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**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?**

Marcy Karin*

The War on Terror has had a significant toll on enlisted members, reservists, their families, and their employers.¹ As of early 2008, close to 1.7 million troops have served in Iraq since September 2001.² Over 600,000 members of the Guard and Reserve, who are usually a part of the

* Legislative Counsel, Workplace Flexibility 2010; Adjunct Professor of Law, Federal Legislation and Administrative Clinic, Georgetown University Law Center. In August 2009, Marcy will be an Associate Clinical Professor of Law and the Director of a new Work-Life Policy Unit of the Civil Justice Clinic at Arizona State University Sandra Day O'Connor College of Law. Many thanks to Paula Shapiro, Shelley MacDermid Wadsworth, Michael Teter, Mike McGinley, Katie Corrigan, Sharon Masling, Liz Watson, Chai Feldblum, and the staff of the *Rutgers Law Record* for their invaluable feedback and support.

¹ Almost three million soldiers serve in the military's Total Force, which is made up of Active Components (AC) and Reserve Components (RC). U.S. DEP'T OF DEF., CITIZENS' REPORT 2008 6 (2009); U.S. DEP'T OF DEF., DIR. 1200.17, Glossary Definition: Total Force (Oct. 29, 2008). AC members serve full-time in the federal military service – Army, Navy (including the Marine Corps), or Air Force. 10 U.S.C. § 101(d)(1) (2006). In December 2008, there were approximately 1,458,500 AC personnel. U.S. DEP'T OF DEF., PERSONNEL & PROCUREMENT STATISTICS, MILITARY PERSONNEL STATISTICS, available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/ms0.pdf>. Almost half of the personnel serving in today's military are RC members, which consist of: Air Force Reserve; Army Reserve; Coast Guard Reserve; Naval Reserve; Marine Corps Reserve; and National Guard (comprised of Air National Guard and Army National Guard). U.S. DEP'T OF DEF., EMPLOYER SUPPORT OF THE GUARD & RESERVE, RESOURCES: TIPS FOR EMPLOYERS 1 (2008), http://www.esgr.org/files/factsheet/tips_for_employers.pdf; MICHAEL WATERHOUSE & JOANNE O'BRYANT, CONG. REC. SERV. REP. FOR CONG., NAT'L GUARD PERS. AND DEPLOYMENTS: FACT SHEET 2 (Jan. 2008). RC members participate in at least 48 scheduled drills or training periods each year (roughly 24 days, usually weekends) and serve on active duty for training of not less than 14 days each year (exclusive of travel time). 32 C.F.R. § 101.5 (2009). Of course, RC members serve many more days if they are deployed. See 10 U.S.C. § 12303 (2006). Under normal conditions, each state's National Guard is under the command of the Governor, with a state-security mission. 32 U.S.C. § 104(c) (2006). During wartime or emergency situations, however, the President has the authority to federalize the National Guard, at which time they serve many of the same roles as other Total Force members. 10 U.S.C. § 10103 (2006).

² House Speaker Nancy Pelosi, *The Cost of War in Iraq - Five Years Later*, (Mar. 17, 2008), available at

civilian workforce, have been called up to serve; 133,000 of whom have served more than one tour of duty.³ These numbers reflect an almost tripled reliance on the Guard and Reserve when compared to Desert Storm,⁴ solidifying their place as a critical component of our Nation's strategy in fighting this war and meeting the military's operational needs.⁵

This war has also solidified the military's embrace of the concept of recruiting a soldier and retaining a family,⁶ the majority of whose members are employed in the civilian workforce.⁷ This increased reliance on civilians – as well as the greater number of families with members being deployed – is significantly affecting our Nation and its workplaces.⁸

One recent movement to ease some of the impact of the war at home and at work is a nationwide push to obtain guarantees for job-protected time off to address the day-to-day realities and other effects of war. The law has long provided job-protected time off for reasons related to military service.⁹ However, all levels of government have seen calls to expand employment

<http://speaker.house.gov/newsroom/reports?id=0031>.

³ David A. Lowe & Andrew P. Lee, *Military Leave and the Workplace At War: USERRA Overview and Update*, 763 PLI/LIT 929, 935 (2007).

⁴ Konrad S. Lee, "When Johnny Comes Marching Home Again" Will He Be Welcome At Work?, 35 PEPP. L. REV. 247, 248-49 (2008).

⁵ This is part of the Total Force strategy. U.S. DEP'T OF DEF., EMPLOYER SUPPORT OF THE GUARD & RESERVE, ABOUT ESGR, <http://www.esgr.org/about.asp> (last visited Apr. 27, 2009) ("The current National Defense Strategy indicates that the National Guard and Reserve, will be full partners in the fully integrated Total Force. Our Reserve forces will spend more time away from the workplace defending the nation, supporting a demanding operations tempo and training to maintain their mission readiness."); Lee, *supra* note 4, at 249.

⁶ Sheila Casey, Chief Operating Officer, The Hill, Panelist, at Workplace Flexibility 2010 Briefing: Supporting our Nation's Military Families: The Role of Workplace Flexibility (Dec. 18, 2008) (webcast, available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=690>) [hereinafter WF2010 Briefing]; see also *The Family and Medical Leave Act: Extending Coverage to Military Families Left at Home: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Ed. & Lab.*, 110th Cong. 2 (2007) [hereinafter *Extending Coverage Hearing*] (statement of Sen. Christopher J. Dodd) ("And with an all-volunteer military, supporting our military families is more essential today than ever: We recruit a soldier, but we retain a family."); *On the 2009 Budget for the Reserve Component: Hearing Before the Subcomm. on Defense of the S. Comm. on Appropriations*, 110th Cong. 4, 7 (2008) (statement of Lt. Gen. Jack C. Stultz, Chief, U.S. Army Reserve & Commanding Gen., U.S. Army Reserve Command) (further noting that "Our Soldiers, their Families and employers; however, are experiencing an operational tempo unlike their comrades in arms who served before them.").

⁷ Shelley MacDermid Wadsworth, *Military Families as a Case Study: Flexibility Needs and the Federal Response*, Panel at "Working for Change: A Conversation on Workplace Flexibility, Research, Business Practice and Public Policy," Georgetown Law Center (May 29, 2008) (webcast, available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=575>) [hereinafter *Military Families Panel*]; see also *Extending Coverage Hearing*, *supra* note 6, at 3 (statement of Jessica Perdew, Deputy Director of Government Relations, The National Military Family Association (NMFA)) ("Sixty-six percent of military spouses are in the labor force.").

⁸ The impact is further compounded when additional civilian soldiers do not return home or return home with a disability. Helen E. Tuttle, *What To Do When Employees Return From Active Military Duty*, 246-JUN N.J. LAW. 28, 30 (2007) (citing U.S. GEN. ACCOUNTING OFFICE, MILITARY PERSONNEL: ADDITIONAL ACTIONS NEEDED TO IMPROVE OVERSIGHT OF RESERVE EMPLOYMENT ISSUES 36 (2007)) (Between 2003 and 2006, the Department of Defense identified nearly 12,000 Reservists as having disabilities, which includes both physical and mental impairments); *The 15th Anniversary of the Family Medical Leave Act: Achievements and Next Steps: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Ed. & Lab.*, 110th Cong. 2 (2008) [hereinafter *Achievements and Next Steps: Hearing*] (statement of Rep. Lynn Woolsey) ("[W]orkers with family members in the military face additional challenges due to the conflicts in Iraq and Afghanistan, which have resulted in over 4,000 deaths and more than 30,000 injuries . . .").

⁹ See, e.g., Selective Training and Service Act, Pub. L. No. 783, § 8, 54 Stat. 885 (1940) (provides job restoration

protections to ease the transition back into the civilian workforce or to care for those leaving for or returning home from service.

In January of 2008, an important change to the status quo in this area came when Congress amended the federal Family and Medical Leave Act (“FMLA”) to include two new provisions for military families.¹⁰ These new provisions provide time off for a “qualifying exigency” related to a covered servicemember on active duty or call to active duty status and for “caregiving” of a covered servicemember with a serious injury or illness.¹¹ An examination of the FMLA’s new provisions and its legislative history illustrates the needs Congress was trying to address. It also provides insight into whether additional support for the work-life balance needs of our Nation’s military, including their families and the companies that employ them, as well as the work-life balance needs of other members of society can be expected in the future.

