH SERV. RL 41874, FY2012 NATIONAL DEFENSE AUTHORIZATION ACT: SELECTED MILITARY PERSONNEL POLICY ISSUES, 2-5 (2011); <http://www.fas.org/sgp/crs/natsec/R41874.pdf>.

¹⁸² See, e.g., Root, *supra* note 75, at 169-180 (describing recent Army attrition and

Different initiatives have been created to work on recruitment and retention, including efforts to target particular subgroups of military personnel. For example, in 2007, the Navy created a Taskforce on Life/Work to study how to attract and maintain highly qualified female enlisted members and officers.¹⁸³ The Taskforce surveyed its members to identify needs, priorities, and ideas for changes to support any needed life/work integration policies.¹⁸⁴ Through this survey, the Navy deepened its understanding of the importance of workplace flexibility to its service members and their families.¹⁸⁵ The Navy also learned about a strong desire for flexibility in a range of forms, particularly to support women, those with dependents, and millennials.¹⁸⁶ This information has been used to craft pilot programs and other initiatives that respond to the members' self-reported needs, as well as to educate its Fleet about existing, yet underutilized, flexibility provisions.¹⁸⁷

The Taskforce's findings about the Fleet's call for more flexibility mirrors comments from military leadership.¹⁸⁸ According to Admiral Mullen, "[r]esources for women in the military services are lagging behind those of men, and the military system does not yet understand the unique challenges of women in uniform."¹⁸⁹ Women currently make up 14.3 percent and 17.8 percent of the Armed Forces, Guard and Reserve, respectively.¹⁹⁰ Many of these women are mothers, caregivers, and members of dual-earner families.¹⁹¹ In the past, women who entered the

retention problems).

¹⁸³ Barrett, *supra* note 56, at slide 1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 23.

¹⁸⁶ *Id.* at 25.

¹⁸⁷ *See id.* at 3 (one goal is moving "Life-Work Integration . . . from pilots to Fleet implementation").

¹⁸⁸ *See, e.g.,* DEP'T OF DEF. REP. OF THE 2ND QUADRENNIAL QUALITY OF LIFE REV. 36 (2009) (emphasizing that "[s]ervice members must balance the competing demands of military service with those of their families.").

¹⁸⁹ Cheryl Pellerin, *Mullen: Military Lags in Support of Women Warriors*, American Forces Press Service, Nov. 4, 2010, <http://www.defense.gov/news/newsarticle.aspx?id=61559>.

¹⁹⁰ Wadsworth & Southwell, *supra* note 26, at 4.

¹⁹¹ Drummet, *supra* note 36, at 279 (drawing a link between military mothers and work-life policies). On December 12, 2011, Michele A. Flournoy, the chief advisor to Defense Secretary Leon E. Panetta, stepped down from her job to "rebalance" her life and be with her kids. Flournoy's husband is second in command at the VA and they have three minor children together. Before announcing her departure, Flournoy was seen as a strong possibility for appointment as the first female Secretary of Defense. Elisabeth Bumiller, *One of the Pentagon's Top Women Is Stepping Down*, N.Y. TIMES, Dec. 12, 2011, <http://www.nytimes.com/2011/12/13/us/michele-flournoy-resigns-as-a-top-pentagon-adviser.html>; Bryce Covert, *Flournoy Leaves the Pentagon: Another Sign That Our Workplace Policies Fail Women*, NEW DEAL 2.0, Dec. 13, 2011, <http://www.newdeal20.org/2011/12/13/flournoy-leaves-the-pentagon-another-sign-that-our-workplace-policies-fail-women-67203/>.

militia “were expected to adapt to the [male] norms and values of the military.”¹⁹² Recently, these norms have been changing, particularly with the expansion of the number of roles that women are authorized to perform in the military, and the reality that this is the first generation where large numbers of women have been deployed.¹⁹³ These changes will have implications for enlistment and retention rates, among other things, and identify a structural issue that workplace flexibility may help address. Further study is needed to understand the work-life needs of military women as well as to maximize their effectiveness as service members.

It is also imperative that the military identify and respond to the needs of the younger generation, as it makes up the majority of its workforce. As mentioned above, more than half of enlisted active duty personnel are twenty-five years old or younger.¹⁹⁴ When this figure is viewed in conjunction with the initial enlistment period of eight years for new personnel,¹⁹⁵ it underscores the importance of retaining the talent pool of twenty-four to thirty-five year-old service members, in particular, to meet military readiness.¹⁹⁶ Evaluations from the Navy Taskforce comports with prior research findings that younger workers place a high value on workplace flexibility.¹⁹⁷ In fact, workplace flexibility is a demonstrated tool to improve employee retention and is a key element in the successful recruitment of employees of all generations, including millennials and other young workers.¹⁹⁸ In addition, flexibility is linked to higher employee

¹⁹² Drummet, *supra* note 36, at 279.

¹⁹³ Michelle Norris, *Roles for Women in U.S. Army Expand*, NPR, Oct. 1, 2007, <http://www.npr.org/templates/story/story.php?storyId=14869648>; Pellerin, *supra* note 170 (“[m]ore than 200,000 women have served in Iraq and Afghanistan.”). Over “100,000 female soldiers who have served in the wars are mothers, nearly half the number of women who have been deployed. The vast majority are primary caregivers, and a third are single mothers.” Paula J. Caplan, *Female Veterans Carry Special War Baggage*, WOMEN’S E-NEWS, Nov. 10, 2011, <http://www.womensenews.org/story/books/111109/female-veterans-carry-special-war-baggage>; see also DEP’T OF DEF. INSTR. 1315.18 (2005); Lizette Alvarez, *Wartime Soldier, Conflicted Mom*, N.Y. TIMES, Sept. 27, 2009, <http://www.nytimes.com/2009/09/27/Us/27mothers.html> (stating that the military discourages single parents; “They are not allowed to enlist in active duty, though if they become single they can stay after providing a notarized family care plan The National Guard and the Reserves allow single parents to join since those jobs are technically part time.”); Robyn Roche-Paull, *Breastfeeding In Combat Boots*, <http://breastfeedingincombatboots.com> (exploring “the unique circumstances and demands that accompany breastfeeding while on active duty”).

