

**CAPITALIZING “F” IS NOT ENOUGH: THE ARMY SHOULD
REVISE ITS POSTPARTUM LEAVE POLICIES TO BETTER
SUPPORT THE ARMY FAMILY**

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*To further acknowledge the role Army spouses and
children of Soldiers play in today’s military, the director
of the Army staff has instructed for the word Families to
be capitalized in all official correspondence.¹
We are committed to providing our Families a strong,
supportive environment where they can thrive.²*

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¹ IMCOM, Europe—Public Affairs, *Uppercasing ‘Families’ Highlights Support*, ARMY.MIL NEWS, Apr. 24, 2007, <http://www.army.mil/-news/2007/04/24/2831-uppercasing-families-highlights-support/>; E-mail from Lieutenant General James L. Campbell, Director of the Army Staff, to General John Abizaid et al. (Apr. 18, 2007, 09:46 EST) (on file with author) (instructing commanders to widely disseminate the Acting Secretary of the Army’s and the Chief of Staff of the Army’s guidance on capitalizing the word “family” when used to describe U.S. military families).

² *Army Family Covenant*, <http://www.army.mil/-images/2007/10/10/9140/army.mil-2007-10-10-164403.jpg> (last visited Mar. 9, 2009) [hereinafter *Army Family Covenant*] (showing the Army Family Covenant signed 17 October 2007 by Secretary of the Army Peter Geren, Chief of Staff of the Army General W. Casey, Jr., and Sergeant Major of the Army Kenneth O. Preston in recognition of Army families); Elizabeth M. Lorge, *Army Leaders Sign Covenant with Families*, ARMY.MIL NEWS, Oct. 17, 2007, <http://www.army.mil/-news/2007/10/17/5641-army-leaders-sign-covenant-with-families/> (“The Army wants to provide Soldiers and their Families with a level of support commensurate with their level of service, and the covenant is in direct response to concerns from Army Families.”) (quoting General W. Casey Jr.).

I. Introduction

The eight-week-old infant developed a 104-degree temperature. A few hours later, the mother rushed the baby to the emergency room. The infant's fever was rising, even with medication. A doctor examined the baby and immediately called the neonatal specialist. Within moments, the doctors inserted a catheter and tube into the baby's spinal cord and turned the baby over. The mother watched in horror as the fluid drained from her baby's spinal cord. The diagnosis: meningitis. The baby would have died before the day was over had he not been treated. The source of the meningitis: exposure to bacteria carried by an older infant in the same daycare center. The difference in age between the two infants: seven months. The older infant was nine months old and therefore, had a more developed immune system to fight the bacteria. The eight-week-old infant's less established immune system could not defeat the nearly fatal bacteria on its own. The doctor told the mother that children three months and younger should not be in childcare centers because of the substantially increased risk of illness.³

In this situation, the mother did not have the option to be home for three months. She was an active component servicemember,⁴ and the Army authorizes only six weeks of convalescent leave for a mother after childbirth. Originally, her commander granted an additional two weeks of ordinary leave. However, the mother's supervisor needed her in the office, and he revoked her additional leave. If the Family and Medical Leave Act⁵ (FMLA), which applies to civilians, applied to this active component mother, her infant would not have had to be in a daycare center and would not have contracted meningitis from the other child. The time has come for Congress to expand military leave entitlements⁶ to include provisions similar to those provided by the FMLA.

³ In order to protect the privacy of the minor child, the name of the servicemember is not included.

⁴ "Active component" refers to servicemembers serving an active duty service obligation. "Active duty" includes active component and can also refer to activated U.S. Army Reserve and National Guard servicemembers. Because retention issues and policies vary between U.S. Army Reserve, National Guard, and active component personnel, the author focuses on the active component throughout the article for purposes of consistency. *See infra* Section V.

⁵ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

⁶ 10 U.S.C. § 701 (2006).

During legislative hearings from 1985 to 1993, the United States (U.S.) Congress considered hundreds of other situations similar to the example above in attempting to establish a national family leave policy.⁷ Each example involved the almost impossible choice between family and financial security by virtue of sustained employment.⁸ Congress also heard counter-arguments from business owners describing the hardships they would face by being forced to implement the proposed labor protections.⁹ Finally, in 1993, President William J. Clinton signed Public Law 103-3, the FMLA.¹⁰ The FMLA provides up to twelve weeks of unpaid leave for “eligible employees”¹¹ under certain qualifying conditions.¹² Active duty servicemembers are not eligible employees.¹³

⁷ See, e.g., *Parental and Disability Leave: Joint Hearing on H.R. 2020 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation & Employee Benefits of the Comm. on Post Office & Civil Serv., and the Subcomm. on Labor Mgmt. Relations & the Subcomm. on Labor Standards of the Comm. on Educ. & Labor*, 99th Cong. 21 (1985) [hereinafter *PDLA H.R. Hearing*] (statement of Liberia Johnson, Parent, Charleston, S.C.); *Family and Medical Leave Act of 1993: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs, & Alcoholism of the Comm. on Labor & Human Resources*, 103d Cong. 21–24 (1993) (statements of Linda & Rudy Fernandez, Parents, Lynn, Mass.). In addition to these hearings, twelve other hearings took place during that time frame.

⁸ See sources cited *supra* note 7.

⁹ See, e.g., *Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Educ. & Labor*, 99th Cong. 79 (1986) (statement of Barbara Inkellis, General Counsel of Disclosure Information Group); *Family and Medical Leave Act of 1993: Hearing on H.R. 1 Before the Subcomm. on Labor-Mgmt. Relations of the Comm. on Educ. & Labor*, 103rd Cong. 91–101 (1993) (prepared statement of the National Federation of Independent Business). In addition to these hearings, twelve other hearings took place during that time frame.

¹⁰ 29 U.S.C. §§ 2601–2654.

¹¹ *Id.* § 2611(2)(A) (defining an eligible employee as an employee who had been employed for at least twelve months by the employer providing leave and “for at least 1250 hours of service with such employer during the previous twelve-month period”).

¹² *Id.* § 2612(a)(1)(A)–(D) (qualifying conditions include the birth of a son or daughter, adoption of a son or daughter, “[t]o care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter or parent has a serious health condition,” or “[b]ecause of a serious health condition that makes employee unable to perform the functions of the position of such employee”).

¹³ *Id.* § 2611(4)(A)(i) (defining eligible employee as one employed by “any person engaged in commerce or in any industry affecting commerce”). The FMLA specifically amends 5 U.S.C. § 6301 (2006) to cover civil service employees but does not amend 10 U.S.C. § 701 to cover servicemembers.

Leave authority for active duty servicemembers is provided by law and covered primarily by regulation.¹⁴ Army Regulation 600-8-10, *Leaves and Passes*, covers leave and pass programs for members of the U.S. Army.¹⁵ “Soldiers on active duty earn 30 days of leave a year with pay and allowances at the rate of 2 ½ days a month.”¹⁶ There are two different types of leave that might cover postpartum leave for an active component mother who has recently given birth: convalescent leave and ordinary leave. The Army does not have maternity leave.¹⁷

Regarding convalescent leave, hospital and unit commanders are authorized to grant up to forty-two days of convalescent leave following childbirth.¹⁸ The regulation states, “Convalescent leave is a nonchargeable absence from duty granted to expedite a soldier’s return to full duty after illness, injury, or childbirth.”¹⁹ Additionally, male and female servicemembers can request ordinary leave following the birth of a child. The unit commander has discretion in granting ordinary leave.²⁰ In addition to ordinary leave, fathers may receive paternity leave. President George W. Bush signed the National Defense Authorization Act of 2009²¹ on 14 October 2008, amending 10 U.S.C. § 701, which provides ten days paternity leave for active duty married members of the armed forces whose wife gives birth.²²

¹⁴ 10 U.S.C. § 701 (implemented in Army Regulation 600-8-10). U.S. DEP’T OF ARMY, REG. 600-8-10, LEAVES AND PASSES (15 Feb. 2006) [hereinafter AR 600-8-10]. The author mostly limits the parameters of this article to Army policies.

¹⁵ AR 600-8-10, *supra* note 14.

¹⁶ *Id.* para. 2-3.

¹⁷ The Army’s policy of providing convalescent leave is more similar to health care benefits in the civilian work force where leave is granted under temporary disability. This usually ranges from four to six weeks. Maternity leave, on the other hand, is a leave of absence for a new mother for the birth and care of her child. The Army’s policy does not provide for time to care for the baby. For example, if a servicemember mother gives birth to a premature infant that remains in the hospital for six weeks, the mother would not be entitled to any additional leave or to delay her convalescent leave to care for her infant when it is discharged from the hospital.

¹⁸ 10 U.S.C. § 70; AR 600-8-10, *supra* note 14, para. 5-3(b), (c).

¹⁹ AR 600-8-10, *supra* note 14, para. 5-3(a).

²⁰ *Id.* para. 4-3(c).