In addition to providing certain employees with job-protected time off, these new provisions have the potential to act as a powerful catalyst for future changes, particularly with the change in government personnel that has taken place since the law was enacted. In his best-selling book, Malcolm Gladwell posits that “[a]ll epidemics have Tipping Points”, and “[i]deas[,] products[,] messages and behaviors spread just like viruses do.”¹² He defines “The Tipping Point” as “the moment of critical mass, the threshold, the boiling point.”¹³ This country has seen a number of calls for the government to get involved in addressing the work-life balance needs of society. After explaining the law’s provisions and legislative history, this piece explores whether the new FMLA provisions have helped the work-life movement reach its Tipping Point. Do they represent a paradigm shift in the way legislators (and society) think about work-life policy, unifying a confluence of other events and activities to change the way people think about the role of law and policy in supporting work-life balance? Are they an incremental step in a larger movement whose time is approaching, but has not yet arrived? Or are they simply a one-off policy response to a particular population’s needs during a time of war?

rights to servicemembers who took a leave from work for official training and service); Vietnam Era Veterans’ Readjustment Act, Pub. L. No. 93-508, §§ 403-404 (1974) (requires employers to restore jobs for certain Vietnam era veterans). Current law requires the prompt reemployment of servicemembers returning from active duty to the same or similar position, with the seniority, rights, benefits, and promotions they would have received if they had remained continuously employed. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4335 (2006). Under USERRA, employers must provide up to five-years of job protection to employees who voluntarily or involuntarily take time off from work to participate in the “uniformed services,” which includes military service and any category of people the president has designated eligible in a time of war or national emergency. *Id.* §§ 4301-4334. Generally, the law entitles an employee to reemployment, provided the employee (or appropriate military officer) gave advance notice of the service and returns to work or applies for reemployment in a timely fashion. *Id.* § 4312(a)(1), (3). An employee is entitled to return to work at his or her “escalator position,” i.e., a position of comparable seniority, status, and pay to which the employee “would have attained with reasonable certainty” but for the absence for service. If the employee is not qualified to hold the escalator position, the employer must make “reasonable efforts” to qualify the employee for such a position. *Id.* § 4313(a)(2)(B). Only if such efforts are unsuccessful may an employer place the employee in a position that is comparable to the position that the employee held when he or she left for service. *Id.* § 4313(a)(2)(B). Absent cause, an employer may not discharge a reinstated employee for one year from the date of the individual’s reemployment. *Id.* § 4316(c). USERRA also affords certain protections related to benefits. *Id.* §§ 4316-4318.

¹⁰ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585 (2008).

¹¹ *Id.*

¹² MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 7, 12 (2000).

¹³ *Id.*

The New Federal Time Off Guarantees for Military Families

Enacted in 1993, the FMLA is the first federal law to require time off in the private sector.¹⁴ The original law permits eligible employees to take up to 12 weeks per year of unpaid, job-protected leave for: (1) the birth or adoption of a child; (2) the “serious health condition” of an employee; or (3) the “serious health condition” of the employee’s immediate family member.¹⁵ To be eligible for FMLA coverage, an individual must work for a private employer with at least 50 employees within a 75-mile radius of each other, or for the federal, state, or local government.¹⁶ In addition, an employee seeking time off must have worked for the employer for at least one year and for over 1250 hours during the previous 12 months.¹⁷ The “job-protected” provision means that an employee is entitled to return to the same or equivalent position, “with equivalent pay, benefits and other terms of employment . . . even if the employee has been replaced or [the] position has been restructured to accommodate the employee’s absence.”¹⁸

On January 28, 2008, President Bush signed the National Defense Authorization Act for FY 2008 (“NDAA”)¹⁹ – which included the first ever private sector expansion of the FMLA.²⁰ Section 585(a) of the NDAA created two new types of FMLA leave specifically designed to support military families: (1) qualifying exigency leave; and (2) military caregiver leave (collectively, the “NDAA provisions”).²¹ On November 17, 2008, the Department of Labor (“DoL”) issued regulations implementing the NDAA provisions.²² The regulations offer key definitions of new statutory phrases and clarify the availability and administration of the NDAA provisions.²³

A. Qualifying Exigency Leave²⁴

Effective January 16, 2009, qualifying exigency leave allows eligible employees to take up to

¹⁴ Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2006).

¹⁵ *Id.* The statute defines a “serious health condition” as an ailment requiring inpatient care or “continuing treatment” by a health care provider. *Id.* § 2611(11). Regulations further define inpatient care at 29 C.F.R. § 825.114 (2009) and “continuing treatment” at 29 C.F.R. § 825.115 (2009).

¹⁶ 29 U.S.C. § 2611(2) (2006); 29 C.F.R. § 825.110 (2009). Governmental agencies do not have to meet the 50-employee test. 29 C.F.R. § 825.104(a) (2009).

¹⁷ 29 C.F.R. § 825.110(a) (2009).

¹⁸ 29 U.S.C. § 2614(a)(1)(B) (2006); 29 C.F.R. §§ 825.214, 825.215 (2009).

¹⁹ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585 (2008).

²⁰ The Congressional Accountability Act and the Presidential and Executive Office Accountability Act applied some of the FMLA’s provisions to Congressional and Executive staff. *See* 2 U.S.C. §§ 1301(a)(3), 1302(a)(5) (1995) (applies the FMLA to Congressional staff); 3 U.S.C. §§ 401(a)(2)-(4), 402(5) (1998) (applies the FMLA to employees of the White House and Executive Office). Nonetheless, the NDAA provisions are the first expansion of the FMLA for the private sector or that add qualifying reasons for eligibility.

²¹ National Defense Authorization Act for Fiscal Year 2008 § 585.

²² Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934 (Nov. 17, 2008) (codified at 29 C.F.R. pt. 825). This rulemaking also includes revisions to the existing FMLA regulations. *Id.*

²³ *See, e.g.*, 29 C.F.R. §§ 825.309-825.310 (2009) (containing new certification provisions for qualifying exigency and military caregiver leave, and referencing new optional certification Forms WH-384 and WH-385).

²⁴ This section was originally drafted for Workplace Flexibility 2010, AN OVERVIEW OF USERRA AND THE FMLA’S PROVISIONS FOR MILITARY FAMILIES (2008).

12 weeks of job-protected leave:

Because of any qualifying exigency arising out of the fact that the [employee's] spouse, or a son, daughter, or parent . . . is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.²⁵

The “active duty” language refers to a federal call to active duty for members of the Guard or Reserves.²⁶ Other members of the military as well as Guard and Reserves performing duties or participating in training not associated with a federal call to active duty are not covered.

The statute does not define what constitutes a “qualifying exigency.” Rather, Congress specifically punted that question to the DoL.²⁷ In implementing the NDAA, the DoL defined a “qualifying exigency” as an event in at least one of eight categories:²⁸ (1) short-notice deployment of up to seven days “to address any issue” arising from the notification of an impending call to active duty; (2) military events and related activities such as ceremonies, programs, events or briefings related to active duty or a call to active duty; (3) childcare and school activities;²⁹ (4) financial and legal arrangements;³⁰ (5) counseling needed as a result of active duty or the call to active duty that is provided by someone other than a health care provider; (6) rest and recuperation to spend up to five days per period of short-term, temporary, R&R leave that a covered service member has during deployment; (7) post-deployment activities to attend reintegration and other official events for up to 90-days after active duty terminates or to deal with the death of a covered service member; and (8) any additional activities related to service for which the employer and employee agree.³¹

B. Military Caregiver Leave³²

The second new provision, which went into effect in January, 2008, entitles “an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember . . . to a total of 26 workweeks of leave during a [single] 12-month period to care for the servicemember.”³³ Unlike other FMLA-provisions with an age cap of 18, a “son or daughter of a covered

²⁵ 29 U.S.C. § 2612(a)(1)(E) (2008); *see also* 29 C.F.R. § 825.126(b)(1) (2009) (child has no age limitation).

²⁶ 29 U.S.C. § 2611(14) (2008) (referring to 10 U.S.C. § 101(a)(13)(B) (2006)); 29 C.F.R. § 825.126(b)(2)(i)-(ii) (2009). Hence, caregivers of members of the Regular Armed Forces are ineligible for qualifying exigency leave. *Id.* § 825.126(b)(2)(i).

²⁷ 29 U.S.C. § 2612(a)(1)(E) (2008).

²⁸ 29 C.F.R. § 825.126(a)(1)-(8) (2009).

²⁹ This does not include “routine, regular, or everyday” childcare, rather it relates to changes that need to be made as a result of the active duty or call to active duty, such as making “arrange[ments] for alternative childcare[;] . . . provid[ing] childcare on an urgent and immediate need basis[;] . . . enroll[ing] in or transfer[ing] to a new school or day care facility[;] . . . and attend[ing] meetings with [school or daycare] staff.” *Id.* § 126(a)(3)(i)-(iv).

³⁰ Regulatory examples include making or updating a will, obtaining military ID cards or service-related benefits, executing powers of attorney, and registering with the Defense Enrollment Eligibility Reporting System. *Id.* § 825.126(a)(4)(i)-(ii).

³¹ *Id.* § 825.126(a)(8). They must “agree to both the timing and duration of such leave.” *Id.*

³² This section was originally drafted for Workplace Flexibility 2010, AN OVERVIEW OF USERRA AND THE FMLA’S PROVISIONS FOR MILITARY FAMILIES (2008).