¹⁹⁴ Barrett, *supra* note 56, at slides 28-30. Only 5.1 percent are over the age of 40. *Id.*

¹⁹⁵ See DEP’T OF DEF. QUADRENNIAL DEF. REV. REP. 76 (2010), <http://www.defense.gov/qdr/report/Report20100203.pdf> (every enlistee signs this contract, which contains a Military Service Obligation of eight years for an initial enlistment).

¹⁹⁶ Pellerin, *supra* note 170; see Root, *supra* note 75, at 172 (noting the Army’s efforts to support work-life to retain Millennials).

¹⁹⁷ Barrett, *supra* note 56, at 10-12.

¹⁹⁸ See, e.g., Marcie Pitt-Catsoupes, Christina Matz-Costa, & Elyssa Besen,

satisfaction, increases in productivity, and lower stress levels.¹⁹⁹

Younger generations are not the only employees who desire and would benefit from a robust menu of workplace flexibility policies. Flexibility, especially career flexibility for veterans (who may be recruited back to service at a future date), aids the military's need to support its personnel. More than one million Iraqi war veterans will have returned home and attempted to reenter the civilian workforce by 2012.²⁰⁰ Significant challenges persist for these veterans; some of whom are entering the civilian workforce for the first time.²⁰¹ Meanwhile, despite USERRA's protections, some veterans who attempt to return to the same job they had before they left are unable to do so because positions are no longer available or are only open for significantly reduced pay or with fewer

Workplace Flexibility: Findings from the Age & Generations Study (2009), http://www.bc.edu/content/dam/files/research_sites/agingandwork/pdf/publications/IB19_WorkFlex.pdf; The Lattice Group, <http://thelatticegroup.org/about-5/about-the-lattice-group> (non-profit that "conducts research and sparks dialogue about work-life issues from a Gen Y perspective").

¹⁹⁹ See *The Business Case for Flexible Work*, Workplace Flexibility 2010 & Urban Inst., (2008), available at <http://workplaceflexibility2010.org/images/uploads/BusinessCaseforFWAs.pdf> (compiling key findings from the research on the business case for flexible work arrangements); *Business Impacts of Flexibility: An Imperative for Expansion 41*, Corporate Voices for Working Families, (2005), <http://www.cvworkingfamilies.org/system/files/Business%20Impacts%20of%20Flexibility.pdf>; Kenneth Matos & Ellen Gallinsky, *Workplace Flexibility in the United States: A Status Report* (2011), http://whenworkworks.org/research/downloads/www_us_workflex.pdf. Workplace flexibility also reduces absenteeism rates and can combat high attrition rates, even in industries with high levels of attrition across the field. *Id.* at 10; see also Joan Williams & Penelope Huang, Ctr. For WorkLife Law, *Improving Work-Life Fit in Hourly Jobs 4* (2011), <http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf> (explaining the benefits of workplace flexibility for low-wage and hourly workers). In addition, workplace flexibility mitigates negative health consequences associated with caregiving. See, e.g., Grzywacz, Case, & Jones, *The Effects of Workplace Flexibility on Health Behaviors: A Cross-Sectional and Longitudinal Analysis*, 49 J. OCCUPATIONAL MED. 1302-1309 (2007); *Supporting a Healthier Workplace*, Briefing by American Psychological Association, New America Foundation, and Workplace Flexibility 2010, (May 20, 2009), materials & webcast, available at http://workplaceflexibility2010.org/index.php/events/congressional_briefing2.

²⁰⁰ See Aaron Smith, *Job Challenges Loom for War Vets*, CNN MONEY (March 22, 2012), <http://money.cnn.com/2012/03/22/news/economy/unemployment-veterans/index.html>; U.S. Rep. Gus Bilirakis, R-Palm Harbor, Tampa Bay Online, *Help Transition Veterans to the Civilian Workforce*, <http://www2.tbo.com/news/opinion/2012/feb/22/naopino2-help-transition-veterans-to-civilian-work-ar-361360/> (noting that there are one million unemployed veterans).

²⁰¹ These challenges are reflected in Gulf War-era II veterans having a 13.3 percent unemployment rate in June 2011. U.S. DEP'T. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT SITUATION NEWS RELEASE, USDL-11-1011, July 8, 2011. Civilian counterparts had an overall 9.2 percent unemployment rate. *Id.* By contrast, 3.6 percent of veterans were unemployed in 2001. KENNETH MATOS & ELLEN GALLINSKY, WHEN WORK WORKS, EMPLOYER SUPPORT FOR THE MILITARY COMMUNITY 1 (2011). Unemployment for Guard and Reservists has quadrupled since 2007. Embree, *supra* note 156. The unemployment rate for veterans with disabilities is 49 percent. *Overcoming Barriers*, *supra* note 119 (citing a Oct. 6, 2011 Roundtable Before the Senate Veterans' Affairs Committee about Hiring Unemployed Veterans).

responsibilities.²⁰² Other veterans closed or transferred ownership in small businesses before serving, only to find upon returning home that they had no hope of getting their businesses back or that they lacked the capital to restart them.²⁰³

In recognition of veterans' service, presidents have regularly used the bully pulpit to support the employment of veterans (and military families).²⁰⁴ Recently, the most visible form of this commitment to veterans is through the "Joining Forces" initiative.²⁰⁵ Spearheaded by First Lady Michelle Obama and Dr. Jill Biden, Joining Forces is an effort to maximize the success of veterans returning from deployment and to improve the lives of military families.²⁰⁶ The initiative focuses attention on the unique challenges and strengths of veterans, and educates civilians, business, and community members about the importance of maximizing veterans' incredible strengths.²⁰⁷ Its goals include more deeply weaving veterans into

²⁰² See 38 U.S.C. § 4312 (explaining that the employer is not obligated to reemploy the veteran if the rehiring would be "impossible or unreasonable because of a change in an employer's circumstances").