²¹ Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, Pub. L. No. 110-417, 122 Stat. 4356, 4449 (2008) [hereinafter NDAA 2009].

²² 10 U.S.C.S. § 701(j)(1)–(2) (LexisNexis 2008) (amended by NDAA 2009, Pub. L. No. 110-417, 122 Stat. 4356, 4449 (2008)). The Army recently issued implementing instructions. See Message, 101547Z Mar 09, PTC Washington, DC, subject: ALARACT 062/2009—Army Guidance for Paternity Leave Authorized by Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 [hereinafter Paternity Guidance].

While military regulations do provide servicemembers with options to take leave, they do not provide enough time for postpartum leave.²³ Congress could expand the FMLA to include active component servicemembers as “eligible employees.” However, applying all provisions of the FMLA to servicemembers goes too far.²⁴ This article proposes Congress amend 10 U.S.C. § 701 to entitle female servicemembers twelve weeks maternity leave following the birth of a child, male servicemembers four weeks paternity leave following the birth of a child, and male and female servicemembers six weeks parental leave following the adoption of a child.²⁵ This would provide benefits more consistent with the FMLA, state laws, international policy, and the Army’s own renewed commitment to families, without compromising the mission.²⁶

This article establishes five reasons why postpartum leave should be extended: (1) to improve infant health; (2) to improve parent health; (3) to improve infant-parent bonding; (4) to improve servicemember performance; and (5) to improve retention rates.

Opening with a discussion of the FMLA, Part II explains why the FMLA is the federal standard in the United States. Part III then describes the current Army leave policies and authorizations and aids the reader in understanding the genesis of postpartum leave in the Army. Part IV discusses corporate leave policies beyond those authorized by the FMLA, as well as state efforts to financially supplement family leave. Part IV also compares U.S. standards with international leave policies and highlights why the Army’s policies are inadequate. Part V discusses in depth the five reasons why the Army leave policy should be expanded. In Part VI, the author addresses possible counterarguments to expansion

²³ In the event of serious illness or death of an immediate family member, a Soldier may request emergency leave for up to thirty days. AR 600-8-10, *supra* note 14, para. 6-1. However, this article focuses primarily on portions of the FMLA pertaining to postpartum parental leave and will therefore only discuss leave related to childbirth.

²⁴ Expanding the entire FMLA to servicemembers, to include the provisions allowing twelve weeks to fathers for parental leave and twelve weeks to family members to care for seriously ill family members, would cause too great an impact on mission requirements than expanding portions of the FMLA.

²⁵ Current policy allows for twenty-one days leave following the adoption of a child. 10 U.S.C. § 701(i)(1) (2006). The author recommends six weeks to allow for various factors involved with adoption procedures, to include travel and minimum stay requirements in foreign adoptions, as well as bonding issues.

²⁶ *Army Family Covenant*, *supra* note 2.

of the Army leave policy. Finally, Part VII concludes with recommendations and a proposal.

II. The Family and Medical Leave Act

A. Overview

The FMLA mandates that certain employers provide eligible employees with up to twelve weeks of unpaid leave during any twelve-month period for the birth, adoption, or foster care placement of a son or daughter; to care for a spouse, parent, or son or daughter with a serious health condition; or “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.”²⁷ Except for certain exempt employees,²⁸ employers must restore employees to their original position of employment or “an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.”²⁹ “[T]he employer shall maintain coverage under any ‘group health plan’ . . . for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.”³⁰ If an employee does not return to work after taking leave, “[t]he employer may recover the premium that the employer paid . . . during any period of unpaid leave”³¹ Small businesses with “less than fifty employees” are exempt from providing FMLA benefits to its employees.³²

B. Background

Two months following the birth of her daughter in 1982, Lillian Garland attempted to return to her position as a receptionist with

²⁷ 29 U.S.C. § 2612(a) (2006).

²⁸ *Id.* § 2614(b). Exempt employees include, “salaried eligible employee[s] who [are] among the highest paid ten percent of the employees employed by the employer within seventy-five miles of the facility at which the employee is employed.” *Id.* The employee must also be “necessary to prevent substantial and grievous economic injury to the operations of the employer,” and “employer[s] must] notif[y] the employee of the intent of the employer to deny restoration” *Id.*

²⁹ *Id.* § 2614(a).

³⁰ *Id.* § 2614(c)(1).

³¹ *Id.* § 2614(c)(2).

³² *Id.* § 2611(2)(B)(ii).

California Federal Savings and Loan Association (Cal Fed).³³ Her employer informed her “that her job had been filled and that there were no receptionist or similar positions available.”³⁴ Ms. Garland filed a complaint claiming Cal Fed had violated § 12945(b)(2) of California’s Fair Employment and Housing Act³⁵ that required Cal Fed to reinstate her after she returned from pregnancy leave.³⁶ Cal Fed brought an action in the U.S. District Court for the Central District of California seeking both “a declaration that § 12945(b)(2) [was] inconsistent with and preempted by Title VII [of the Civil Rights Act of 1964] and an injunction against enforcement of the section.”³⁷ The district court found in favor of Cal Fed stating that providing such rights to women based on “pregnancy, childbirth, or related medical conditions [is] preempted by Title VII and [is] null, void, invalid and inoperative under the Supremacy Clause of the U.S. Constitution.”³⁸ Although the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court ultimately overturned the district court’s decision,³⁹ the district court’s decision gave birth to the FMLA and encouraged the law’s initiators to develop a non-gender-based family medical leave policy.⁴⁰

In the law, Congress set forth several findings warranting the passage of the FMLA. “[T]he number of single parent households and two-parent households in which the single parent or both parents work [had] increase[ed] significantly.”⁴¹ Society had simultaneously recognized the importance of having both parents participate in early childrearing on the development of children. However, “the lack of employment policies to accommodate working parents [forced] individuals to choose between job security and parenting.”⁴² Congress likewise recognized the importance of family participation in caring for family members with

³³ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 278 (1987).

³⁴ *Id.*

³⁵ CAL. GOV’T CODE § 12945(b)(2) (West 2008).

³⁶ *Cal. Fed. Sav. & Loan Ass’n*, 479 U.S. at 278.

³⁷ *Id.* at 279.

³⁸ *Id.*

³⁹ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 758 F.2d 390, 393 (9th Cir. 1985) (“[T]he district court’s conclusion that § 12945(b)(2) discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the PDA.”); *Cal. Fed. Sav. & Ass’n*, 479 U.S. 272.

⁴⁰ See generally RONALD D. ELVING, CONFLICT AND COMPROMISE 17–34 (1995) (providing insight to the initial family law proposal and potential sponsors).

⁴¹ 29 U.S.C. § 2601(a)(1) (2006).

⁴² *Id.* § 2601(a)(3).

serious health conditions.⁴³ Congress also found that women—more often than men—had the “primary responsibility for family caretaking,” and “such responsibility affect[ed] the working lives of women more than it affect[ed] the working lives of men.”⁴⁴ Finally, Congress specifically stated that laws protecting only women would “encourage employers to discriminate.”⁴⁵

Based on these findings, Congress intended the FMLA “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”⁴⁶ The FMLA is also meant to balance the needs of the employee with “the legitimate interests of employers and to minimize the potential for employment discrimination on the basis of sex by ensuring leave is available on a gender-neutral basis.”⁴⁷ The final articulated purpose of the FMLA is “to promote equal employment opportunity for women and men.”⁴⁸

Passing the FMLA proved to be an exceptionally difficult task.⁴⁹ Congress debated and revised several versions of the legislation for eight long years.⁵⁰ Supporters of the FMLA included mostly Democratic politicians representing constituents with compelling stories about balancing job security and family obligations, as well as women’s organizations, medical personnel supporting better early infant care and parental bonding, and religious organizations supporting stronger families.⁵¹ The key opponents included Republican politicians resisting Government interference with business, the National Federation of

⁴³ *Id.* § 2601(a)(2).

⁴⁴ *Id.* § 2601(a)(5).

⁴⁵ *Id.* § 2601(a)(6).

⁴⁶ *Id.* § 2601(b)(1).

⁴⁷ *Id.* § 2601(b)(3)(4).

⁴⁸ *Id.* § 2601(b).

⁴⁹ See generally ELVING, *supra* note 40 (providing a detailed analysis of the personalities, proponents, and opponents to the FMLA).

⁵⁰ See generally Parental and Disability Act of 1985 (PDLA), H.R. 2020, 99th Cong. (1985); Parental and Medical Leave Act of 1986 (PMLA), H.R. 4300, 99th Cong. (1986); Parental and Temporary Medical Leave Act of 1987, S. 249, 100th Cong. (1987); Family and Medical Leave Act of 1987 (FMLA of 1987), H.R. 925, 100th Cong. (1987); FMLA of 1989, H.R. 770, 101st Cong. (1989); FMLA of 1989, S. 345, 101st Cong.; 136 CONG. REC. H4451 (1990) (veto message of President George H.W. Bush); FMLA of 1991, H.R. 2, 102d Cong. (1991); FMLA of 1991, S. 5, 102d Cong. (1991); 138 CONG. REC. S14841, 1484–42 (1992) (veto message of President George H.W. Bush); FMLA of 1993, H.R. 1, 103d Cong. (1993); FMLA of 1993, S. 5, 103d Cong. (1993) (enacted).