³³ 29 U.S.C. § 2612(a)(3)-(4) (2008).

servicemember” is defined without regard to age.³⁴ “[N]ext of kin” is defined as “the nearest [other] blood relative.”³⁵ A “covered servicemember” is one “who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.”³⁶ A “serious injury or illness” is one that is “incurred by the member in [the] line of duty on active duty . . . that may render the member medically unfit to perform the duties of [his or her] office, grade, rank, or rating.”³⁷

Both the military caregiver and qualifying exigency leave may be taken intermittently or on a reduced schedule.³⁸ An employee that is eligible to take more than one type of FMLA leave is limited to 26 weeks of FMLA time off for any reason in a 12-month period.³⁹

The New Provisions Were Enacted Quickly To Support Our Troops

The NDAA provisions are one recent chapter in a much larger story on the FMLA. The original FMLA was the result of a protracted, decade long fight that involved numerous hearings, and two vetoes by President Bush in 1990 and 1992.⁴⁰ The debate did not end when President Clinton signed the FMLA days after taking office in 1993.⁴¹ Rather, a significant and continuous dialogue about implementation ensued.⁴² In fact, calls to expand the scope of permissible reasons

³⁴ 29 C.F.R. § 827.127(b)(1) (2009). “[P]arents ‘in law’” are explicitly excluded from coverage. § 827.127(b)(2).

³⁵ 29 U.S.C. § 2611(18) (2008); 29 C.F.R. § 827.127(b)(3) (2009). Next of kin is determined using the following priority order: “blood relatives who have been granted legal custody . . . brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave.” An employer may require certification of the familial relationship before granting leave under this provision. *Id.*

This is not the first time that laws have used different definitions of family member in the leave context. For example, several state laws use a broader definition of family member. *See, e.g.*, D.C. CODE § 32-501(4) (2008). Nor is it the first time a new or different reason than those in the original FMLA is covered. *See, e.g.*, ARIZ. ADMIN. CODE § R2-5-411 (2008) (includes miscarriage and abortion); CONN. GEN. STAT. § 5-248a (2008) (includes time off for “serv[ing] as an organ or bone marrow donor”); FLA. ADMIN. CODE ANN. r. 60L-34.0051 (2009) (includes “family leave for non-medical family responsibilities”); ME. REV. STAT. ANN. tit. 26, § 843 (2008) (includes organ donation and death during service).

³⁶ 29 U.S.C. § 2611(16) (2008).

³⁷ *Id.* § 2611(19); *see also* 29 C.F.R. § 825.126(a) (2009).

³⁸ 29 C.F.R. §§ 825.202(b), 825.202(d) (2009).

³⁹ § 825.200(f).

⁴⁰ *See, e.g.*, 153 CONG. REC. S8241 (daily ed. June 21, 2007) (statement of Sen. Dodd); 138 CONG. REC. S14,841 (daily ed. Sept. 22, 1992) (presidential veto message on The Family and Medical Leave Act of 1992); 136 CONG. REC. H5484 (daily ed. July 25, 1990) (presidential veto message on The Family and Medical Leave Act of 1990); *see also* Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69504, 69504-07 (Dec. 1, 2006); The Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7878-79 (Feb. 11, 2008).

⁴¹ William J. Clinton, Statement on Signing the FMLA, 1 PUB. PAPERS 50 (Feb. 5, 1993).

⁴² The FMLA gives the Secretary of Labor the responsibility to issue regulations for its implementation. 29 U.S.C. § 2654 (2006). The final DoL regulations were published on January 6, 1995. 29 C.F.R. § 825 (2009). Technical corrections were published on February 3, 1995 and March 30, 1995. The Family and Medical Leave Act of 1993; deferral of effective date of regulations, 60 Fed. Reg. 6658-01 (Feb. 3, 1995); The Family and Medical Leave Act of 1993; correction, 60 Fed. Reg. 16,382-02 (Mar. 30, 1995). The regulations became effective on April 6, 1995. 60 Fed. Reg. 6658-01. On December 1, 2006, the DoL issued a Request for Information (“RFI”) seeking public comments about the implementation, administration, and current practices under the FMLA. RFI, 71 Fed. Reg. 69504 (Dec. 1, 2006). The DoL received over 15,000 comments to the RFI. Family and Medical Leave Act Regulations: A Report on DoL’s RFI, 72 Fed. Reg. 35,550, 35,551 (June 28, 2007). In July, the DoL issued a report

for time off, coverage of additional employees, and availability of paid leave under the law began almost immediately after the FMLA was enacted.⁴³ These calls continue to this day.

Until very recently, however, the major national proposals to expand the FMLA did not include military specific provisions.⁴⁴ Rather, the NDAA provisions are the result of being introduced at the right time by the right people. This expansion was possible because of the nature of the group protected and the fact that America is at war. But for those realities, these provisions would not have passed in the political climate that existed at that time.

Unlike other time off proposals that have languished for multiple sessions of Congress and been the subject of much public debate, the NDAA provisions received quick and strong bipartisan support in both the House and Senate. The first major activity occurred in May 2007. After spending time with returning service members at the Walter Reed Hospital in March 2007, Representative Jason Altmire teamed with Representative Tom Udall to introduce and secure quick passage of the “qualifying exigency” provision in hopes of addressing the multiple deployments Reservists faced in this “new kind of war.”⁴⁵

Two months later, in July 2007, a bipartisan commission co-chaired by former Senator Bob Dole and former Health and Human Services Secretary Donna Shalala issued recommendations about “needed improvements” after examining soldiers’ transition back to civilian society.⁴⁶ Recommendation 4, found in the commission’s report, *Serve, Support, Simplify – Report of the President’s Commission on Care for America’s Returning Wounded Warriors*, states: “Significantly Strengthen Support for Families Recommendation: Strengthen family support programs including . . . extending the Family and Medical Leave Act for up to six months for spouses and parents of the seriously injured.”⁴⁷ The report recommended the following “Action step”: “Congress should amend the Family Medical Leave Act to allow up to six months’ leave for a family member of a service member who has a combat-related injury and meets the other eligibility requirements in the law.”⁴⁸ This

summarizing its findings from review of those comments. *Id.*; see Workplace Flexibility 2010, Introduction (Summer 2007), available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/documents/WF2010IntroductiontoRFIDocuments3.pdf> (describing this history and summarizing comments submitted in response to 12 issues raised in the RFI). A Notice of Proposed Rulemaking was issued in February 2008. The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 7876 (Feb. 11, 2008). The new regulations were promulgated in November 2008. The Family and Medical Leave Act of 1993; Final Rule, 73 Fed. Reg. 67934 (Nov. 17, 2008).

⁴³ These are some of the same calls for change that remain today. See, e.g., *Extending Coverage Hearing*, *supra* note 6, at 10 (statement of Sen. Christopher J. Dodd) (“Since its passage, I have sought to expand FMLA to include more employees, particularly in small businesses, to expand the definition of who is a caregiver, and also to provide paid leave.”); see also *Writing the Next Chapter of the Family and Medical Leave Act – Building on a Fifteen Year History of Support for Workers: Hearing Before the Subcomm. on Children & Families of the S. Comm. on Health, Ed. Lab. & Pens.*, 110th Cong. (2008) (statement of Debra Ness, President, National Partnership of Women and Families); see discussion *infra* Part 3.

⁴⁴ See *infra* note 76. The protections granted in USERRA, and the fact that it had been some time since large numbers of soldiers were deployed, likely precluded a general feeling that more protections were needed. See *supra* note 9 (summarizing USERRA’s protections).

⁴⁵ Sharon Werner, Chief of Staff, Congressman Jason Altmire, *Military Families Panel*, *supra* note 7; National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong. (2007).

⁴⁶ SERVE, SUPPORT, SIMPLIFY: REPORT OF THE PRESIDENT’S COMMISSION ON CARE FOR AMERICA’S RETURNING WOUNDED WARRIORS 9 (July 2007) [hereinafter WOUNDED WARRIORS REPORT].

⁴⁷ *Id.*; Senator Dodd has noted that six months is considered the average amount of recovery time needed for those injured. Frank C. Morris, Jr. & Minh N. Vu, *Selected Developments Under The Family And Medical Leave Act of 1993*, SP003 ALI-ABA 771, 840 (2008).

⁴⁸ WOUNDED WARRIORS REPORT, *supra* note 46, at 10.

recommendation and action step served as the “genesis” of the caregiver leave provision.⁴⁹ In the Senate, Senators Dodd, Clinton, Obama, and McCaskill repeatedly introduced caregiver leave provisions as stand-alone bills or as amendments to existing bills until the provisions were enacted into law.⁵⁰ In the House, Representative Woolsey took the lead on the caregiver leave provision, which was included during the Conference Committee.⁵¹ Even though Democrats spearheaded the bills, they enjoyed broad bipartisan support and were enacted with little discussion on the floor of either chamber and with only one hearing.⁵²

As with other employment protections related to the military,⁵³ Congress intended to encourage service in a time of war and recognize the sacrifices that are made by those who serve.⁵⁴ More than half of the Active Duty force (56.6%) and of the Selected Reserve (57.7%) have family responsibilities, defined as having “a spouse, one or more children and/or one or more adult dependents.”⁵⁵ Not surprisingly, military service impacts marital, childcare, and eldercare

⁴⁹ Senators Dodd and Clinton added the caregiver leave provision a day after the WOUNDED WARRIORS REPORT was released. *Military Officers Association Endorses Dodd Measure to Expand Family and Medical and Leave Benefits to Wounded Warriors and Families*, STATES NEWS SERV. (Sept. 13, 2007), <http://dodd.senate.gov/?q=node/4042> [hereinafter *Military Officers Association*]; *Dodd, Clinton Praise House Passage of Their Amendment to Expand Family and Medical Leave for Families of Wounded Soldiers*, CAPITOL HILL PRESS RELEASES (Oct. 25, 2007), <http://dodd.senate.gov/?q=node/4105> [hereinafter *Dodd, Clinton Praise*].