²⁰³ See U.S. Small Business Association, U.S. Dep't of Labor, *Special Types of 7(a) Loans: Patriot Express Loan Program* (2011), <http://www.sba.gov/content/express-programs>.

²⁰⁴ See Woodrow Wilson, 8th Annual Message, THE AMERICAN PRESIDENCY PROJECT, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29561#axzz1rrvBH577> ("The nation's gratitude must be effectively revealed to them by the most ample provision for their medical care and treatment as well as for their vocational training and placement."); Harry S. Truman, Special Message to Congress: The President's First Economic Report, THE AMERICAN PRESIDENCY PROJECT, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=12828#axzz1rrvBH577> ("less than a year and a half after VJ-day more than 10 million demobilized veterans and other millions of wartime workers have found employment in the swiftest and most gigantic changeover that any nation has ever made from war to peace."); Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union, THE AMERICAN PRESIDENCY PROJECT, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=10416#axzz1rrvBH577> ("In our determination to keep faith with those who in the past have met the highest call of citizenship, we now have under study the system of benefits for veterans and for surviving dependents of deceased veterans and servicemen. Studies will be undertaken to determine the need for measures to ease the readjustment to civilian life of men required to enter the armed forces for two years of service.").

²⁰⁵ THE WHITE HOUSE, ABOUT JOINING FORCES (2011), <http://www.whitehouse.gov/joiningforces/about>.

²⁰⁶ See *id.* Joining Forces encourages participation by asking Americans to find service opportunities, pledge service hours, or send messages of thanks to veterans. These efforts aim to show support for the military members and families. *Id.*

²⁰⁷ See *id.* The "Employment Resources" section of the website pulls together multiple sources of information for veterans and employers, such as the National Resource Directory and My Next Move For Veterans. The website highlights which party should use these websites and encourages both veterans and industry to utilize them and learn more about how they can aid the initiative. The website also provides links to military sites so visitors can learn more about the services.

the fabric of our society and aiding military spouses seeking employment, given the obstacles in their career paths.²⁰⁸ Through this initiative, private businesses have committed to hiring more than 235,000 unemployed veterans.²⁰⁹ Joining Forces also has encouraged employers to “make their workplaces . . . more Guard and Reserves-friendly with things like flexible work schedules and portable jobs.”²¹⁰

Another element of Joining Forces is giving a high-profile platform to recent government and public/private partnerships that offer tools to support civilian hiring of the military community.²¹¹ For example, the Veterans Job Bank is a clearinghouse of jobs posted specifically for veterans.²¹² The “O*NET Veteran Gold Card Initiative” offers training and job search assistance to Gulf War-II era veterans through DoL’s One-Stop Career Centers.²¹³ DoL also has projects called “America’s Heroes at Work,” which educates employers about the needs of service members reintegrating into civilian employment with TBI and PTSD,²¹⁴ and “My

²⁰⁸ *Id.* (explaining that the service members and their families have earned the help of their fellow Americans through their military service).

²⁰⁹ *Obama to Announce Executive Action to Help Boost Veteran Employment*, U.S. NEWS, (Nov. 7, 2011), <http://www.usnews.com/news/articles/2011/11/07/obama-to-announce-executive-actions-to-help-boost-veteran-employment>. President Obama also set a goal for private sector civilian employers to hire at least 100,000 veterans by 2013. Press Release, The White House, Fact Sheet: President Obama’s Commitment to Employing America’s Veterans (Aug. 5, 2011), <http://www.whitehouse.gov/the-press-office/2011/08/05/fact-sheet-president-obama-s-commitment-employing-america-s-veterans>.

²¹⁰ Posting of Hilda Solis, *Giving Back to our Military Families*, <http://www.whitehouse.gov/blog/2011/04/18/giving-back-our-military-families> (Apr. 19, 2011).

²¹¹ THE WHITE HOUSE, JOINING FORCES (accessed Dec. 16, 2011), <http://www.whitehouse.gov/joiningforces/resources>. *But see* Waterstone, *supra* note 130, at 1126 (observing that “job training programs have also been criticized as having weak leadership and accountability, limited data and analysis to manage programs, a low success rate, and not having a proactive approach to serving veterans with serious employment handicaps”); SHRM, SHRM ADVISES HOUSE COMMITTEE ABOUT EMPLOYER VIEWS ON VETERAN EMPLOYMENT, Sept. 16, 2011, (challenges include: “inadequate programs designed by the military to prepare service members for a civilian job search; the difficulty in correlating military job descriptions to state-required licensing and professional certifications; and the need for better alignment among employers, government agencies, and veteran-service organizations”).

²¹² National Resource Directory, Veterans Job Bank (accessed Dec. 17, 2011) https://www.nationalresourcedirectory.gov/home/veterans_job_bank. This job bank is a collaboration of the DoD, DoL, and VA. *Id.* With over 500,000 listings, the job bank allows companies to “tag” a job they post on their own website or on other sites. THE WHITE HOUSE, *supra* note 165.

²¹³ *Reviewing the Implementation of the VOW to Hire Heroes Act of 2011: Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans’ Affairs*, 112 Cong., (2011) (statement of Ismael “Junior” Ortiz, Acting Assistant Secretary, VETS, U.S. Dep’t of Labor).

²¹⁴ AMERICA’S HEROES AT WORK, <http://www.americasheroesatwork.gov/> (this collaboration between DoD, VA, HHS, Education, SBA, SSA and others is run by DoL VETS and ODEP). *See Overcoming Barriers*, *supra* note 119 (statement of George M.