⁵¹ See sources cited *supra* note 50.

Independent Business, business owners, and the National Education Association.⁵² Opponents were not against family leave, in concept, but opposed the Federal Government mandating the terms.⁵³ Additionally, during this time period, businesses were also in the process of implementing the Americans with Disabilities Act and the Civil Rights Act of 1991, which required businesses to provide handicapped-accessible facilities and to meet certain racial hiring quotas for their businesses.⁵⁴ Faced with additional mandates to provide national family leave, businesses fought the legislation and asked for the President's support. President Bush vetoed it twice.⁵⁵

What is now called the Family and Medical Leave Act was first introduced in the House of Representatives on 4 April 1985 as the Parental and Disability Leave Act of 1985.⁵⁶ Several key elements of the FMLA were debated and altered in different versions of the bill over the years, often as a result of compromise.⁵⁷ One main issue debated was the applicability of the FMLA. Those who qualified as employees varied in different bills, and employee status usually depended on the number of hours an individual had worked for an employer in the previous year.⁵⁸ The initial version did not include federal, state, or government workers.⁵⁹ The definition of employer always included any person engaged in commerce or an activity affecting commerce but varied depending on the number of employees the employer employed.⁶⁰ Some versions also featured exceptions for "highly compensated employees."⁶¹

⁵² See sources cited *supra* note 50. Many education associations were initially against mandated family leave because of concerns over "classroom disruption" and "educational mission." ELVING, *supra* note 40, at 137–38.

⁵³ *Id.*

⁵⁴ 42 U.S.C. §§ 12,101–03 (2006); 42 U.S.C. § 1981 (2006).

⁵⁵ 136 CONG. REC. H4451 (1990) (veto message of President George H.W. Bush); 138 CONG. REC. S14841, 1484–42 (1992) (veto message of President George H.W. Bush).

⁵⁶ PDLA of 1985, H.R. 2020, 99th Cong. (1985).

⁵⁷ See sources cited *supra* note 50.

⁵⁸ See *id.*

⁵⁹ H.R. 2020 §§ 101–103.

⁶⁰ See, e.g., FMLA of 1987, 100th Cong. § 101(3), (4) (1987) (defining employee as someone who had worked for employer for "not less than three consecutive months or not less than 500 hours, whichever occurs earlier"); FMLA of 1993, H.R. 1, 103d Cong. § 101(2) (1993) (defining employee as any person "employed for the last twelve months by the employer" and "for at least 1,250 hours of service in the previous twelve month period").

⁶¹ See, e.g., FMLA of 1989, H.R. 770, 101st Cong. § 106(b) (1989) (defining "highly compensated employees" as those amongst the highest paid 10% or one of the five highest paid employees).

The amount of available leave time varied from ten weeks to thirty-nine weeks and depended on the reason for and type of leave.⁶² In some versions of the bill, leave could be taken intermittently or on a reduced leave schedule.⁶³ The requirements for a qualifying serious medical condition also varied. The definition of “qualifying family members” was expanded in later versions to include parents and spouses.⁶⁴ Finally, although no version of the bill proposed paid leave, it was discussed and debated during almost every session, and proponents strongly supported its inclusion.⁶⁵

In addition to disagreements on the application of the FMLA, delays to the legislation, caused by the failure of key leadership in Congress to schedule subcommittee hearings, created further challenges.⁶⁶ In 1986, the House held hearings, but the Senate never scheduled hearings.⁶⁷ In 1987, the Senate again took no action.⁶⁸ In 1989 and 1991, after many hearings and mark-ups, Congress finally passed family leave legislation;⁶⁹ however, President H.W. Bush vetoed both versions, and the legislation did not become law. Finally, in 1993, after eight years of trying, Congress passed and the President signed this important legislation into law.⁷⁰

⁶² See, e.g., H.R. 2020, § 103(a)(2) (providing a minimum of eighteen weeks parental leave); FMLA of 1989, S. 345, 101st Cong., § 103 (1989) (providing ten weeks family leave). Other than testimony from pediatricians recommending at least twelve weeks parental bonding time, the legislative history does not provide insight to why drafters proposed the different time periods.

⁶³ See, e.g., S. 345 § 103(a)(2)(3).

⁶⁴ See, e.g., 136 CONG. REC. H2198, 2240 (1990) (amending H.R. 770 to expand family leave to cover spouses for the first time).

⁶⁵ See, e.g., *Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation & Employee Benefits of the Comm. on Post Office & Civil Serv.*, 99th Cong. 131 (1986) (statement of Dr. Meryl Frank, Director, Infant Care Leave Project, Yale Bush Center in Child Development and Social Policy) [hereinafter Frank Statement].

⁶⁶ See generally ELVING, *supra* note 40 (explaining the actions taken to schedule hearings on the FMLA).

⁶⁷ See sources cited, *supra* note 50.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ 29 U.S.C. §§ 2601–2654 (2006); William J. Clinton, *Remarks on Signing the FMLA of 1993* (Feb. 5, 1993), 28 WKLY. COMP. PRES. DOC. 143.

C. Current Status of the FMLA

As of 2005, “[o]ver fifty million Americans had used the FMLA to take leave from their employment.”⁷¹ Of those, 26% took leave to care for a new child.⁷² However, sixteen years after its passage, proponents of the FMLA recognize its inadequacies. In addition to regulatory concerns over qualifying conditions and intermittent leave,⁷³ the most significant deficiency of the FMLA is the inability of some individuals to take necessary leave because it is unpaid.⁷⁴ On 4 June 2009, the House of Representatives passed the Federal Employees Paid Parental Leave Act providing financial compensation for four of the twelve weeks of leave.⁷⁵ A similar version was introduced in the Senate on 29 January 2009 and referred to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia on 19 March 2009.⁷⁶

In 2008, Congress extended eligibility of the FMLA to allow family members of military personnel to use their FMLA benefits to assist the military member with deployment preparation and care of the military member’s dependants.⁷⁷ Congress also extended the FMLA to allow immediate family members of servicemembers wounded in the Global War on Terror to take six months of unpaid leave to care for the servicemember.⁷⁸ In essence, Congress continues to afford opportunities to civilians to care for their family servicemembers, but Congress still does not extend those benefits to servicemembers to care for their own families.

⁷¹ *Roundtable Discussion: The Family and Medical Leave Act: A Dozen Years of Experience: Hearing of the Comm. on Health, Educ., Labor, & Pensions*, 109th Cong. 8 (2005) [hereinafter *Roundtable Hearing*] (statement of Debra Ness, President, National Partnership for Women & Families).

⁷² AAUW, *The Family and Medical Leave Act: Facts and Statistics*, <http://aauw.org/advocacy/laf/lafnetwork/library/FMLAstatistics.cfm> (last visited May 27, 2009).

⁷³ LINDA LEVINE, CONG. RESEARCH SERV. REPORT, *THE FAMILY AND MEDICAL LEAVE ACT: RECENT LEGISLATIVE AND REGULATORY ACTIVITY*, RL31760, at 7–10 (2008).

⁷⁴ *Id.* at 6–7.

⁷⁵ Federal Employees Paid Parental Leave Act, H.R. 626, 111th Cong. (2009).

⁷⁶ Federal Employees Paid Parental Leave Act, S. 354, 111th Cong. (2009).

⁷⁷ 29 U.S.C.S. § 2612(a)(1)(E) (LexisNexis 2008) (*amended by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 § 585(a) (2008)).

⁷⁸ *Id.* § 2612(a)(3).

III. The Army Leave Policies⁷⁹

A. Postpartum Leave

1. Convalescent Leave for Female Soldiers Following Childbirth

To understand the current status of the Army's postpartum leave policies, it is important to understand the origin of regulations applying to pregnant women in the military. Congress established the Women's Army Auxiliary Corps (WAAC) on 14 May 1942.⁸⁰ Initially, women were not technically a part of the Army, and Army Regulations did not govern WAAC members.⁸¹ However, the WAAC drafted a set of regulations that covered, among other things, discharges from service.⁸² Under these rules, "[w]omen had been discharged as soon as possible after a doctor had certified the condition [pregnancy]."⁸³ After the WAAC became the Women's Army Corps (WAC) on 1 July 1943,⁸⁴ and then a part of the Regular Army on 12 June 1948,⁸⁵ the Army continued to discharge women for pregnancy.⁸⁶ Because the law integrating the WAC into the Regular Army did not specifically address the policy of

⁷⁹ The other Armed Services' postpartum policies are similar to the Army's. All of the services provide forty-two days of convalescent leave to recover from childbirth. The Navy has the longest postpartum operational deferment of one year, whereas the Army, Air Force, and Marine Corps only provide six months. Message, 151521Z Jul 08, PTC Washington DC, subject: ALARACT 171/2008—Notification of Pending Postpartum and Adoption Deferment Policy Change [hereinafter Postpartum Deferment Policy Change]. The Coast Guard offers a two-year sabbatical to its servicemembers called the "Care for Newborn Children Program." U.S. DEP'T OF HOMELAND SECURITY, U.S. COASTGUARD, COMDTINST M1000.6A, PERSONNEL MANUAL (with Changes 1 through 41) [hereinafter COMDSTINST M1000.6A]. For several years, the Marine Corps has been providing ten days non-chargeable leave under its Permissive Temporary Additional Duty Regulation to its male servicemembers whose wives recently gave birth.