⁵⁰ See, e.g., Military Family Job Protection Act, S. 1885, 110th Cong. (2007); Dignity for Wounded Warriors Act, S. 713, 110th Cong. (2007). The Military Family Job Protection Act was also included as an amendment to the Children’s Health Insurance Program Reauthorization Act of 2007 (CHIP), H.R. 976, 110th Cong. (2007). The amendment was offered during the floor debate on CHIP on August 2, 2007. 153 CONG. REC. S10740 (daily ed. Aug. 2, 2007) (Sen. Obama offering Amendment 2588). The amendment was approved by unanimous consent and the Military Family Job Protection Act became part of the CHIP bill with no debate or discussion. *Id.* H.R. 976 then went on to pass both the House and Senate but was vetoed by President Bush on October 3, 2007. 153 CONG. REC. H11203 (daily ed. Oct. 3, 2007) (President Bush’s veto message). The House sustained the President’s veto on October 18, 2007. 153 CONG. REC. H11735-54 (daily ed. Oct. 18, 2007). The House and Senate passed CHIP again on November 1, 2007, without the Military Family Job Protection Act. See Children’s Health Insurance Program Reauthorization of 2007, H.R. 3963, 110th Cong. (2007). H.R. 3963 did retain a provision that would have provided up to 52 weeks of caregiver leave protection by keeping the provisions of the Support for Injured Servicemembers Act (S. 1894, S. 1975, H.R. 3481), which was also included as an amendment to the original CHIP, H.R. 976. See The Military Family Job Protection Act, H.R. 976, § 611, 110th Cong. (2007). Other proposals for job protected time off for military families were also introduced. See, e.g., Wounded Warriors Commission Act of 2007, H.R. 3502, 110th Cong. (2007); Military Family and Medical Leave Act, H.R. 3391, 110th Cong. (2007); H.R. 3556, 110th Cong. (2007); the Military Family Support Act of 2007, S. 1649, 110th Cong. (2007); Healthier Heroes Act, H.R. 3645, 110th Cong. (2007).

⁵¹ H.R. REP. NO. 110-477, at 916-17 (2007) (Conf. Rep.) (describing the genesis of the NDAA provisions in the law); Werner, *supra* note 45 (attributing the provision’s inclusion in Committee to Rep. Woolsey).

⁵² See *Extending Coverage Hearing*, *supra* note 6. The hearing occurred after the Altmire/Udall amendment containing the qualifying exigency leave passed in the House. *Id.* at 2 (statement of Sen. Hillary Rodham Clinton) (noting the “substantial bipartisan support, including Senators Dole, Graham, Mikulski, Chambliss, Brown, Cardin, Menendez, Salazar, Kennedy, Reed, Boxer, Murray, Lieberman, and Roberts”); *id.* (statement of Debra Ness, President, National Partnership for Women & Families) (noting bipartisan nature of both the House and Senate bills); see also Jerry Geisel, *Lawmakers OK FMLA expansion; Military family members would get new leave*, BUS. INS., Jan. 28, 2008, <http://www.businessinsurance.com/cgi-bin/article.pl?articleId=23940>.

⁵³ See, e.g., *supra* note 9 (describing USERRA).

⁵⁴ See, e.g., 153 CONG. REC. E1076 (daily ed. May 17, 2007) (statement of Rep. Udall) (“We should ensure that the FMLA benefits given in other circumstances are provided to our fighting families during their time of need.”); *Military Officers Association*, *supra* note 49; *Dodd, Clinton Praise*, *supra* note 49.

⁵⁵ MILITARY FAMILY RESEARCH INSTITUTE AT PURDUE UNIVERSITY, 2005 DEMOGRAPHICS REPORT 111 (2005), available at http://www.cfs.purdue.edu/mfri/pages/research/2005_demographics_report.html (last visited Apr. 27,

responsibilities. Some of these needs are particularly acute for dual-military families.⁵⁶ In enacting this law, Congress hoped to ease the familial responsibilities of those protecting our country. As Senator Dodd noted,

military families face unusually difficult demands, such as caring for a loved one with traumatic brain injury, and it is essential that FMLA be expanded to accommodate those special needs. The brave men and women who serve our country deserve nothing less [and] family members [need to] care for them without fear of losing their jobs.⁵⁷

Work-Life Issues Continue to Gain National Attention and Support

Even putting the NDAA provisions aside for a moment, work-life issues are experiencing a renewed, bipartisan interest that is being played out in two key policy arenas, both of which are newly repopulated: Capitol Hill and the White House. Of course, work-life policy is not new to either of these institutions. Congress has debated proposals to address work-life balance before, and the topic has been a major agenda item of certain members for decades. The 111th Congress, which convened in January, is no different. In fact, it has already witnessed the introduction of a number of bills, hearings, and other legislative activity on work-life issues.⁵⁸

One thing that is new, however, is the bipartisan Senate Study Group on Workplace Flexibility. In 2008, six Senators created this Study Group to “explore the most up-to-date research, policy and business practices on this issue [and to] provide an opportunity for meaningful discussion

2009).

⁵⁶ WF2010 Briefing, *supra* note 6. 12.7% of Active Force marriages are dual-military marriages; 5% of Selected Reserve are dual-military marriages. MILITARY FAMILY RESEARCH INSTITUTE, *supra* note 55, at 31, 86.

⁵⁷ *Dodd, Clinton Praise*, *supra* note 49. Senator Clinton agreed, “[t]he families caring for wounded servicemembers are facing extraordinary circumstances and it is our duty to make sure they have the care and support they need. Extending Family and Medical Leave to six months will have a significant and immediate impact for families who have sacrificed so much on our behalf.” *Id.*

⁵⁸ For example, the Workforce Protections Subcommittee of the House Education and Labor Committee held its first hearing, entitled, Encouraging Family-Friendly Workplace Policies, on March 3, 2009. At the hearing, a range of work-life policy options was discussed, including flexible work arrangements, time off, and federal-state partnerships to fund extended time off. *See, e.g., Encouraging Family-Friendly Workplace Policies: Hearing Before the Workforce Protections Subcomm. of the H. Comm. on Education and Labor Comm.*, 111th Cong. (2009) (statement of Eileen Appelbaum, Professor, School of Management and Labor Relations and Director of the Center for Women and Work, Rutgers University, Visiting Scholar, Center for Economic and Policy Research) and (statement of Heather Boushey, Senior Economist, Center for American Progress Action Fund). Interestingly, Representative Hare asked Michelle Bernard, President & CEO, Independent Women’s Forum, one of the witnesses, about the NDAA provisions during his allotted time for question and answer. *Id.*

Moreover, a handful of bills have already been introduced on a range of work-life issues. *See, e.g., Security and Financial Empowerment Act*, H.R. 739, 111th Cong. (2009) (provides time off and flexible work arrangements for victims of domestic violence); *Working Families Flexibility Act*, H.R. 1274, 111th Cong. (2009) (provides a right to request a flexible work arrangement); *Family and Medical Leave Enhancement Act of 2009*, H.R.824, 111th Cong. (2009) (provides time off for parental and grandparental involvement in school activities and for regular care of elderly relatives); *Federal Employees Paid Parental Leave Act of 2009*, H.R. 626, 111th Cong. (2009) (proposes to make 4 weeks of parental leave paid); *see also Workplace Flexibility 2010, Time Off Bills in the 111th Congress (2009)* (summarizing time off bills introduced in this Congress). The author predicts that many more will be introduced in the coming weeks and months.

on how increased access to flexibility can help both businesses and employees succeed.”⁵⁹ The flexibility needs of military families were explicitly mentioned in the letter inviting other Senate offices to participate.⁶⁰ At this time, legislation is not the end goal; rather, the purpose is to provide a different experience and rare opportunity in D.C., mainly to educate staff (across jurisdiction and party) and talk about people’s changing work-life needs, the role and impact on employers, and various models to address these topics, outside of the context of specific bills.

In addition, the importance of the new Administration cannot be overstated. After the first campaign where both parties developed a platform position on how to address work-life balance,⁶¹ a president took office with a deep commitment to this issue: President Obama was a key supporter of the NDAA provisions and is a long-time supporter of other time off and work-life proposals.⁶² Since taking office, the Obama Administration has reinforced its interest in this area, announcing that the time is ripe to “start pursuing policies that truly value families.”⁶³ Two new structures were launched to help achieve that goal: the White House Task Force on Middle Class Working Families;

⁵⁹ Letter from Blanche L. Lincoln, Mike Crapo, Herb Kohl, Gordon H. Smith, Susan M. Collins, and Christopher J. Dodd, to their Colleagues (Aug. 22, 2008) (on file with author). Workplace Flexibility 2010, a consensus-building project funded by the Alfred P. Sloan Foundation, and the New America Foundation were invited to support the Study Group. *Id.*; see also Workplace Flexibility 2010, <http://www.workplaceflexibility2010.org> (last visited Apr. 27, 2009); New America Foundation, *Workforce and Family Program*, http://www.newamerica.net/programs/workforce_and_family (last visited Apr. 27, 2009).