Next Move for Veterans,” which helps veterans translate military experience onto resumes and other job application documents in the most effective way possible.²¹⁵ The VA is experimenting with programs that target specific veterans for particular civilian jobs.²¹⁶ Also at the VA, the Voc Rehab Program assists veterans with service-connected disabilities to find and retain work.²¹⁷ In addition, the DoD’s Employer Support of Guard and Reserve (“ESGR”) “promote[s] cooperation and understanding between Reserve component members and their civilian employers, [assisting] in the resolution of conflicts arising from an employee’s military commitment.”²¹⁸

This panoply of policies and programs shows the government’s attempt to do right by its military personnel.²¹⁹ The DoD — as well as the rest of

Parker, Director, Office of Compliance and Investigations, VETS, DoL).

²¹⁵ MY NEXT MOVE (accessed Dec. 17, 2011) <http://www.mynextmove.org/vets/>. Veterans can browse careers by industry, by comparisons to their military jobs, and by keywords. *Id.* Other similar tools exist. *See, e.g.,* ARIZONA COALITION FOR MILITARY FAMILIES, *MIL/VET EMPLOYMENT PORTAL*, <http://arizonacoalition.org/employment> (last visited Jan. 2, 2012); Emily Glazer, *Resources to Help Veterans Land a Civilian Job* (Dec. 4, 2011), <http://online.wsj.com/article/SB10001424052970203699404577044052223447854.html> (despite “highly specialized skills”, many veterans “don’t know how to go about finding a civilian job that utilizes that expertise. Enter websites such as Military.com, MyNextMove.org and Indeed.com, where veterans can plug in their military roles and find out a variety of skills they’ve acquired and jobs that use those skills.”).

²¹⁶ For example, the STAP apprenticeship is a partnership between the VA and Lockheed Martin in which “veterans with disabilities [are prepared] for full-time, flexible employment in the areas of supply chain management and information technology with career ladders.” Robert Micholas, et al, *Ready and Able: Addressing Labor Market Needs and Building Productive Careers for People with Disabilities through Collaborative Approaches* (2011), available at http://askjan.org/Webcast/handouts/Ready_Able.pdf#search=%22military%22. STAP participants serve as paid apprentices for 2-years in identified jobs with Lockheed Martin at the same time the VA provides “career specialists, mentors, coaches[,] access to web-based training and other educational resources to prepare them for careers in the company.” *Id.*

²¹⁷ *See* 38 C.F.R. Chapt. 31. Each eligible veteran is paired with a counselor to design a 12-year program to ensure workforce attachment. Dep’t of Veterans Affairs, *Vocational Rehabilitation & Employment Service*, <http://www.vba.va.gov/bln/vre/> (last visited Dec. 31, 2011); *see also* Waterstone, *supra* note 130, at 1107-08 (describing the Voc Rehab program). Military branches also have their own programs. *See, e.g.,* U.S. Army Warrior Transition Command, U.S. Army Wounded Warrior Program (AW2), <http://wtc.army.mil/aw2/index.html> (AW2 “assists and advocates for severely wounded, ill, and injured Soldiers, Veterans, and their Families, wherever they are located, regardless of military status.”).

²¹⁸ EMPLOYER SUPPORT OF GUARD AND RESERVE, <http://www.esgr.org/>. Major ESGR activities include serving as USERRA ombudsmen, presenting awards to military friendly employers, reviewing human resource policies, and orientating employers to the Guard and Reserve system. *Id.*

²¹⁹ *See, e.g.,* Miller, *supra* note 11 (quoting Admiral Mullen) (“People are our best resource, and we have moved to a much broader and deeper understanding of what that means.”); DEP’T OF DEF., *WORKLIFE AT DOD, DCPAS*, (2012), <http://www.cpms.osd.mil/worklife/> “The foundation of the DoD Mission is the people who carry it out. For us to keep achieving that mission, every DoD employee must be

the Administration — continues to examine the strategic use of workplace flexibility as a recruitment, retention, and reintegration tool.²²⁰ These programs show momentum in the right direction, but more needs to be done to respond to the needs of the military and its members.

B. Workplace Flexibility to Recruit and Retain a Family

President Barack Obama has characterized “the care and support of military families a top national security policy priority.”²²¹ The DoD has echoed that sentiment, and announced that “reducing stress on military personnel and their families is a top priority.”²²²

This priority is well-founded. Military families report stress from worrying about a service member’s safety and from the added responsibilities to perform all adult household duties while the service member is away.²²³ Military families must cope with deployment, multiple tours of duty, extended periods of absence of one (or both)²²⁴ parents, and

able to perform at peak effectiveness. That means the wellbeing of the DoD workforce really is a matter of national security.” *Id.* See also DEP’T OF DEF., *supra* note 104, at 2 (the DoD “recognizes that its most precious resource is its people”).

²²⁰ See DEP’T. OF DEF., INSTR. NO. 1035.01, (Apr.4, 2012), <http://www.dtic.mil/whs/directives/corres/pdf/103501p.pdf> (outlining telework directives); DEP’T. OF LABOR, *Annual Performance Report, FY 2011*, 68-69, <http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V1-01.pdf> (naming workplace flexibility, specifically the FMLA, as one of the annual outcome goals and analyzing the success initiatives have had); DEP’T. OF LABOR, WAGE & HOUR DIVISION, CONGRESSIONAL BUDGET JUSTIFICATION, *FY 2013*, 7, 20, 2 (reasserting workplace flexibility, specifically the FMLA, as an outcome goal with more detailed analysis of success statistics, as well as mentioning the need to comply with the NDAA); Wadsworth & Southwell, *supra* note 26, at 9 (outlining various initiatives the military has undertaken to maintain workplace flexibility and work-family balance).

²²¹ STRENGTHENING OUR MILITARY FAMILIES, *supra* note 2, at 1 (Introduction by President Obama) (“Let me be clear, stronger military families will strengthen the fabric of America.”).