⁸⁰ An Act to Establish the Women's Army Auxiliary Corps, Pub. L. No. 77-554, 56 Stat. 278 (1942).

⁸¹ BETTIE J. MORDEN, *THE WOMEN'S ARMY CORPS 1945-1978*, at 5 (1990).

⁸² *Id.* at 138.

⁸³ *Id.*

⁸⁴ An Act to Establish the Women's Army Corps in the Army of the United States, Pub. L. No. 78-110, 57 Stat. 371 (1943).

⁸⁵ Women's Armed Services Integration Act, Pub. L. No. 80-625, 62 Stat. 356 (1948).

⁸⁶ MORDEN, *supra* note 81, at 138 (citing U.S. DEP'T OF ARMY, REG. 615-361, ENLISTED MEN, DISCHARGE MEDICAL (4 Nov. 1944); WAAC Circular 17 (29 Dec. 42); WAAC Circular 140 (citing U.S. DEP'T OF ARMY, REG. 625-361, DISCHARGE OF ENLISTED PERSONNEL, MEDICAL (14 May 1947) (C3, 23 Feb. 1949) and SPECIAL REG. 625-5-5, DISCHARGE OF WAC OFFICERS AND WARRANT OFFICERS FOR MARRIAGE AND PREGNANCY (11 Jan. 49)).

discharging women for pregnancy, President Truman issued Executive Order 10240 in 1951 authorizing the military to discharge military women “on parenthood.”⁸⁷ The services in turn made the discharges mandatory, which continued for several years.⁸⁸

In 1967, the Army conducted the ’75 Personnel Concept Study “to develop a new personnel management concept for the post-Vietnam era,” with a “focus on reducing draft calls during peacetime.”⁸⁹ In addition to other recommendations, “[t]he study also examined the idea of retaining pregnant women and mothers on active duty as a means of reducing WAC losses.”⁹⁰ However, the study concluded, “there are too many more cogent reasons for this not being permitted . . . The members of the Women’s Army Corps must possess the same degree of mobility as male soldiers,”⁹¹ and recommended women continue to be discharged when they became pregnant.⁹²

As the Women’s Rights Movement gained momentum in the late 1960s,⁹³ female servicemembers challenged pregnancy policies in court,⁹⁴ and Congress, pressure groups, and citizens alleged the military

⁸⁷ *Id.* at 140 (citing Exec. Order No. 10240 (Apr. 27, 1951), Regulations Governing the Separation from the Service of Certain Women Serving in the Regular Army, Navy, Marine Corps, or Air Force, in U.S. DEP’T OF ARMY, BULL. (14 May 1951)).

⁸⁸ *Id.* (citing U.S. DEP’T OF ARMY, REG. 615-361, ENLISTED PERSONNEL, DISCHARGE ON MARRIAGE, PREGNANCY AND PARENTHOOD (21 Sept. 1954); SPECIAL REG. 605-225-10, RELEASE OF WOMEN OFFICERS BECAUSE OF MARRIAGE, PREGNANCY, OR PARENTHOOD) (17 June 1954)).

⁸⁹ *Id.* at 228.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* The only person to question this policy was Senator Daniel K. Inouye of Hawaii, who asked during the October 19, 1967 Senate Armed Services Committee hearing, “Why hasn’t the service done something about this? It would appear to me that by our rules and regulations, we discourage our women members to carry on without considering the normal and natural life of raising families.” *Id.* at 213.

⁹³ Federal legislation and executive actions included The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (ensuring equal pay for equal work for women employed in jobs controlled by interstate commerce laws); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prohibiting sex discrimination in employment unless gender was a bona fide occupational qualification); and Exec. Order No. 11,246, 3 C.F.R. 339 (Sept. 24, 1965) (prohibiting sex discrimination in the Federal Government or in employment generated by federal contracts).

⁹⁴ MORDEN, *supra* note 81, at 234 (citing Interview with Brigadier General Elizabeth Hoisington, U.S. Army Retired (Nov. 3, 1980); JEANNE M. HOLME, WOMEN IN THE MILITARY, AN UNFINISHED REVOLUTION 297 (1982)).

services discriminated against women.⁹⁵ Consequently, the Army reviewed its policies involving entry and retention of pregnant servicemembers and female servicemembers with children.⁹⁶ Despite objections from key leaders in the Army,⁹⁷ effective 9 April 1971, women could request waivers for disqualification from entry and retention because of pregnancy, terminated pregnancies, and parenthood.⁹⁸

In June 1974, the Deputy Assistant Secretary of Defense for Military Personnel Policy, over opposition from the WAC and the Deputy Chief of Staff for Personnel, “directed the services to cease invoking such policies” that authorized involuntary discharge of a woman who became pregnant, became a parent, or assumed custody of a minor.⁹⁹ Accordingly, the Army made several changes to the existing regulation, to include providing that “[t]he maximum postpartum absence would be six weeks unless the surgeon general of the Army approved an extension.”¹⁰⁰ “[T]he Secretary of Defense’s general counsel appointed the Army as the executive agent to develop uniform pregnancy and parenthood policies and to draft legislation required to repeal the offending sections of the law.”¹⁰¹ Department of Defense (DoD) directed

⁹⁵ *Id.*

⁹⁶ *Id.* at 235. The Deputy Assistant Secretary of the Army for Personnel Policy and Programs, John R. Kester, “believed that, as a matter of equity, the Army should not bar married women or unwed mothers from initial enlistment or appointment or from retention.” *Id.* at 234. He directed the Deputy Chief of Staff for Personnel to amend Army Regulations. *Id.*

⁹⁷ At that time, the Under Secretary for the Army ordered the revision of Army Regulations to allow waivers for illegitimate pregnancies and responsibility for children under eighteen years of age despite the Deputy Chief of Staff for Personnel’s request for more time to “study the impact.” *Id.* at 235 (explaining Mr. Beal’s reason was to avoid “possible adverse court rulings” while allowing the Army to decide each case individually).

⁹⁸ *Id.* at 239 (citing Memorandum from Deputy Assistant Sec’y of the Army, to Sec’y, Gen. Staff, subject: Elimination of Discriminatory Provisions of Army Regulations Pertaining to Standards of Service (25 Mar. 1971)).

⁹⁹ *Id.* at 305 (citing Memorandum from Deputy Assistant Sec’y of the Army, to Assistant Sec’y of the Military Dep’ts., subject: Involuntary Separation of Women for Pregnancy and Parenthood (7 June 1974)).

¹⁰⁰ *Id.* at 306 (citing Memorandum from Deputy Chief of Staff Personnel to Deputy Assistant Sec’y of Def., subject: Involuntary Separation of Women for Pregnancy and Parenthood (5 Nov. 1974); Message 061400Z Jun 75, Dep’t of Army, subject: Interim Change to Chapters 6 and 8, Army Regulation 635-200 and the Trainee Discharge Program (implementing the policy changes)).

¹⁰¹ *Id.* (citing Memorandum from Office of the Gen. Counsel, Dept. of Def., to Sec’y of Army, subject: Misc. 1425, proposed legislation “to amend title 10, United States Code,

the Army and the Navy to implement their new policies by 15 May 1975.¹⁰²

Other changes to the Army policy included “four weeks prenatal sick-in-quarters time, an unrestricted number of days for hospitalization during childbirth, and six to eight weeks of postpartum convalescent leave.”¹⁰³ Pregnant servicemembers were not sent overseas and were temporarily deferred from overseas duty for six weeks following childbirth.¹⁰⁴ Male servicemen were also permitted to seek a twelve-week deferment from overseas duty if their wife was in “an advanced stage of pregnancy.”¹⁰⁵ Despite time lost because of pregnancy-associated leave, subsequent DoD studies indicated, “[E]nlisted men had a higher rate of lost time than women” due to “desertion, AWOL, and alcohol and drug abuse.”¹⁰⁶ Such studies resulted in “[t]he Army (and the other services) abandon[ing] their efforts to regain the authority to discharge women involuntarily for pregnancy and accept[ing] the attendant costs in time and money.”¹⁰⁷

The current Army Regulation continues to provide female Soldiers the 1974 standard of convalescent leave following childbirth.¹⁰⁸ The unit

to repeal provisions authorizing involuntary separation of women for pregnancy and parenthood.” (29 Nov. 1974). “The Judge Advocate General prepared the draft legislation.” *Id.*

¹⁰² *Id.* at 307 (citing Memorandum from Deputy Assistant Secretary of Defense to Assistant Secretary of the Depts. of Army and Navy, subject: Involuntary Separation of Women for Pregnancy and Parenthood (11 Apr. 1975)).