⁶⁰ Letter from Blanche L. Lincoln, Mike Crapo, Herb Kohl, Gordon H. Smith, Susan M. Collins, and Christopher J. Dodd, to their Colleagues (Aug. 22, 2008) (on file with author). The unique situations that servicemembers and their families face when locating and maintaining civilian employment also were discussed during *Supporting our Nation’s Military Families: The Role of Workplace Flexibility*. WF2010 Briefing, *supra* note 6 (remarks by Barbara Thompson, Director, Office of Family Policy/Children and Youth Military Community and Family Policy, Office of the Deputy Under Secretary of Defense U.S. Department of Defense and Kelly Hruska, Deputy Director, Government Relations, NMFA); Workplace Flexibility 2010, A Sampling of Workplace Flexibility Laws and Programs for Military Personnel, <http://www.law.georgetown.edu/workplaceflexibility2010/documents/MilitarySamplingHandout.pdf>.

⁶¹ See Carol Guensburg, *Candidates Differ On Relief For Working Families: Weighing In On The Conversation*, NPR.ORG, Oct. 31, 2008, <http://www.npr.org/templates/story/story.php?storyId=96289036>; Chai Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility*, in WORK-LIFE POLICY, Urban Institute Press, at 3-6, available at <http://www.law.georgetown.edu/workplaceflexibility2010/documents/PolicyOpportunities-StateofPlayin2008.pdf> (describing how recent campaigns described work-life issues). President Obama discussed time off in his Presidential platform, during his acceptance speech at the Democratic National Convention and in early correspondence as President-elect and President. See, e.g., Barack Obama, *Strengthening Families and Communities*, <http://www.barackobama.com/issues/family/#support-families> (last visited Apr. 27, 2009); Barack Obama, *BLUEPRINT FOR CHANGE: OBAMA AND BIDEN’S PLAN FOR AMERICA*, 49-51, <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf>.

⁶² In fact, his version of the NDAA provisions provided for even more expansive protections: 52 weeks of time off, without any hours of service requirements. Amendment 2588 to H.R. 976, 110th Cong. (2007). Going back further, then State Assembly member Obama was a chief sponsor of Illinois’s Victims’ Economic Security and Safety Act, which provides the most expansive state employment protections to victims of domestic violence, including allowing victims to take up to 12 weeks of time off per year to seek medical care, counseling, services from victims’ groups, safety training, and/or legal assistance. 820 ILL. COMP. STAT. ANN. 180/20(a) (West 2003). President Obama’s Chief of Staff, Rahm Emanuel, also sponsored a bill that would have provided similar federal protections to victim employees. Crime Victims Employment Leave Act, H.R. 5845, 110th Cong. (2008).

⁶³ Carol D. Leonning, *Obama Wrote Federal Staffers About His Goal: Workers at Seven Agencies Got Detailed Letters Before Election*, WASH. POST, Nov. 17, 2008, at A01; see also Sue Shellenbarger, *Family Time: Lawmakers Push to Expand Paid Leave*, WALL. ST. J., Nov. 19, 2008, at D1 (“No incoming president has set a more ambitious work-family agenda than Barack Obama.”).

and the White House Council on Women and Girls.⁶⁴ Run by Vice President Biden, the Task Force is creating “a detailed set of recommendations” in five areas, including how to “improve work and family balance,” “protect retirement security” and “expand . . . lifelong training opportunities.”⁶⁵ Chaired by Senior Advisor Valerie Jarrett, the Council is tasked with “[e]nsuring that the administration evaluates and develops policies that establish a balance between work and family.”⁶⁶ Further, First Lady Michelle Obama has made her interest in supporting military families and highlighting the needs of working women and families, including work-life balance, well known.⁶⁷

The personnel changes accompanying the new Administration and 111th Congress, along with renewed support from the state, local, and grassroots levels, supports the idea that more change is on its way in this area. Given the current makeup of players in Washington, one should expect renewed calls to improve the NDAA provisions for military families, expand their protections to other families, and explore a wide range of other flexibility policy options to address the work-life balance needs of the entire country.

Are the NDAA Provisions a Tipping Point for Additional Policy in This Area?

With this context in mind, the question becomes what impact the NDAA provisions will have in translating these calls into new laws. There is no doubt that the NDAA provisions are important. Out of all of the proposals to amend the FMLA (not to mention other workplace flexibility proposals), this is the first time that it has happened. Yet, even though these provisions garnered broad bipartisan support and will help certain military families address specific needs, they are unlikely – by themselves – to open a panacea of new laws in this area. Nonetheless, they are now part-and-parcel of a larger effort to expand opportunities to address work-life balance. While the NDAA provisions move the work-life movement closer to universal coverage and support in the law, they do not bring society to the Tipping Point. They do serve as a useful model for the development of all-but-certain future work-life policies, however. Critical mass on work-life law and policy in the United States is coming. Just how much – and how – these provisions can be leveraged to gain additional protections remains to be seen. A few predictions and observations in this vein follow.

A. The NDAA Provisions Raise the Floor for New State and Local Proposals (as well as more federal proposals) to Address the Needs of Military (and other) Families

The NDAA provisions followed on the heels of a movement of state and local level activity. A number of states and localities enacted time off laws related to military service after September

⁶⁴ Posting of About the Task Force to The White House Blog, http://www.whitehouse.gov/the_press_office/ObamaAnnouncesMiddleClassTaskForce/ (last visited Apr. 27, 2009).

⁶⁵ *Id.*; Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies on the White House Task Force on Middle-Class Working Families (Jan. 30, 2009), http://www.whitehouse.gov/the_press_office/memorandum_for_the_heads_of_executive_departments_and_agencies/.

⁶⁶ Press Release, President Obama Announces White House Council on Women and Girls, The White House Office of the Press Secretary (Mar. 11, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-White-House-Council-on-Women-and-Girls; Exec. Order No. 13,506, 74 Fed. Reg. 11271 (Mar. 16, 2009).

⁶⁷ See, e.g., Michelle Obama, *Aiding Working, Military Families*, U.S. NEWS & WORLD REPORT, Oct. 27, 2008, at 14; Our Many Hats, BlogHer, <http://www.blogher.com/our-many-hats> (Oct. 14, 2008) (blog post by Michelle Obama).

11th. These laws vary with respect to the scope of and eligibility for coverage. Some apply only to state employees.⁶⁸ Others cover more employers than are included in the federal FMLA.⁶⁹ Still others provide time off to spouses and other specified family members of servicemembers (as opposed to the persons serving).⁷⁰ And other laws permit time off only for a particular event or timeframe.⁷¹ The majority of these laws provide for unpaid time off. But a few provide public sector employers with the authority to provide paid time off for military service.⁷²

Most of these state laws, along with a number of local provisions, were enacted before the NDAA provisions became law.⁷³ A number of other states were considering new employment protections for military members and their families at the same time the NDAA provisions were moving on Capitol Hill.⁷⁴ Only a handful of new proposals have been introduced or enacted since the NDAA provisions went into effect.⁷⁵ However, there is no doubt that new time off provisions for military families will be introduced on the state and local levels. These proposals should be watched closely as they make their way through the legislative process. The NDAA provisions will influence their progression. And additional activity on the state and local levels, in turn, will bubble back up as increased support for expanded coverage on the national level, influencing and forecasting future federal proposals for expansion.

B. The NDAA Provisions Will Influence How Work-Life Policy Is Developed

It will be some time until we know how many people will utilize the NDAA provisions. Nonetheless, the NDAA provisions do not begin and end with addressing the needs of military families. In fact, the NDAA provisions have already had immediate and (likely) lasting

⁶⁸ See, e.g., 51 PA. CONS. STAT. ANN. § 7301-03 (West 2009) (gives state employees 90 days after enlistment expires to readjust before returning to work and time off to spouses and parents of military personnel called to at least 30 days of service).

⁶⁹ See, e.g., 820 ILL. COMP. STAT. 151/5-10 (2005) (state military family leave act applies to all employers – public, private, and not-for profit – with at least 15 employees).

⁷⁰ See, e.g., CAL. MIL. & VET. CODE § 395.10 (West 2007) (provides employees whose spouses are serving in war zones with up to 10 days of time off for any reason).

⁷¹ See, e.g., ME. REV. STAT. ANN. tit. 26, § 814(2) (West 2007) (employers must provide up to 15 days of time off “per deployment [that] may be taken only during [t]he 15 days immediately prior to deployment; [d]eployment, if the military member is granted leave; or [t]he 15 days immediately following . . . deployment”); N.J. STAT. ANN. § 38:23-4 (West 2009) (provides public employees who returned from war with an injury with the ability to extend a leave of absence “until three months after his recovery from such wound or sickness, or until the expiration of two years from the date of his discharge from such service, whichever shall first occur”); DEL. CODE ANN. 29, § 5121 (2001) (provides public employees with the ability to take time off to serve in one military funeral detail per year).

⁷² See, e.g., CAL. MIL. & VET. CODE § 395(b) (allowing, but not requiring, agencies to provide paid time off).

⁷³ See, e.g., ME. REV. STAT. ANN. tit. 26, § 814(2) (approved by the 122nd Maine Legislature on Apr. 3, 2006); 820 ILL. COMP. STAT. 151/5-10 (approved by the 94th Illinois General Assembly on Aug. 15, 2005).