²²² Sparks, *supra* note 120, at 78; Root, *supra* note 75, at 132 (citing IMCOM, Europe--Public Affairs, Uppercasing ‘Families’ Highlights Support, ARMYMIL NEWS, Apr. 24, 2007, <http://www.airny.mil/-news/2007/04/24/2831-uppercasing-families-highlights-support>) (describing the Army’s mandate to capitalize the word “Families” in official correspondence to recognize the importance families play in military efforts.).

²²³ See Wadsworth & Southwell, *supra* note 26, at 6. The non-deploying parent “is likely to encounter separation strain, loneliness, role overload, role shifts, financial concerns, changes in community support, in-creased parenting demands, and frustration with the military bureaucracy. The deployed service member is also affected and may experience an overload of feelings, such as loss, fear, and helplessness, which begin to develop before separation and may remain throughout the course of the separation.” Drummet, *supra* note 36, at 281-82 (citations omitted).

²²⁴ 6.7 percent are dual-military couples. DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at 4.

frequent relocations.²²⁵ The near complete unavailability of one spouse for extended and frequent periods of time makes employment for the nonmilitary spouse difficult to find and even more difficult to maintain.²²⁶ The reintegration of a service member into the home after extended separation and deployment is also a source of stress.²²⁷ Given these realities, a 2010 Joining Forces report, “Strengthening our Military Families,” identified four priority areas for improving the lives of military families: psychological health and wellbeing, children’s education and development, career and educational opportunities for military spouses, and increased childcare.²²⁸ These priorities provide a framework to discuss the

²²⁵ Wadsworth, *supra* note 129, at 6 (providing context for why “[d]eployments are hard on families.”); Miller, *supra* note 11 (“Even with both parents stateside, military careers have involved strenuous [and often inflexible] hours.”); Drummet, *supra* note 36, at 282 (“Deployment is uniquely different from relocation, because deployment seldom includes the family unit. Numerous factors related to separation result in stress for military families, [including]: issues related to care of children, relationship maintenance, boundary negotiation, and media coverage of military events.”).

²²⁶ National Defense Research Institute, *Working Around the Military: Challenges of Military Spouse Employment* (2005), http://www.rand.org/content/dam/rand/pubs/research_briefs/2005/RAND_RB9056.pdf; About 70 percent of active duty spouses are employed, 10 percent are seeking work, and 20 percent are neither in the labor force nor seeking work. DEP’T OF DEF., *supra* note 6, at 13; *see also* MILITARY SPOUSE CAREER ADVANCEMENT INITIATIVE (2011) <http://www.milspouse.com/military-spouse-career-advancement-career-initiative.aspx> (military spouses have a higher unemployment rate than their civilian counterparts). Some spouses opt out of the workforce for caregiving purposes. Others cannot immediately seek work when they relocate due to job licensing requirements. *See* Sheila Casey, Chief Operating Officer, The Hill, Panelist, *2008 Families Briefing*, *supra* note 129 (further commenting that other military spouses have thanked her for working because it empowers them to have employment). Given the gender composition of service members and, until recently, the Don’t Ask Don’t Tell policy (which precluded same-sex spouses from coverage in most existing research on spouses), the overwhelming majority of military spouses are women. DEMOGRAPHICS 2010 PROFILE, *supra* note 1, at 56. Generally, women in the civilian sector have not yet achieved pay equity with men. Institute for Women’s Policy Research, *Pay Equity and Discrimination*, <http://www.iwpr.org/initiatives/pay-equity-and-discrimination> (collecting research on pay equity). These challenges result in military spouses earning less money than equivalent civilian workers who are not in military families. MARGARET C. HARRELL, NELSON LIM, LAURA WERBER CASTANEDA, & DANIELA GOLINELL, *WORKING AROUND THE MILITARY* 49-50 (2004) (observing that the cost averages to be three dollars less per hour for the military spouse); Katherine Lewis, *Obama Administration Highlights Work-Family Balance, Military Families* (Oct. 26, 2010), <http://workingmoms.about.com/b/2010/10/26/obama-administration-highlights-work-family-balance-military-families.htm> (last visited Oct. 29, 2010) (quotation omitted) (“military spouses make an average of \$10,000 less a year than civilians”).

²²⁷ Drummet, *supra* note 36, at 281. “[T]he difficulty of separation is [not] instantaneously overcome when the military spouse and parent returns home . . . Six reunion factors are of particular concern: (a) roles and bound-aries, (b) household management, (c) honeymoon effects, (d) so-cial support, (e) parental rejection and anxiety, and (f) service member’s physical and mental condition.” *Id.* (citation omitted).

²²⁸ STRENGTHENING OUR MILITARY FAMILIES, *supra* note 2, at 2-3 (citing Defense Manpower Data Center, 2008 DMDC Survey of Active Duty Spouses, *available at* <https://www.dmdc.osd.mil/appj/dwp/index.jsp>).

workplace flexibility needs of these families. However, additional research on how flexibility supports each of these areas and analysis of that research on the existing flexibility framework is needed.²²⁹

Two frequent factors that are considered in a person's decision to enlist or re-enlist in service are spousal support of a military career and member perception of work/life balance.²³⁰ The stress and disharmony that results from the clash between work and family commitments has caused many "star performers" to separate themselves from military service "at a time when the nation simply can't afford to lose their [top] talent and experience."²³¹ Implementing strategic workplace flexibility is essential to help the military retain these "star performers."²³²

The military has been working to alleviate the difficulties associated with having a spouse, parent, or child in the military within the framework described above. Since 1996, the DoD's Office of Family Policy has coordinated programs and policies related to improving the lives of military families.²³³ The Office includes a Military Family Readiness Council, whose members monitor, evaluate, and assess the effectiveness of the DoD's family readiness programming.²³⁴ During the last decade, continued efforts from this Office and its military and civilian partners have led to the "greatest transformation of family support that we have ever seen."²³⁵ This transformation has cemented the DoD's embrace of the notion that the military recruits a soldier and retains a family.²³⁶

In addition to the Office of Family Policy, many other Administration efforts implicitly or explicitly support the employment and well-being of military spouses and children. Some initiatives connect military spouses to private sector employers who have self-identified as seeking employees connected to the military.²³⁷ Others offer funding for education and training

²²⁹ Research will also be needed on the impact of the end of Don't Ask Don't Tell on these priority areas. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321.