¹⁰³ *Id.* at 309 (citing Disposition Form Deputy Chief of Staff for Personnel to Commander, Military Personnel Ctr., subject: Study of WAC Pregnancy Cases and Female Personnel with Dependent Children, and Information Paper, Officer of the Surgeon General (13 May 1975)).

¹⁰⁴ *Id.* (citing Disposition Form, Deputy Chief of Staff for Personnel to Commander, Military Personnel Ctr., subject: Study of WAC Pregnancy Cases and Female Personnel with Dependent Children (13 May 1975); U.S. DEP’T OF ARMY, REG. 635-5 LEAVE, PASS, ADMINISTRATIVE ABSENCES AND PUBLIC HOLIDAYS (1 June 1975)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 310 (citing BINKEN & BACH, WOMEN AND THE MILITARY 60 (1977)).

¹⁰⁷ *Id.*

¹⁰⁸ AR 600-8-10, *supra* note 14, para. 5-3. The author was unable to find any evidence that postpartum convalescent leave for female servicemembers has been studied or considered again since first implemented in 1974. *See* Telephone Interview with Colonel Peter Nielsen, Obstetrician and Gynecological Consultant to the Surgeon Gen. (Feb. 18, 2009) [hereinafter Nielsen Telephone Interview]; Telephone Interview with Colonel Scott Goodrich, Senior Med. Staff Officer, Health Policy & Services Directorate, Office of the Surgeon Gen. (Jan. 15, 2009); E-mail from Major Matthew Fandre, Med. Doctor, United States Army Special Operations Command, to author (Oct. 21, 2008, 22:12 EST)

and hospital commander are the approval authorities,¹⁰⁹ and the commander is required to “limit leave to the minimum amount of time essential to meet medical needs.”¹¹⁰ The commander is also required to “consider granting soldier’s request for additional accrued, advanced, and or excess leave, as appropriate.”¹¹¹ Although the regulation states, “Soldiers are authorized forty-two days after pregnancy and childbirth,”¹¹² it also states, “A commander may require early return of a soldier if that soldier’s absence will clearly have an adverse impact on readiness or operational mission of the soldier’s unit.”¹¹³ “A cognizant military health authority must determine that such action is medically acceptable.”¹¹⁴ From a medical standpoint, the six weeks of postpartum leave is focused more on the mother and not the child.¹¹⁵ Guidance regarding medical profiles for female Soldiers is contained in Army Regulation 40-501, which references AR 600-8-10.¹¹⁶ AR 40-501, *Standards of Medical Fitness*, has only one section on postpartum. Section 7-10, Postpartum profiles, states, “convalescent leave (as prescribed by AR 600-8-10) after delivery will be for a period determined by the attending physician. This will normally be for 42 days following normal pregnancy and delivery.”¹¹⁷

2. Paternity Leave

Signed by President George W. Bush on 14 October 2008, section 532 of the 2009 National Defense Authorization Act amended 10 U.S.C. § 701 to provide, “Under regulations prescribed by the Secretary concerned, a married member of the armed forces on active duty whose

(on file with author) [hereinafter Fandre e-mail]; E-mail from Lisa Young, United States Army Ctr. for Health Promotion & Preventive Med., to author (19 Jan. 2009, 23:09 EST) (on file with author); E-mail from Colonel Karen O’Brien, TRADOC Surgeon Gen., to author (9 Feb. 2009 16:43 EST) (on file with author).

¹⁰⁹ AR 600-8-10, *supra* note 14, para. 5-3.

¹¹⁰ *Id.* tbl.5-2.

¹¹¹ *Id.*

¹¹² *Id.* para. 5-7d.

¹¹³ *Id.* para. 5-7d(2). Author has not found any evidence of a commander giving less than six weeks convalescent leave.

¹¹⁴ *Id.*

¹¹⁵ Fandre e-mail, *supra* note 108.

¹¹⁶ *Id.*

¹¹⁷ U.S. DEP’T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 7-10 (14 Dec. 2007) [hereinafter AR 40-501].

wife gives birth to a child shall receive 10 days of paternity leave.”¹¹⁸ This law was a FY 2010¹¹⁹ Unified Legislative Budget¹²⁰ proposal initiated by the Navy.¹²¹ In its original form, the proposal included twenty-one days of leave, which was permissive.¹²² The final legislation reduced the leave to ten days, but made it mandatory.¹²³ The DoD has not published instructions to the regulation; however, it authorized the services to implement their own instructions. The Army released its implementing instruction on 10 March 2009.¹²⁴

B. Family and Parental Leave Options

Two other leave options are available to parents. First, active component servicemembers are authorized twenty-one days adoption leave.¹²⁵ Second, ordinary leave, as governed by AR 600-8-10, is the only option available to a parent with a seriously ill newborn following six weeks of convalescent leave.¹²⁶ Ordinary leave is discretionary—the commander can deny such requests.¹²⁷ A civilian parent in the same situation can take twelve weeks of leave.¹²⁸ This is especially relevant for mothers of premature infants. In these cases, the baby often remains in the hospital for several weeks. When the infant is ready to return home, the female servicemember has no parental leave option because her convalescent leave cannot be used to care for the child beyond the

¹¹⁸ NDAA 2009, Pub. L. No. 110-417, 122 Stat. 4356, 4449 (2008).

¹¹⁹ Because it did not involve any budgetary issues, it was able to be passed through sooner than FY 2010. Telephone Interview with Jon Clark, Staff Member, Senate Armed Services Comm. (Jan. 16, 2009) [hereinafter Clark Telephone Interview].

¹²⁰ A Unified Legislative Budget proposal is a mechanism used to change the law.

¹²¹ E-mail from Lieutenant Colonel Matthew Voithofer, G-1, Compensation and Entitlements, U.S. Army, to author (Jan. 15, 2009, 14:41 EST) (on file with author).

¹²² Clark Telephone Interview, *supra* note 119.

¹²³ *Id.* (explaining the only reason for the change was negotiation).

¹²⁴ Paternity Guidance, *supra* note 22.

¹²⁵ 10 U.S.C. § 701(i)(1) (2006). This was implemented more to enable servicemembers to meet the procedural adoption requirements such as spending a certain amount of time home with a newly adopted child. It was not implemented in an effort to allow bonding time. Clark Telephone Interview, *supra* note 119.

¹²⁶ AR 600-8-10, *supra* note 14, para. 4-3.

¹²⁷ *Id.* para. 4-3(c).

¹²⁸ 29 U.S.C. § 2612(a)(1)(A–D) (2006).

forty-two days authorized after the birth. There is no option to postpone a portion of the convalescent leave for when the baby returns home.¹²⁹

IV. Corporate, International, and State Parental Leave Policies

A. Corporate Parental Leave Policies

Corporate leave policies have steadily improved over the past twenty years as more working mothers enter or remain in the workforce. In 1989, “[f]ifty-six percent of all American women and more than one-half of all mothers with infants under one year of age work[ed] outside the home.”¹³⁰ Senator Christopher Dodd explained in legislative hearings,

There were twenty-nine million two-earner families in the United States, with 25 million children, and almost 8 million single-parent families, with an equal number of children—33 million children. One out of every other child is being reared today in a family where either both parents work or only one parent is providing for that family.¹³¹

During the same year, a survey of Fortune 500 companies found that “[o]nly half the employers surveyed offer[ed] critical infant-mother ‘bonding’ leave beyond the childbirth-related disability period.”¹³² As of 2007, 59.3% of U.S. women were working,¹³³ and 71% of women in the workforce had children under the age of eighteen.¹³⁴ Statistics from a 2008 study by the Joint Economic Committee found that 75% of Fortune

¹²⁹ AR 600-8-10, *supra* note 14, para. 5-3; Nielsen Telephone Interview, *supra* note 108 (explaining servicemembers have requested such accommodations, but the commander routinely denies due to the stated purposes of the regulation).

¹³⁰ *Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 101st Cong. 2 (1989) [hereinafter *FMLA of 1989 S. Hearing*] (statement of Sen. Dodd, Chairman, Subcomm. on Children, Family, Drugs and Alcoholism, Comm. on Labor & Human Resources).

¹³¹ *Id.*

¹³² *Id.*

¹³³ U.S. BUREAU OF LABOR SERVICES, HOUSEHOLD DATA ANNUAL AVERAGES tbl.2 (2008) [hereinafter *HOUSEHOLD DATA ANNUAL AVERAGES*] (providing employment status of the civilian non-institutional population sixteen years and over by sex from 1973 to date).