⁷⁴ SLOAN WORK AND FAMILY RESEARCH NETWORK, LEGISLATIVE SUMMARY SHEET: BILLS RELATED TO MILITARY FAMILIES RECENTLY INTRODUCED INTO STATE LEGISLATURES, 3-5, available at http://wfnetwork.bc.edu/pdfs/BillTheme_military.pdf.

⁷⁵ See, e.g., H.B. 1249, 87th Gen. Assem., Reg. Sess., (Ark. 2009); A.B. 2134, 2007-2008 Leg., Reg. Sess., (Cal. 2008) (conforms state law to the new federal provisions and “expand[s] the number of qualifying family members . . . to include grandparent, grandchild, and sibling”); R.I. GEN. LAWS §§ 30-33-1-6 (2008) (grants time off from work to the spouse or parent of a servicemember on military duty). Information about efforts to enact new local paid leave laws is available at Multi-State Working Families Consortium, <http://www.valuefamiliesatwork.org> and National Partnership for Women & Families, Support paid Sick Days, <http://paysickdays.nationalpartnership.org>.

consequences in at least two related ways. First, the NDAA provisions have expanded the groups of people working on and interested in work-life issues, bringing the support of new bedfellows – mainly military and veterans’ disability groups.⁷⁶ Importantly, the work-life needs of military families have also expanded the ways Republicans are willing to participate in the work-life conversation, which has traditionally been left to and composed mostly of Democrats.⁷⁷

Second, the NDAA provisions are shaping the substance of future conversations about the role the government has in encouraging or requiring employers to provide time off and implementing other work-life balance policies.⁷⁸ For example, while the time off needs of military families are particularly acute, the rationale underlying the provisions and the momentum building from them are being used to support the need for access to time off for other families and populations.⁷⁹ An immediate effect of the NDAA provisions is the ability of this new federal baseline to infiltrate and shape the larger work-life conversation, including what questions are asked. Work-life policy cannot be developed now without examining the NDAA provisions closely to determine what improvements are needed for members of the extended military family, and/or what lessons can be learned as proposals are renewed to expand the FMLA and other policies to tackle work-life balance in different situations.

⁷⁶ See Press Release, Dodd, Clinton Legislation to Extend FMLA for Families of Wounded Servicemembers Heads to President’s Desk for Second Time (Jan. 22, 2008), available at <http://dodd.senate.gov/?q=node/4208> (noting that the provisions are supported by “the National Partnership for Women and Families, the Iraq and Afghanistan Veterans of America, the National Military Families Association, the Military Officers Association of America, the National Guard Association of the United States, the Enlisted Association of the National Guard of the United States, and the Reserve Officers Association.”); Public Submission in response to Family and Medical Leave Act Notice of Proposed Rulemaking 29 C.F.R. pt. 825 from Shelley M. MacDermid, Director, Military Family Research Institute, to Victoria Lipnic, Assistant Secretary of Labor, Employment Standards, Docket No. ESA-2008-0001-1594.1 (Apr. 10, 2008). Compare Letter from National Partnership for Women & Families, and other organizations, to Elaine L. Chao, Secretary, Dep’t of Labor (Apr. 12, 2005), available at <http://www.nationalpartnership.org/site/DocServer/FMLALettertotheDOL.pdf?docID=961> (letter from 200 organizations, one of which is a state chapter of a veterans’ disability group, advocating for expanded time off without a reference to military families) and Letter from National Partnership for Women & Families, and other organizations, to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, Dep’t of Labor (Feb. 16, 2007), available at http://www.nationalpartnership.org/site/DocServer/National_Partnership_Group_Comments.pdf?docID=1541 (essentially the same) with Letter from National Partnership for Women & Families, and other organizations, to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, Dep’t of Labor (Apr. 11, 2008), available at http://www.nationalpartnership.org/site/DocServer/National_Partnership_Military_Response_DOL_NPRM.pdf?docID=3201 (an entire letter from the FMLA Coalition, co-sponsored by NMFA, about time off for military families).

⁷⁷ Traditionally, Republican policy in this area has focused on bills that would amend the Fair Labor Standards Act to allow private employers to provide employees with compensatory time off in lieu of overtime pay. See, e.g., Family-Friendly Workplace Act, H.R. 933, 111th Cong. (2009); Family Time Flexibility Act, H.R. 1119, 108th Cong. (2003).

⁷⁸ See, e.g., Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 J.L. & POL’Y 193, 195 (2004) (observing, “when a statute has already passed, it changes the course of policy discussion on a topic”).

⁷⁹ See, e.g., Press Release, Dodd, Clinton React to New FMLA Regulations (Nov. 15, 2008), available at <http://dodd.senate.gov/?q=node/4627> (quoting Sen. Christopher J. Dodd) (“Although this is a positive step, I remain concerned that these regulations do not go far enough and will not adequately protect every military family.”); Press Release, National Partnership for Women & Families, Family & Medical Leave Act Regulations Taking Effect Today Make it Harder for Workers to Access the Leave They Need (Jan. 16, 2009), available at http://www.nationalpartnership.org/site/PageServer?pagename=newsroom_pr_PressRelease_090116 (“This is the first-ever expansion of the FMLA, but we are confident that it will not be the last.”).

This examination will raise a variety of questions and concepts with which future policymakers must grapple. Policymakers will have to consider and likely articulate rationales for the situations and categories of people who are – and are not – afforded protections. For example, why are certain military families treated differently than other military families, as well as from other families in general? Does it make sense to differentiate between members of the Total Force?⁸⁰ Or to provide different protections to Guard called up in response to a federal call and first responders assisting with homeland security or otherwise responding to a national emergency? Or to provide protections to people who are injured in Afghanistan, but not while performing service in post-Katrina Louisiana or post-9-11 Manhattan?

On a macro level, stakeholders will ask whether the NDAA provisions can be exported to others in the civilian workforce, and whether these provisions will erase some of the stigma associated with time off so it is easier for everyone to gain these protections. While it may be a non sequitur that other types of families do not need time off for post-deployment activities,⁸¹ the same is not true for a number of the other activities that now constitute a qualifying exigency. For example, why do certain military families have federal protection for time off to attend parent-teacher conferences, but not other families?⁸² Why are children of some Guard and Reserve members given greater access to their parents?⁸³ What is the justification for valuing the non-medical circumstances that impact the lives of some groups of people, but not others? For example, should the government make the decision that the death of a loved one killed at war deserves job-protected bereavement leave, but employees dealing with the loss of a loved one arbitrarily killed as

⁸⁰ By contrast, when USERRA was enacted, Congress intentionally did not limit it to active duty servicemembers; instead, the statute intentionally “provide[s] blanket protection for all those serving in the various military components.” Lee, *supra* note 4, at 254 (citing 39 CONG. REC. H2210 (statement of Rep. Stump)) (“It would effectively clarify and strengthen existing laws, on veterans’ reemployment rights. It would cover the active duty forces, reserves and National Guard alike.”). Military groups have already starting calling for an expansion of the qualifying exigency leave to families of all servicemembers, not understanding why one provision would apply to all, but not the other. See, e.g., *Beneficiary and Advocacy Overview: Hearing Before the Subcomm. on Military Pers. of the H. Armed Serv. Comm.*, 111th Cong. 4 (2009) (statement of Kathleen B. Moakler, Director, Government Relations, NMFA). NMFA was “disappointed that leave allowing family members to take care of issues arising out of the deployment was not extended to active duty families. Active duty families are struggling with the same deployment issues that their Reserve Component counterparts are – the law should reflect that.” *Id.*; see also Military Officers Association of America, *FMLA Serves Bountiful Feast – for Some*, Nov. 25, 2008, http://www.moaa.org/lac/lac_issues/lac_issues_major/lac_issues_major_fam/lac_issues_major_fam_fmlla.htm (further noting “[w]e’re sure glad they included Active Duty families in the caregiver component, but that made the exclusion of them in the deployment provision even more perplexing.”); Military Officers Association of America, *Medical Leave Rule Excludes Active Duty Families*, Nov. 21, 2008, http://www.moaa.org/lac/lac_issues/lac_issues_major/lac_issues_major_fam/lac_issues_major_fam_medicalleave.htm (“The bad news, incredibly, is that family members of active duty personnel are excluded from [qualifying exigency] leave from a civilian employer to handle family needs in conjunction with a servicemember’s deployment[. We are] already meeting with lawmakers to get that corrected when Congress reconvenes.”).

⁸¹ 29 C.F.R. § 825.126(a)(7) (2009).

⁸² § 825.126(a)(3). Some states provide a limited amount of job-protected time off to attend school activities. See, e.g., CAL. LAB. CODE § 230.8 (West 2009); see also Labor Project for Working Families, *State By State List Of Family Leave Laws*, at http://www.working-families.org/policy/statebystate_leave.pdf (listing these and other state time off provisions). In addition, there have been efforts to expand the FMLA or otherwise have time off protections for reasons related to childcare at the federal, state, and local levels. See, e.g., Family and Medical Leave Enhancement Act of 2009, H.R. 824 § 3, 111th Cong. (2009); A.B. 116, 2009-10 Leg., Reg. Sess. (Wisc. 2009) (proposes to add school conferences and activities to the state FMLA law); see also *supra* note 58.