²³⁰ Wadsworth, *supra* note 129.

²³¹ MILLER, *supra* note 11 (quoting Admiral Mullen); *see also* Lolita Burrell, *Military Community Integration and Its Effect on Well-Being and Retention*, 30 ARMED FORCES & SOC'Y 7, 12 (2003); Andrew O. Behnke, et al, *Ethnic Variations in the Connection Between Work-Induced Family Separation and Turnover Intent*, 31 J. OF FAM. ISSUES 626 (2009).

²³² MILLER, *supra* note 11 (quoting Admiral Mullen).

²³³ 10 U.S.C. § 1781(b).

²³⁴ *Id.* It conducts and analyzes any surveys of military families to evaluate the welfare of families and the success of programming. *Id.*

²³⁵ Wadsworth, *supra* note 129 (further noting last time we had force of this size, we had a draft); Pellerin, *supra* note 6 (quoting Admiral Mullen, "[W]e've made significant strides [towards our focus on people and families]. We still have a long way to go."); Barbara Thompson, Director, Office of Family Policy/Children and Youth, Military Community and Family Policy, Office of Secretary of Defense, U.S. Department of Defense, *2008 Families Briefing*, *supra* note 129.

²³⁶ *See* Karin, *supra* note 143, at 47 (citations omitted).

²³⁷ *See, e.g.*, THE MILITARY SPOUSE EMPLOYMENT PARTNERSHIP, <http://www.>

of military spouses.²³⁸ There also are efforts to recognize specific military families, such as the new Military Spouse of the Year Award.²³⁹ Further, government efforts use the bully pulpit to publicize the business case for “more military-spouse friendly” workplaces.²⁴⁰ Together, these workplace flexibility policies incentivize, educate, and otherwise assist stakeholders in supporting the military’s retention of military families.

C. *Workplace Flexibility Is Not A One Size Fits All Solution*

Despite a clear business and mission readiness case for workplace flexibility in the military community, there is no one size fits all approach for every service member in all branches.²⁴¹ Nor is there a policy that would help every veteran and every member of a military family.²⁴² Even if every type of flexibility was made available to all, there are barriers that limit the use of flexibility in the military community. A full exploration of these barriers—and what might be done to mitigate them—is outside of the scope of this paper. Nonetheless, some observations about these challenges follow.

First, the use of flexibility in the military will always come second to the mission critical needs of the military as an employer. As an employer that protects the country, the military must succeed. A perception change is needed, however, to view workplace flexibility as more than a soft-benefit for some military spouses, and as a tool in the military’s arsenal of weapons that can be utilized to help an all-volunteer force retain the people that carry out operations and mission critical work. Flexibility is not yet

msepjobs.com; THE WHITE HOUSE, *supra* note 165 (describing it as a “comprehensive web-enabled recruitment and career partnership solution connecting military spouses to employers seeking a 21st century workforce with the skills [held by military spouses]).

²³⁸ See, e.g., MILITARY SPOUSE CAREER ADVANCEMENT ACCOUNT (“MyCAA”), <https://aiportal.acc.af.mil/mycaa/>. MyCAA offers certain military spouse funds for costs related to postsecondary education and training like tuition, books, and credentialing and licensing fees. See BLUE STAR FAMILIES, *supra* note 2, at 7 (fifty-five percent of those surveyed, across all ranks, want to use funds to support advanced degrees); National Military Families Association, *SASC Recommends Reduction to MyCAA Funding*, Nov. 22, 2011, <http://www.militaryfamily.org/speak-up/policy-issues/updates/sasc-recommends-reduction-to.html> (describing utilization of MyCAA in light of recent decreased funding proposals and eligibility changes).

²³⁹ Posting of Brad Cooper, *Recognizing Our Extraordinary Military Spouses* (Dec. 2, 2011) <http://www.whitehouse.gov/blog/2011/12/02/recognizing-our-extraordinary-military-spouses> (using an online public voting system, an award will recognize the “work and sacrifices” of a military spouse of each branch).

²⁴⁰ THE WHITE HOUSE, *supra* note 165.

²⁴¹ This is consistent with workplace flexibility for all sectors. See, e.g., WORKPLACE FLEXIBILITY 2010, *supra* note 44, at 25.

²⁴² See National Defense Research Institute, *supra* note 226, at 2 (recognizing that “[o]ne size won’t fit all” with respect to military spouses looking for work).

seen as one fiber that runs underneath a tactile force strategy operating multiple efforts of various sizes around the world.

Second, even where national security may not be at risk, workplace flexibility requires commander approval, which means supervisors must know about and understand the importance of flexibility for military personnel. Integrating written, official workplace flexibility policies that comply with the legal framework into existing personnel materials is an important step for effective implementation of workplace flexibility. But the existence of such policies by themselves is not enough.

Third, backing by senior leadership is vital to ensuring the success of workplace flexibility policies.²⁴³ The hierarchical structure of the military—an environment where members are taught not to question the judgment of superiors and to understand and execute orders as given—makes even *asking* for commander approval of a “new” type of request difficult for members.²⁴⁴ Without continued leadership support, the further evolution of these policies in the military will be stunted. Further, even though the military has made great strides in workplace flexibility and there has been a recent uptick in Administration efforts like Joining Forces and support from Admiral Mullen, it is still mostly seen as a side note for the military.²⁴⁵ This gap between the rhetoric and reality of supporting flexibility cannot be understated; it remains important to study the effectiveness of existing programs and differences between who in the military community has access to flexibility and who actually utilizes it.²⁴⁶

²⁴³ Patricia S. Reed and Shirley M. Clark, *Win – Win Workplace Practices: Improved Organizational Results And Improved Quality of Life* (2004), <http://www.choose2lead.org/Publications/Study%20on%20Win-Win%20Workplace%20Practices.pdf>.