¹³⁴ U.S. BUREAU OF LABOR STATISTICS, BULL. 2307, tbl.578 (2008) (Employment Status of Women by Marital Status and Presence and Age of Children: 1997 to 2007).

100 companies offer new mothers paid maternity leave, typically lasting six to eight weeks.¹³⁵ Another study by Working Mother Media, Inc., publisher of *Working Mother Magazine*, selected the one hundred family-friendliest companies in the United States.¹³⁶ More than 28% provided nine or more weeks of paid maternity leave, and more than half provided some amount of paid paternity leave varying from one to six weeks.¹³⁷ Eighty top law firms provide at least twelve weeks of some type of compensated maternity leave.¹³⁸ The paid portion is usually broken down into two parts: short-term, insurance-paid medical leave (usually six to eight weeks), and firm-paid parental or childcare leave.¹³⁹ Additionally, the FMLA still entitles parents to take what is remaining of twelve weeks as unpaid leave.¹⁴⁰

Even though many companies offer generous benefits, many advocates argue that the FMLA should be expanded for those who are not able to work for such companies. Advocates argue that when compared to the rest of the industrialized world,¹⁴¹ the United States is out of synch. Ms. Debra Ness, President of the National Partnership for Women and Families in Washington, D.C., provided the following statement during a Senate hearing on 23 June 2005:

We live at a time when three-quarters of families
have both parents working. And we still are very badly

¹³⁵ JOINT ECONOMIC COMMITTEE, MAJORITY STAFF, PAID FAMILY LEAVE AT FORTUNE 100 COMPANIES: A BASIC STANDARD BUT STILL NOT THE GOLD STANDARD 6 (2008), *available at* <http://www.jec.senate.gov/index.cfm?FuseAction=Reports.Reports> (follow “March 2008” hyperlink; then follow “Paid Maternity Leave” hyperlink) [hereinafter JEC PAID FAMILY LEAVE].

¹³⁶ INSTITUTE FOR WOMEN’S POLICY RESEARCH, MATERNITY LEAVE IN THE UNITED STATES (2007), *available at* www.iwpr.org/pdf/parentalleaveA131.pdf [hereinafter IWPR REPORT].

¹³⁷ *Id.* at 8 (explaining some of the companies offering the best benefits include Goldman, Sachs & Co. (offering sixteen weeks of paid maternity leave, plus four weeks for new fathers and eight weeks for adoptive parents), Pillsbury Winthrop Shaw Pittman LLP (offering eighteen weeks of paid leave), Johnson & Johnson (offering twenty-six weeks of paid maternity leave to new mothers with five year tenure)).

¹³⁸ The Associate Pirate, *Maternity Leave, Part Deux*, <http://associatepirate.com/2008/02/21/maternity-leave-part-deux> (last visited Jan. 19, 2009) [hereinafter Associate Pirate].

¹³⁹ JEC PAID FAMILY LEAVE, *supra* note 135, at 8.

¹⁴⁰ Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a) (2006).

¹⁴¹ Jamie L. Hartman, *House Passes Paid Parental Leave Bill; President Expected to Veto*, OHMYGOV!, June 20, 2008, http://ohmygov.com/blogs/general_news/archive/2008/06/20/house-passes-paid-parental-leave-bill-president-expected-to-veto.aspx (explaining more than 163 industrialized nations guarantee paid maternity leave, and forty-five of those also provide paid paternity leave).

out of sync with the realities that most working families face because we still primarily operate as a society on the assumption that there is still a full-time caregiver at home. We as a Nation care a great deal about family values and I think the FMLA was a step toward putting those values into action in ways that really support families.

Since its enactment, 50 million Americans have taken advantage of the FMLA; 42 percent of those have been men, 58 percent of those have been women. And we know from some of the research that has been done that many of those individuals say that it led to quicker recoveries, it led to their ability to follow doctor's orders more carefully, it led to avoidance of parents being put into nursing homes. And we also know that 98 percent of employees who have taken advantage of FMLA have returned to the same employer.¹⁴²

Similarly, another professional expert who advocated for the implementation of the FMLA during the eight years it was debated in Congress was Dr. Meryl Frank, then the Director of the Infant Care Leave Project, Yale Bush Center in Child Development and Social Policy. Dr. Frank testified regarding the findings of the Yale Bush Center Advisory Committee on Infant Care Leave, which recommended passage of

policies which would allow employees a leave of absence for a period of time sufficient to enable mothers to recover from pregnancy and childbirth and parents to care for newborn or newly adopted infants. Such a leave would provide income replacements, benefit continuation and job protection. The leave would be available to either mother or father for a minimum of six months, and would include partial income replacement (75% of salary) for three months, up to a realistic maximum benefit sufficient to assure adequate basic resources for the families who need them most. Benefit

¹⁴² Roundtable Hearing, *supra* note 71, at 8.

continuation and job protection would be available for the entire six-month leave period.¹⁴³

The military should take these statistics and policy recommendations into consideration in establishing more family-friendly parental leave policies. The demographics of families in the military are similar to those of civilians. More male servicemembers have working spouses, requiring male servicemembers to be more involved in parenting than in previous generations. More importantly, 38.1% of all females in the Army are married to other servicemembers.¹⁴⁴ If the military does not keep pace with the benefits civilian companies offer to retain their own most talented employees, the military will continue to lose talented servicemembers.

B. International Parental Leave Policies

The FMLA provides for less parental leave than any other industrialized nation.¹⁴⁵ The U.S. military provides even less than the FMLA.¹⁴⁶ In the 1970s, after the U.S. Army started allowing female servicemembers to remain in the military following childbirth, nine European countries were already increasing job-protected paid leave on average from ten to twenty-six weeks and full-pay weeks from eight to twenty-one weeks.¹⁴⁷ The European Union mandates a minimum of fourteen weeks paid parental leave.¹⁴⁸ In Canada, mothers receive “job protection and benefit entitlement” for a maximum of one year in most provinces.¹⁴⁹ “Income replacement for maternity leave in Canada is

¹⁴³ Frank Statement, *supra* note 65.

¹⁴⁴ U.S. DEP'T OF THE ARMY, DEPUTY CHIEF OF STAFF OF PERSONNEL, OFFICE OF ARMY DEMOGRAPHICS, FY08 ARMY PROFILE (2008) [hereinafter FY08 ARMY PROFILE] (on file with author).

¹⁴⁵ *Family and Medical Leave Act of 1989: Hearing Before the Comm. of the Whole House on the State of the Union*, 101st Cong. 27 (1990) (statement of Rep. George Miller, Democratic Congressman, explaining twenty-four African countries, nine Asian countries, seven Middle Eastern countries, nineteen European countries and fourteen Central American countries have maternity leave, and most offer paid leave).

¹⁴⁶ AR 600-8-10, *supra* note 14, para. 5-3 (providing forty-two days convalescent leave); 29 U.S.C. §§ 2612(a) (2006) (providing twelve weeks parental leave).

¹⁴⁷ Christopher J. Ruhm, *Parental Leave and Child Health*, 19 J. OF HEALTH ECON. 931, 942-43 (2000).

¹⁴⁸ Katharina Staehelin et al., *Length of Maternity Leave and Health of Mother and Child—A Review*, 52 INT. J. PUB. HEALTH 202, 202 (2007).

¹⁴⁹ Michael Baker et al., *Maternal Employment, Breastfeeding, and Health: Evidence from Maternity Leave Mandates*, 27 J. OF HEALTH ECON. 871, 872 (2008).

governed by the Employment Insurance program. Most other terms of the leave, including job protection, are determined by provincial labor market standards.”¹⁵⁰ In Sweden, parents are authorized approximately eighteen months of parental leave, and leave can be shared between the mother and the father.¹⁵¹ Germany provides fourteen weeks of paid maternity leave, and France provides sixteen weeks, both with one hundred percent wage replacement.¹⁵² “In Great Britain, 90% of wages are provided for the first six weeks, with a flat rate thereafter for a minimum total of fourteen weeks. Mothers in Norway may receive either 100% paid maternity leave for forty-two weeks, or 80% paid leave for fifty-two weeks.”¹⁵³

The military in these countries extend these same benefits to their servicemembers.¹⁵⁴ A 2009 comparative report on reproductive health studying eight navies found the U.S. Navy offered the least maternity leave to its servicemembers.¹⁵⁵ The country offering the second lowest amount of maternity leave was Germany, which provides fourteen weeks paid maternity leave—eight weeks more than the United States. The U.S. military is shamefully behind both civilian corporations and other countries in providing necessary parental leave to new parents.

¹⁵⁰ *Id.* at 874.

¹⁵¹ See Asa Premberg et al., *Experiences of the First Year as Father*, 22 SCAND. J. CARING SCI. 56, 56 (2008).

¹⁵² Ruhm, *supra* note 147, at 938.