⁸³ 29 C.F.R. § 825.126(a)(3) (2009).

an innocent bystander in violence at home should not?⁸⁴ Is the fact that servicemembers are in a different situation or were injured or killed while serving America the justifying distinction? Are these provisions a benefit of service?

The NDAA provisions also have the potential to make the ongoing decisions not to expand the scope of employees eligible for coverage more difficult to justify. The inclusion of “next of kin” in the NDAA’s caregiver provision is the first time siblings, grandparents and others have been provided some federal job-protected time off.⁸⁵ Future policymakers will have to grapple with why next of kin only qualify within the military provision.⁸⁶ A person with a disability may have the same access to caregivers to assist with treatment and meeting medical needs, regardless of how the injury was sustained. Should it matter if a sibling’s traumatic brain injury was a result of service? Should the government allow all employees to designate a CADRE to recognize society’s changing family demographics?⁸⁷ If not, why do military families have legally recognized relationships that are not available to other families?⁸⁸

Some of these questions are relatively new to the national work-life conversation; others will have a renewed importance given society’s ever-changing demographics. Regardless of how entrenched they have been in the historical work-life conversation, all of these questions (and a number of others) will be part of future work-life policy debate.

Moreover, there is precedent for exporting policy that was originally created to address acute military needs to the civilian sector. Just like the Internet⁸⁹ and the Hummer,⁹⁰ the NDAA

⁸⁴ § 825.126(a)(7)(ii).

⁸⁵ 29 U.S.C. § 2611(18) (2009); 29 C.F.R. § 825.127(b)(3) (2009).

⁸⁶ Members of Congress recognized the importance of this change. See, e.g., *Achievements and Next Steps: Hearing*, *supra* note 8, at 2 (statement of Rep. Lynn Woolsey) (“This is important because, for the first, family members other than the spouse, parent, or child can take off leave under the FMLA.”). Some have observed that “[t]he caregiver provision should affect a small number of people. The [qualifying exigency provision] will affect considerably more employees.” David Prizinsky, *Iraq War Toll Felt in New FMLA Category*, CRAIN’S CLEVELAND BUS., Mar. 3, 2008.

⁸⁷ CADRE stands for Committed and Designated Representative. 73 Fed. Reg. at 7927; 73 Fed. Reg. at 67966-67 (summarizing comments submitted in response to the DoL’s question of whether CADRE should be “next of kin”).

⁸⁸ See *Extending Coverage Hearing*, *supra* note 6, at 2 (statement of Sen. Christopher J. Dodd).

For the first time, this bill offers FMLA leave not just to parents, spouses, and children, but to next-of-kin, including siblings. Families—not the government—should decide for themselves who takes on the work of caring for their injured loved ones. This legislation recognizes that fact, and it’s a major accomplishment. But it is just a first step in providing the support that our military families need.

Id.

⁸⁹ JOHN GLADSTONE MILLS III, DONALD C. REILEY III, & ROBERT C. HIGHLEY, 1 PAT. L. FUNDAMENTALS § 5:16 (2d ed. 2009) (The Internet stems from a program “designed to enable computers operated by military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war.”); see also Gehan Gunasekar, *The ‘Final’ Privacy Frontier? Regulating Trans-Border Data Flow*, 15 INT’L J.L. & INFO. TECH. 362, 378 (2007) (“A great many military applications have led to the development of civilian uses, mostly beneficial, that we now take for granted[, including] GPS (global positioning system), microwave ovens and Velcro.”); DEFENSE ADVANCED RESEARCH PROJECTS AGENCY, TECHNOLOGY TRANSITION (n.d.), available at <http://webext2.darpa.mil/Docs/transition.pdf> (exported military innovations include computer “operating systems[, virtual memory, . . . computers that understand human speech, vision systems, and artificial intelligence”).

⁹⁰ GM Hummer - Hummer History, <http://www.gmhummer.com/history/history.htm> (last visited Apr. 27, 2009) (contracts to develop and test High Mobility Multi-Purpose Wheeled Vehicles to serve the needs of wartime military maneuvers were granted in the early 1980s; production on “the Hummer for civilian use” began in 1992).

provisions have the potential to branch out of military-only application to transform the civilian culture. One example of this public policy carryover effect is the impact the GI Bill of Rights had on certain provisions of federal financial aid to students pursuing higher education.⁹¹ In the GI Bill, the government promised to subsidize the education of veterans – the first federal support for tuition assistance for higher education.⁹² Since the GI Bill was enacted in 1944, federal subsidies to students have expanded significantly to other military personnel as well as to civilians.⁹³

C. Future Provisions To Mitigate The Impact Of War On Businesses Are Likely

Like many other employment laws, the NDAA reflects a policy choice to focus on providing additional rights to employees (servicemembers and their families) and does not really address the impact of these new rights on business operations.⁹⁴ Congress could have followed a different path and directly recognized the war's impact on employers by creating tools to assist businesses with the costs associated with covering for employees who take time off to serve or address the needs of family members who serve.

As noted above, more veterans, returning Reservists and members of the Guard, and family members of all forces are present in the workplace than ever before.⁹⁵ In fact, over two-thirds of employees in the Reserves who have been called to duty work for small or medium sized companies;⁹⁶ another eleven percent are self-employed⁹⁷ or work at a family business.⁹⁸ Given these

⁹¹ TG RESEARCH AND ANALYTICAL SERVICE, OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER 9, 20 (Nov. 2005), available at http://tgscl.org/pdf/HEA_History.pdf. “The GI Bill marked the true beginning of federal involvement in higher education financing” *Id.* at 9; see also Online NewsHour, *Remembering the GI Bill*, July 4, 2000, http://www.pbs.org/newshour/bb/military/july-dec00/gibill_7-4.html (observing that “the GI Bill was designed to help veterans, not to transform America”, [but] that’s what it did.”).

⁹² 58 Stat. 284, ch. 268 (1944) (covered certain tuition and other higher education fees for servicemembers active during wartime).

⁹³ See, e.g., New GI Bill Continuation Act, Pub. L. No. 100-48, 101 Stat. 331 (1987) (permanently authorizes the Montgomery GI Bill provisions that give military members who have served during war or peacetime up to three years of financial benefits to cover tuition and other approved education expenses); National Defense Education Act, Pub. L. No. 85-864 (1958) (establishes a student aid program to promote science, math, and foreign language training); Higher Education Act, Pub. L. No. 89-329, title IV, § 401, 79 Stat. 1219, 1232 (1965) (provides need-based financial assistance directly to college students); see David P. Smole & Shannon S. Loanne, A Brief History of Veterans’ Education Benefits and Their Value, CRS Report for Congress (2005), <http://www.fas.org/sgp/crs/misc/RL34549.pdf> (summarizing laws that authorize federal tuition assistance to veterans).

⁹⁴ Major Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 341 (2007) (Congress seems more “interested in providing additional pay, benefits and loan programs to service members” than it does on “removing financial burdens placed on civilian employers”). Future work-life policy conversations will also include questions along the lines of how can employers be supported as they implement a new regulatory structure for the NDAA provisions, which are in some ways similar to other FMLA and USERRA administration procedures and requirement, but in other ways are very different? For example, USERRA applies to all public and private employers in the United States regardless of size – unlike the FMLA, it is not limited to those with at least 50 employees. Compare 38 U.S.C. § 4303(4) (2006) with 29 U.S.C. § 2611 (2)(B)(ii) (2006). But questions along these lines are not new, and the administration of leave has been a key issue in the ongoing debates around the FMLA.

⁹⁵ See *supra* notes 3, 4, 7, 8 and accompanying text.

⁹⁶ 150 CONG. REC. H5067 (daily ed. June 24, 2004) (statement of Rep. McGovern).

⁹⁷ Self-employed reservists who are called to duty are “hit especially hard,” often being called up without alternative plans for keeping their business operational while they are gone. Lee, *supra* note 4, at 249; Steven Greenhouse,

realities, the war impacts businesses in a very real way: employers need to cover or replace employees who serve or take time off to care for those who serve.⁹⁹

Despite these real costs, many businesses voluntarily support their employees who serve our Nation.¹⁰⁰ For example, there is no federal law that requires private employers to pay for time off to serve or to make up the difference between civilian employment salaries and the salary received while on reserve duty.¹⁰¹ Nonetheless, a number of employers have voluntarily enacted policies and programs to supplement this pay gap or otherwise support their employees who serve in the military or who are related to someone serving in the military.¹⁰²

After the War: The Reservists; Balancing Their Duty to Family and Nation, N.Y. TIMES, June 22, 2003, at N14 (recounting the experiences of customer-based and self-employed Guardsmen whose “call-up[s] have] devastated [their] civilian career[s]”).

⁹⁸ Office of the Secretary of Defense Reserve Affairs, Employer Support of the Guard and Reserve, Congressional Response, Prepared for H. REP. 108-187, 4 (Mar. 31, 2004), at <http://www.dod.mil/ra/documents/esgreportlapri104.pdf>. Of course, the burden on employers is not limited to private employers. “32% of Reservists . . . work in the public sector, 13% work for the federal government.” *Id.* at 4-5. A 2004 study by the National Association of Counties reported two-thirds of small counties have suffered a hardship in the form of cutting services or relocated personnel from other places to cover absences due to service. Forte, *supra* note 94, at 336 (citation omitted).