²⁴⁴ See *Overcoming Barriers*, *supra* note 119 (Testimony of Heather Ansley, Director of Veterans Policy, VetsFirst and Co-Chair CCD Veterans Task Force) (“military has a distinct culture—with clear roles, lines of communication and accountability”); Sloan Center on Aging and Work at Boston College, *Employees’ Barriers to Implementing Flexibility*, <http://workplaceflexibility.bc.edu/Barriers#employees> (describing the importance of employees overcoming barriers to flexibility such as workplace culture of traditional work schedules, manager skepticism, and fear of retaliation from managers).

²⁴⁵ THE WHITE HOUSE, ABOUT JOINING FORCES (2011), <http://www.whitehouse.gov/joiningforces/about>; Pellerin, *supra* note 170 (discussing the military’s slow progression towards implementing workplace flexibility for military personnel and their families).

²⁴⁶ For example, only three percent of over 550,000 DoD employees that are eligible to utilize telework do so. PARTNERSHIP FOR PUBLIC SERVICE, ON DEMAND GOVERNMENT 4 (2010). The military is focusing on improving the number of employees that are eligible to and utilize the federal telework program. See Pat Tamburrino, Jr., Deputy Assistant Secretary of Defense, Civilian Personnel Policy, *Telework in the Department of Defense*, Telework Exchange Spring Town Hall, Apr. 28, 2011, available at https://www.teleworkexchange.com/uploads/1000/455-Lunch_Keynote_Tamburrino.pdf; Virtual Command Pilot Program Announcement, NAVADMIN 340/08; FORT BELVOIR POLICY MEMORANDUM #46 TELEWORK (2010).

Fourth, certain laws preclude the use of different types of flexibility.²⁴⁷ For example, manpower calculations and costs to the government of such calculations on end strength may impede certain types of flexible work arrangements, including part-time work and job sharing.²⁴⁸

Fifth, there is a danger of creating an alphabet soup of overlapping programs. The military community is loaded with acronyms, programs, offices, and partnerships with other stakeholders, many of which have related missions and goals with respect to workplace flexibility.²⁴⁹ Innovation and experimentation with workplace flexibility and other types of employment supports should be encouraged, as should collaboration in the maintenance of existing programs and creation of additional supports. Research is needed to ensure that the good intentions and resources of the military, public and private sectors are used as effectively as possible.

Sixth, public education about the existing framework—and an ongoing conversation that involves (re)evaluation of this framework and any potential changes to it—should continue. For example, despite the 2011 creation of veterans hiring tax credits, their utilization and effectiveness remain unclear.²⁵⁰ These tax credits (and their predecessors) are largely unknown, and few of the employers that are familiar with applicable tax credits use them.²⁵¹ As the advocacy group Iraq and Afghanistan Veterans

²⁴⁷ See Georgetown Law, Workplace Flexibility 2010, *Laws Impacting Flexibility* (2010) http://workplaceflexibility2010.org/index.php/laws_impacting_flexibility/.

²⁴⁸ DEP'T OF DEF., DIR. 09-007 24, 27 (Sept. 2, 2011), <http://www.dtic.mil/whs/directives/corres/pdf/DTM-09-007.pdf> (defining manpower in terms of “1 year of full-time support”); DEP'T OF DEF. INSTR. NO. 7730.64, AUTOMATED EXTRACTS OF MANPOWER AND UNIT ORGANIZATIONAL ELEMENT FILES 12 (2004) (using a similar definition of manpower and further defining full-time equivalent as “equal to 2080 civilian straight-time hours”). *But see* INSTR. NO. 1327.06, *supra* note 67, at 2.

²⁴⁹ Compare among others initiatives, VetSuccess.gov, FedsHireVets.gov, Hiring Our Heroes (*see* Chamber of Commerce, Hiring Our Heroes, <http://www.uschamber.com/hiringourheroes>; *see also* *Overcoming Barriers*, *supra* note 119 (statement of Vivian Eng Bendewald, Program Manager, Injured Veterans Employment Initiatives, U.S. Chamber of Congress) (describing the initiative)); SHRM, MILITARY EMPLOYMENT RESOURCE PAGE, <http://www.shrm.org/hrdisciplines/staffingmanagement/Articles/Pages/Military.aspx>. *But see* 10 U.S.C. § 1784 (f) (The Secretary of Defense “(1) shall seek to develop partnerships with firms in the private sector to enhance employment opportunities for spouses of members of the armed forces and to provide for improved job portability for such spouses . . . ; and (2) shall work with the United States Chamber of Commerce and other appropriate private-sector entities to facilitate the formation of such partnerships.”).