¹⁵³ Gerald Calnen, *Paid Maternity Leave and Its Impact on Breastfeeding in the United States: An Historic, Economic, Political, and Social Perspective*, 2 BREASTFEEDING MED. NO. 1, at 34, 39 (2007).

¹⁵⁴ See, e.g., GREAT BRITAIN DEFENSE INSTRUCTIONS AND NOTICES, MATERNITY ARRANGEMENTS FOR SERVICEWOMEN IN THE REGULAR ARMED FORCES para. 18 (Jan 2007) (on file with author) (providing fifty-two weeks total maternity leave, of which twenty-six weeks are paid); Lakshmi Fjord et al., *Reproductive Health in Eight Navies: A Comparative Report on Education, Prevention Services, and Policies on Pregnancy, Maternity/Paternity Leaves, and Childcare*, 174 MIL. MED. NO. 3, at 278 (2009); Telephone Interview with Major Marla Dow, Canadian Army, The Judge Advocate Gen.’s Legal Ctr. & Sch. (Mar. 12, 2009) (explaining the Canadian military follows the civil code and provides a year paid maternity leave, most often back-filled by a reservist); Telephone Interview with Mr. Thomas Nix, German Liaison to The Judge Advocate Gen.’s Legal Ctr. & Sch. (Mar. 12, 2009) (explaining the German military follows the civil code and provides fourteen weeks paid maternity leave).

¹⁵⁵ Fjord et al., *supra* note 154, at 285.

C. State Parental Leave Policies

As a result of inadequate compensation, which prevents many parents from using FMLA leave, six states and Puerto Rico have introduced paid family leave programs.¹⁵⁶ California uses a combination of leave sources to provide parental leave, to include State Disability Insurance, Parental Leave, and most recently, the Family Temporary Disability Insurance (FTDI).¹⁵⁷ In addition to ten weeks of pregnancy-related leave, employees that contribute to FTDI receive up to 5% of their wages for six weeks.¹⁵⁸ New Jersey also provides six weeks of partial wage-replacement in addition to pregnancy-related leave.¹⁵⁹ Similarly, Hawaii, New York, and Rhode Island have Temporary Disability Insurance programs that provide six weeks of wage replacement.¹⁶⁰ Washington provides five weeks of partially paid leave,¹⁶¹ and Illinois recently introduced a Family Leave Insurance Program that would allow for four weeks paid family leave.¹⁶²

The time is ripe for military leaders and Congress to fully review postpartum leave policies for its servicemembers. The next section of this article details several reasons supporting longer parental leave.

V. Reasons Supporting Longer Postpartum Leave

Providing longer parental leave to servicemembers will benefit all facets of the "Army Team." The infant children of servicemembers will benefit by improved health. The health of parent servicemembers will likewise improve. This improved health of parent and child will lead to improved psychological health and bonding between both parent and child and improved infant development. In turn, this will lead to better performance at work by the postpartum parents. Finally, expanding postpartum leave policies will benefit the Army as a whole as it will lead to better performance, more loyal service, and improved retention rates.

¹⁵⁶ Calnen, *supra* note 153, at 38; JEC PAID FAMILY LEAVE, *supra* note 134, at 12.

¹⁵⁷ Nina Fendel et al., *California's New Paid Family Leave Law: Family Temporary Disability Insurance (FTDI)*, 10 CPER J. 161 (2003).

¹⁵⁸ *Id.* at 11.

¹⁵⁹ 2008 N.J. Laws 17.

¹⁶⁰ JEC PAID FAMILY LEAVE, *supra* note 135, at 13.

¹⁶¹ *Id.*

¹⁶² *Id.*

A. Infant Health

1. Generally

Parental leave policies providing at least two to three months of paid leave improve the health of children.¹⁶³ One study determined “an extra week of paid maternity leave correlates with a 2% to 3% reduction in infant mortality rates,”¹⁶⁴ but even as recently as 2000, there were very few studies on the relationship between parental leave entitlements and infant health.¹⁶⁵ In 2000, Christopher Ruhm published results from a study using data from sixteen European countries collected between 1969 and 1994.¹⁶⁶ He found that rights to parental leave are associated with substantial decreases in pediatric mortality:

In particular, there is a much stronger negative relationship between leave durations and either post-neonatal mortality (deaths between 28 days and 1 year of age) or child fatalities (deaths between the first and fifth birthday) than for perinatal mortality (fetal deaths and deaths in the first week), neonatal mortality (deaths in the first 27 days), or in the incidence of low birth weight.¹⁶⁷

Ruhm further found, “A ten-week increase in paid leave is predicted to reduce infant mortality rates by between 2.5% and 3.4%. By contrast, unpaid leave is unrelated to infant mortality, which makes sense if parents are reluctant to take time off work when wages are not replaced.”¹⁶⁸ Additionally, “a year of job-protected paid leave [is] associated with roughly a twenty percent decline in post-neonatal deaths and a fifteen percent decrease in fatalities occurring between the first and fifth birthdays.”¹⁶⁹ Ruhm’s study examined the leading causes of post-neonatal and child deaths in the United States and concluded, “[F]our of

¹⁶³ Ruhm, *supra* note 147, at 931.

¹⁶⁴ *Id.* at 932 (citing C.R. Winegarden et al., *Demographic Consequences of Maternal-Leave Programs in Industrialized Countries: Evidence from Fixed-Effect Models*, 61 S. ECON. J. 1020–35 (1995)).

¹⁶⁵ *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ *Id.* at 933. Ruhm also found these same “leave entitlements are also unrelated to the death rates of senior citizens, suggesting that the models adequately control for unobserved influences on health that are common across ages.” *Id.*

¹⁶⁸ *Id.* at 947.

¹⁶⁹ *Id.* at 952.

the five leading causes of post-neonatal mortality (Sudden Infant Death Syndrome, accidents, pneumonia/influenza, and homicide) account[ed] for forty-three percent of the fatalities, [and] are almost certainly substantially influenced by activities of parents.”¹⁷⁰ Ruhm concluded:

Closer parental involvement is likely to prevent some accidental deaths and may indirectly reduce other sources of fatalities. For example, SIDS is more than twice as common among infants who sleep prone as for those who do not Parental leave could increase the frequency of non-prone sleeping if parents have more energy to monitor sleeping position or are more able to directly observe it. Time off work might also decrease homicides by reducing stress levels in families with young children. Finally, parental leave might lessen the need for child care, which is associated with increased risk of many infectious illnesses Parental inputs may even influence mortality due to congenital anomalies to the extent they determine whether the child receives timely medical treatment and other health-preserving investments.¹⁷¹

Like the infant in our opening scenario, studies have found that young children who attend daycare are at increased risk for infections.¹⁷² One particular study determined that at age two, “frequent wheezing was significantly higher among children with greater exposure to other children at home or at day care than among those with less exposure to other children (24% v. 17%).”¹⁷³ This was particularly true of children who entered daycare before the age of six months.¹⁷⁴ “[A]mong four-to-five year old children, daycare attendance also increased the risk of

¹⁷⁰ *Id.* at 954.

¹⁷¹ *Id.*

¹⁷² See Thomas M. Ball et al., *Siblings, Daycare Attendance, and the Risk of Asthma and Wheezing During Childhood*, 343 NEW ENG. J. MED. NO. 8, at 538, 538 (2000); see also Michael T. Osterholm, *Infectious Disease in Child Day Care: An Overview*, 94 PEDIATRICS NO. 6, at 987 (1994); Catherine J. Holberg et al., *Child Daycare, Smoking by Caregivers, and Lower Respiratory Tract Illness in the First 3 Years of Life*, 91 PEDIATRICS NO. 5, at 885 (1993) (finding the presence of three or more unrelated children in the care setting was a significant independent risk factor for lower respiratory illness during the first three years of life).

¹⁷³ Ball et al., *supra* note 172, at 541.

¹⁷⁴ *Id.*

asthma.”¹⁷⁵ While this study also acknowledges that exposure to other children as a newborn provides important signals to the newborn’s maturing immune system,¹⁷⁶ the study does not address the effect being exposed to bacterial and viral infections has on the youngest of infants; it only acknowledges that infants experience more adverse health effects.¹⁷⁷

Exposure to infection is not the only risk. “Lower respiratory tract illness (LRI) is one of the main causes of morbidity in infancy and early childhood in the United States, accounting for a substantial proportion of office visits to pediatricians and hospitalizations.”¹⁷⁸ One study determined, “The cumulative LRI incidence rates (first, second, and third LRIs) in the first 3 years of life for those infants with the longest daycare experience are significantly higher than those for other child care experience groups.”¹⁷⁹ Another study found, “In children less than one year of age, the first six months of enrollment in the first childcare facility were associated with a 69% higher incidence of hospitalizations for acute respiratory infection compared with children in home care.”¹⁸⁰ This study recommended postponing enrollment into childcare until after the age of one.