⁹⁹ Costs are exacerbated because employers are often not given significant notice before employees leave or come home. *Protecting The Employment Rights of Those Who Protect the United States: Hearing Before the S. Comm. on Health, Ed., Lab. & Pens.* 110th Cong. (2007) (statement of Major Tammy Duckworth, Director, Illinois Department Of Veterans’ Affairs); see also NGA Center for Best Practices, *State Programs to Facilitate the Reintegration of National Guard Troops Returning from Deployment* (Oct. 2007), <http://www.nga.org/Files/pdf/0710NATLGLUARDBACKGROUND.PDF> (“[T]he return home of guard units, especially from combat zones, can create . . . great challenges of reintegration back into families and jobs.”).

¹⁰⁰ “[T]he nation’s employer community is overwhelmingly supportive.” Office of the Secretary of Defense Reserve Affairs, *supra* note 98, at 3 (observing that “there has been a steady increase in employers offering some financial support” since September 11th; further reporting that only 17% of Fortune 500 companies surveyed by the Reserve Officer’s Association in 2003 did not offer any financial benefits to Reservists who were mobilized); see also National Coalition to Protect Family Leave, *Comments in Response to the Department of Labor’s Notice of Proposed Rulemaking*, Apr. 11, 2008, at 32, available at http://www.protectfamilyleave.org/pdf/ncpfl_comments_dol-npr_04-2008.pdf.

The Coalition believes that employers as a whole are very supportive of the dedicated men and women who currently serve or have served Likewise, we believe employers are very compassionate toward employees who have family members called to active duty and may need time off work to address urgent matters occasioned by such a call to active duty, or to care for a loved one injured in the course of fulfilling his or her military duties.

Id.

¹⁰¹ Tax credits have been proposed to help employers who voluntarily address the wage gap Guard and Reserve personnel face when they are called up to service. See, e.g., Helping Our Patriotic Employers at Home Act of 2005, S. 1142, 109th Cong. (2005) (proposing a tax credit for civilian employers who voluntarily give their Guard and Reserve personnel a pay differential while those employees are called to active service); Guard and Reserve Financial Stability Act of 2005, H.R. 2296, 109th Cong. (2005) (proposing a tax credit to employers who pay their employees while on active duty, and to help cover some of the costs associated with temporary workers); Patriotic Employers of Guard and Reservists Act of 2004, H.R. 4655, 108th Cong. (2004) (same). See Forte, *supra* note 94, at 340 (discussing criticisms of these proposals).

In addition, some state laws provide for the payment of the salary differential for state employees who are Reservists and called into active duty. See, e.g., MINN. STAT. ANN. § 43A.183 (West 2008).

¹⁰² See, e.g., Stephen Barr, *Private Sector Surpasses Agencies on Pay to Deployed*, WASH. POST, Oct. 30, 2005, at C2; Matthew B. Stannard, *Jobs Don’t Always Wait for Guards, Reservists: Citizen Soldiers Find Duty in Iraq Can Dent Families’ Finances*, SAN FRAN. CHRON., Feb. 20, 2005, at A1; Matt Viser, *Communities Conflicted About Pay for Reservists: Desire to Be Generous Blunted by Fiscal Reality*, BOS. GLOBE, Oct. 31, 2004, at 1. “Many

Some question how long this voluntary support will or can last. The Department of Defense's Employer Support of the Guard and Reserve ("ESGR") has opined, "employer support may diminish" with "extended and rotational deployments."¹⁰³ Others have echoed this sentiment. For example, the National Military Family Association recently testified, "employers seem to be growing weary of the special demands military service is placing upon their employees. In some cases it appears employer goodwill with respect to flexibility and time off for military commitments has run out."¹⁰⁴

There are limited government programs that exist to help ease this burden. For example, the Military Reservist Economic Injury Disaster Loan program provides small businesses with loans to cover employers' ordinary and necessary operating expenses resulting from essential employees who are called to active military service.¹⁰⁵ The program is meant to provide just enough capital to cover necessary obligations until the essential employee(s) return; it does not cover lost profits.¹⁰⁶ Congress has previously considered other programs, including incentives, which might help businesses cope with the effects of war at work.¹⁰⁷ For the most part, these ideas have not advanced far, and other proposals to support business are sparse.

With respect to employee protections, the associations that lobby on behalf of businesses are in a tough spot. Despite a historical opposition to leave mandates, it is difficult to oppose bills that have the stated mission of supporting military families without taking a public relations hit or looking un-American. In fact, the business community did not "oppose" the NDAA provisions, rather, they expressed concern about: (1) the speed with which the provisions were enacted, (2) the need to limit the scope of the mandate by clarifying terms utilized to prevent any duplication with existing coverage, and (3) the implementation and administration of new and potentially conflicting leave benefits.¹⁰⁸ A similar strategy can be expected in the future – a business lobby that posits that

employers have been providing leave and other accommodations voluntarily well before enactment of [the NDAA provisions.]” National Coalition to Protect Family Leave, *supra* note 100, at 32. Most of these policies are found in employee handbooks or manuals. Employers should be aware that once a policy is established and communicated to staff, they must follow that policy. Maria Greco Danaher, *Failure to Follow Military Leave Wage Policy Violates the USERRA*, 10 NO. 9 LAWYERS J. 2, 2 (2008); *see, e.g., Koehler v. PepsiAmericas, Inc.*, 268 Fed. Appx. 396, 2008 WL 628925 (6th Cir. 2008) (holding an employer that failed to follow its own written policy about wage payment during military leave was liable for liquidated and punitive damages).

¹⁰³ Office of the Secretary of Defense Reserve Affairs, *supra* note 98, at 3. ESGR “seeks to promote a culture in which all American Employers support and value the military service of their employees.” U.S. DEP’T OF DEF., *supra* note 5.

¹⁰⁴ *Extending Coverage Hearing*, *supra* note 6, at 4 (statement of Jessica Perdew, Deputy Director of Government Relations, NMFA, further noting, “[e]ven Reserv[ists] called to active duty are finding many employers less willing to support military commitments”).

¹⁰⁵ Pub. L. No. 110-186, 122 Stat. 629 (2008) (broadening SBA’s MREIDL assistance authority); Pub. L. No. 110-234, 122 Stat. 1408 (2008) (raising the MREIDL limit from \$1.5 million to \$2 million); 13 C.F.R. § 123 (2009); Military Reservists Loans, Small Business Administration, <http://www.sba.gov/services/disasterassistance/businessesofallsizes/militaryreservistsloans/index.html> (last visited Apr. 27, 2009). Certain states have similar low-interest loan programs. *See, e.g.,* Alexi Giannoulas – Illinois State Treasurer, *Employ Illinois: Reserve Forces*, <http://www.treasurer.il.gov/programs/employ-illinois/reserve-forces.aspx> (last visited Apr. 27, 2009).

¹⁰⁶ Military Reservists Loans, *supra* note 105. The loans carry a maximum interest rate of 4% and a term of up to 30 years. *Id.* One criticism of this program and ones like it is that they lack the ability to provide support to members of the Guard or Reserves who are self-employed or rely on clients for their business. Forte, *supra* note 94, at 338-39.

¹⁰⁷ *See supra* note 77 (discussing proposals to provide financial incentives to businesses).

¹⁰⁸ *See, e.g.,* National Coalition to Protect Family Leave, *supra* note 100, at 32-48; Geisel, *supra* note 52 (quoting Marc Freedman, director of labor law policy at the U.S. Chamber of Commerce) (“This was done in a rushed way

existing problems need to be corrected before any leave protections are expanded or new provisions are contemplated.¹⁰⁹ However, the business community can take some (limited) solace in the fact that the longer the war continues, the more likely that provisions to mitigate its impact on employers will be considered.

CONCLUSION

Time will tell whether the NDAA provisions become the Tipping Point in the larger movement to expand policies that support work-life balance for everyone or are simply one incremental (but important) advance among many. Regardless of whether they are *the* Tipping Point, the NDAA provisions have changed the national baseline and raised consciousness of the need to address this issue. They also have illustrated some of the policy challenges and opportunities that exist with the American workplace today, as well as policy choices that are made to afford specific legal accommodations only to targeted populations. More laws supporting military families should be expected, especially as the war continues. But one can also anticipate additional laws that support all employees as they struggle to find a work-life balance, in addition to their employers and communities.

and it shows.”); Prizinsky, *supra* note 86 (“We didn’t oppose it . . . but we want to see clarity in the [regulatory] language.”); Mike Layman, Manager of Employment and Labor, Society for Human Resource Management, *Military Families* Panel, *supra* note 7; Cara Welch, Director of Public Policy, WorldatWork, *Military Families* Panel, *supra* note 7.

¹⁰⁹ This was the position proffered by the National Coalition to Protect Family Leave while the NDAA provisions were being considered. See, e.g., *Extending Coverage Hearing*, *supra* note 6, at 3 (statement of National Coalition to Protect Family Leave).