²⁵⁰ David S. Logan, The Tax Foundation, *Academic Research Suggests the American Jobs Act Will Produce Few Jobs*, Tax Foundation Fiscal Fact No. 283, available at <http://www.taxfoundation.org/news/show/27632.html>

²⁵¹ Embree, *supra* note 156; Military Family Research Institute, *Helping Quality Employers and Employees Find One Another*, <http://www.cfs.purdue.edu/MFRI/resources/public/HelpingEmployers&Employees.pdf> [hereinafter MFRI] (“[A] majority of employers (58 percent) do not take advantage of the [WOTC] for hiring veterans, most (29 percent) citing lack of awareness as the major reason, though (12

of America recently testified, “[a] tax credit designed to spur the hiring of veterans that no one knows about is ineffective and can lead to frustration and misunderstanding between veterans and the business community.”²⁵² Further, some employers do not believe that the burden of applying for the credit was worth it.²⁵³ In addition, military families need information about available programming and, to the extent possible, how service may impact their families at a particular time.²⁵⁴

The “overt and rigid hierarchical structure of ranks and privileges,” extreme gender imbalance, and legal commitment to a length of service do not depict an environment receptive to workplace flexibility.²⁵⁵ Despite these barriers and the “extreme work and extreme ‘work-family’” structure,²⁵⁶ the military is using flexibility to do more to retain civilian and military personnel, help retirees and family members, and truly become an employer of choice.²⁵⁷ As part of the recruitment and retention needs described above, the government has pledged to lead by example both in promoting workplace flexibility and in the continued employment of Guard, Reservists, and veterans.²⁵⁸ There is no doubt that the military is using workplace flexibility—and career flexibility initiatives in particular—to meet this goal, but there is much more to be done.

percent) did cite the ‘administrative burden’ of doing so”).

²⁵² Embree, *supra* note 156.

²⁵³ MFRI, *supra* note 251, at 5.

²⁵⁴ For example, when reintegrating into society after extensive deployments, service members “want to check box and go home and be with family.” The military provides a lot of information, but if it is “kept is another story.” Anne Hirsh et al., JOB ACCOMMODATION NETWORK, VETERAN’S ISSUES WEBCAST, Nov. 8, 2011, <http://webcast.askjan.org/p5kmotm69hd/?launcher=false&fcsContent=true&pbMode=normal>. See also NATIONAL LEADERSHIP SUMMIT ON MILITARY FAMILIES, FINAL REPORT PREPARED FOR THE OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE, MILITARY COMMUNITY AND FAMILY POLICY 12-13, 16-18 (2009) (calling for improved communication for spouses); National Defense Research Institute, *supra* note 226, at 3 (military must “Become a more family-friendly employer, including better informing families about their service member’s schedule and creating more ways for service members to help their spouses with . . . parenthood”).

²⁵⁵ See Wadsworth & Southwell, *supra* note 26, at 2.

²⁵⁶ *Id.*

²⁵⁷ In fact, seven Navy command centers won the 2011 Alfred P. Sloan Award for Business Excellence in Workplace Flexibility. FAMILIES AND WORK INSTITUTE, 2011 GUIDE TO BOLD NEW IDEAS FOR MAKING WORK WORK 4 (2011). See also Matos & GALLINSKY, *supra* note 201 (capturing best practices in flexibility for military community from winners of the Alfred P. Sloan Awards on Workplace Flexibility). In 2010, the Navy won the Work-Life Innovative Excellence Award issued from World at Work’s Alliance for Work-Life Progress. Press Release, *AWLP Announces 2010 Work-Life Innovative Excellence Award Recipients* (Apr. 6, 2010), <http://www.prweb.com/releases/2010/04/prweb3840484.htm>.

²⁵⁸ See, e.g., 38 U.S.C. § 4301 (government should be a USERRA “model employer”); 75 Fed. Reg. 58, 533 (Nov. 9, 2009); THE WHITE HOUSE, REMARKS BY THE PRESIDENT AT WORKPLACE FLEXIBILITY FORUM (Mar. 31, 2010) (“We’re also committed to practicing what we preach and serving as a model for the [workplace flexibility] policies that we’re encouraging.”).

IV. CONCLUSION

The drawdown of combat troops in Iraq marks a turning point in the War on Terror. This transition brings an opportunity to examine how existing laws, policies, and programs operated as well as any lessons learned. One lesson from this war is the critical and strategic role that workplace flexibility may play in terms of helping the military adapt to become an institution capable of twenty-first century modern warfare, which includes but is not limited to the recruitment of service members, as well as in the retention of those members and their families. This paper has surfaced some of the workplace flexibility needs and existing legal supports and programs for past and present military personnel and their families.

Workplace flexibility encompasses a wide range of needs. It is important to military personnel of all branches, status, rank, and grade. It is important to veterans, those with and without service-connected disabilities, and the caregivers and communities of those who are serving or have served. Nonetheless, until recently, military stakeholders were not focused on workplace flexibility in a strategic and organized manner.²⁵⁹ In under a decade, the baseline has shifted. There are now groups that work with each subpopulation and are focused on improving the flexibility framework that offers specific protections to those that serve.²⁶⁰ Plus, the military is on track to be a flexibility employer of choice by using existing authority to create innovative programs, improve interagency collaborations, and build public-private partnerships. The military—including the current Commander in Chief and his Administration—is invested in making this work.

The end of the Iraq War offers the military and the country an opportunity to take stock of the existing legal framework for workplace flexibility. This milestone can draw attention to where military workplace flexibility needs to be changed to reflect the realities of today's workforce, including the large number of people who are serving, have served, and need post-military support, as well as those who have a loved one currently serving or who came back with new needs. Now is the time to keep filling

²⁵⁹ Pellerin, *supra* note 170.

²⁶⁰ Some of these groups have been working on these issues for some time, but had not necessarily framed their efforts as part of the larger movement to increase access to workplace flexibility. *See, e.g.*, NATIONAL MILITARY FAMILY ASSOCIATION, ABOUT US, <http://www.militaryfamily.org/about-us/> (active issues include spousal employment and FMLA military provisions); Military Officers Association of America, Legislative Goals for 2012, http://www.moaa.org/Main_Menu/Take_Action/MOAA_Goals_and_Progress/Selected_Legislative_Goals_for_2012.html (including MyCAA and hiring policy on legislative goals); Reserve Officers Association, *ROA, Current Issues: Employment*, http://www.roa.org/site/PageNavigator/employment_homepage (veterans employments and Reservist-related tax credits among agenda).

those gaps; “[t]he military must continue to move forward in helping its workforce balance their jobs and their lives.”²⁶¹

²⁶¹ Pellerin, *supra* note 6 (quoting Admiral Mullen).