2. Breastfeeding

In addition to the direct benefit of improved health of a baby who is home with a parent, infants are also healthier if they are breastfed for at least the first year of life.¹⁸¹ Longer maternity leave is directly linked to mothers’ breastfeeding of infants for longer periods.¹⁸² The benefits of

¹⁷⁵ *Id.* at 542.

¹⁷⁶ *Id.* But see Holberg et al., *supra* note 172 (concluding prolonged daycare did not protect against lower respiratory illnesses in the third year of life).

¹⁷⁷ Ball et al., *supra* note 172, at 541.

¹⁷⁸ Holberg et al., *supra* note 172, at 885; see also Laurens P. Koopman et al., *Respiratory Infections in Infants: Interaction of Parental Allergy, Child Care, and Siblings—The PIAMA Study*, 108 PEDIATRICS NO. 4, at 943 (2001) (determining child care attendance or having siblings increased the risk of developing doctor-diagnosed LRTI in the first year of life).

¹⁷⁹ Holberg et al., *supra* note 172, at 891. Other child care groups include those without prolonged childcare experience.

¹⁸⁰ See generally Mads Kamper-Jorgensen et al., *Population-Based Study of the Impact of Childcare Attendance on Hospitalizations for Acute Respiratory Infections*, 110 PEDIATRICS NO. 4, at 1439 (2006).

¹⁸¹ See generally American Academy of Pediatrics, *Policy Statement on Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS NO. 2, at 496 (2005).

¹⁸² Baker et al., *supra* note 149, at 872.

breastfeeding on infant health are so great that public health agencies have renewed efforts to promote breastfeeding.¹⁸³

In 1997, the American Academy of Pediatrics summarized the benefits of breastfeeding, citing 111 research articles, in support of a new set of breastfeeding guidelines (American Academy of Pediatrics, 1997). The reported benefits for children include decreases in diarrhea, otitis media (ear infections), gastro-intestinal diseases, asthma, lower respiratory infections, sudden infant death syndrome, lymphoma, and chronic digestive diseases. For mothers, the benefits include an earlier return to pre-pregnancy weight, improved bone remineralization, and a reduced risk of ovarian and premenopausal breast cancer.¹⁸⁴

Unfortunately, the rates of women still breastfeeding at three, six, and twelve months are still very low.¹⁸⁵ Nationwide, as of 2008, 74.2% of women initiated breastfeeding, 43.1% were still breastfeeding at six months, but only 11.9% were exclusively breastfeeding at six months.¹⁸⁶ These numbers continue to fall short of the Healthy People 2010 objectives.¹⁸⁷ “Mothers report the need to return to work is the leading reason to stop breastfeeding at longer durations.”¹⁸⁸

One of the primary reasons women do not initiate breastfeeding immediately following childbirth is because of the need to return to work.¹⁸⁹ “There is a significant relationship between breastfeeding initiation rates and return to work within 6 weeks of delivery; those mothers returning so soon after giving birth were significantly less likely

¹⁸³ *Id.* at 871; *see also* Healthy People 2010 Initiative, <http://www.healthfinder.gov/scripts/SearchContext.asp?topic=129> (last visited Jan. 19, 2009) (explaining the “Healthy People Goal” is to reach a level of seventy-five percent breastfeeding in the early postpartum period, fifty percent at six months, and twenty-five percent at one year).

¹⁸⁴ Baker et al., *supra* note 149, at 873.

¹⁸⁵ DEP’T OF HEALTH & HUMAN SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION, BREASTFEEDING REPORT CARD—UNITED STATES, 2008, at 2–4 (2008), *available at* http://www.cdc.gov/breastfeeding/data/report_card.htm [hereinafter CDC].

¹⁸⁶ *Id.* at 2.

¹⁸⁷ *Id.* at 1. Healthy People 2010 is a description of the nation’s health priorities.

¹⁸⁸ Baker et al., *supra* note 149, at 872; Telephone Interview with Katie Chisolm, Lactation Consultant at Fort Bragg, N.C. (Mar. 10, 2009).

¹⁸⁹ Baker et al., *supra* note 149, at 873 (citing B. HAMLYN ET AL., INFANT FEEDING 2000 (2002)).

to choose to breastfeed.”¹⁹⁰ The longer a woman is able to remain home with her infant before returning to the workforce directly correlates to the length of time the woman continues breastfeeding.¹⁹¹ The Baker study examined breastfeeding rates following an increase in maternity and parental leave entitlements in Canada from six months to one year of job-protected, compensated maternity leave.¹⁹² The study found that when the amount of maternity leave women could take increased, breastfeeding duration also increased substantially.¹⁹³ Therefore, the proportion of mothers entitled to longer maternity leave, who attained the public health benchmark¹⁹⁴ of six months of exclusive breastfeeding, increased by nearly 40%.¹⁹⁵

“At least 50% of women who are employed when they become pregnant return to the labor force by the time their children are 3 months old.”¹⁹⁶ In the military, almost 100% of women return to the workforce by the time their children are between the ages of six and eight weeks.¹⁹⁷ “National norms, however, indicate that only 10% of employed mothers continue feeding their infants breastmilk for the recommended first 6 months of life.”¹⁹⁸ It is likely that military statistics are similar to national norms of other working women, with only 10% of active

¹⁹⁰ Calnen, *supra* note 153, at 34 (citing S. Noble, *Maternal Employment and the Initiation of Breastfeeding*, 90 ACTA PAEDIATRICA 423 (2001)).

¹⁹¹ See C.R. Arthur et al., *The Employment-Related Breastfeeding Decisions of Physician Mothers*, 44 J. MISS. STATE MED. ASS'N No. 12, at 383 (1999); B. Roe et al., *Is There Competition between Breastfeeding and Maternal Employment*, 36 DEMOGRAPHY No. 2, at 157 (2002); G. Yilmaz et al., *Factors Influencing Breastfeeding for Working Mothers*, 44 TURK J. PEDIATRICS No. 1, at 30 (2002).

¹⁹² Baker et al., *supra* note 149, at 872.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 871 (explaining the World Health Organization recommends six months of exclusive breastfeeding; the U.S. Department of Health and Human Services recommends six months of exclusive breastfeeding, with continued feeding to one year; and Health Canada recommends six months exclusive feeding, with continued feeding up to age two and beyond).

¹⁹⁵ *Id.* at 884.

¹⁹⁶ Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates Among Breast-Feeding and Formula-Feeding Women in Two Corporations*, 10 AM. J. OF HEALTH PROMOTION No. 2, at 148, 149 (1995).

¹⁹⁷ AR 40-501, *supra* note 117, para. 7-10; AR 600-8-10, *supra* note 14, para. 5-3. This percentage omits the number of female servicemembers who choose to voluntarily separate either by ETS prior to childbirth or by U.S. DEP'T OF ARMY, REG. 635-20, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 5-8 (6 June 2005).

¹⁹⁸ Cohen et al., *supra* note 196, at 149.

component servicemembers still breastfeeding their infants six months after childbirth.¹⁹⁹

One study determined that one demographic is most likely to combine full-time employment and breastfeeding: “women older than 25 years of age, well-educated (college), in a higher income group (>\$25,000), and living in the western portion of the United States.”²⁰⁰ This is not the demographic of a majority of the Army’s enlisted corps. Combined with the additional challenge of having to return to work six weeks sooner than civilian counterparts entitled to FMLA leave, enlisted servicemembers are much less likely to breastfeed their children for the recommended periods of time.²⁰¹

This is significant because studies indicate infants and young children are less likely to get infections and illnesses if they are breastfed longer.²⁰² One study, comparing infants fed formula to infants fed almost exclusively breast milk, showed that 86% of the total infants that did not have any illnesses were from the breastfed sample.²⁰³ Furthermore, of all the illnesses in this study requiring a one-day absence from work, “[t]wenty-five percent occurred in breast-fed babies and 75%

¹⁹⁹ The author was unable to find any statistics on percentages of female servicemembers breastfeeding. The author contacted numerous military treatment facilities (MTFs) and obstetric and pediatric specialists to include the Senior Medical Staff Officer for Health Policy & Services at the Office of the Surgeon Gen.; the policy advisor to the OSG; Chief of Midwifery, Fort Bragg, N.C.; Lactation Specialists at Fort Bragg, N.C. and Fort Drum, N.Y.; Chief of Obstetrics & Gynecology at Fort Lewis, Wash.; the Ass’n of Military Surgeons of the U.S. (AMSUS) Representative to the United States Breastfeeding Comm. (USBC); and, the U.S. Army Ctr. for Health Policy & Preventive Health and found this data is not tracked. Generally and anecdotally, MTFs seem to reflect the community where they are located. E-mail from Captain Julia D. Block, U.S. Navy, AMSUS Representative, USBC to author (Mar. 5 2009, 0010 EST) (on file with author).

²⁰⁰ Cohen et al., *supra* note 196, at 149 (citing A.S. Ryan et al., *Breastfeeding and the Working Mother: A Profile*, 83 PEDIATRICS 524 (1989)).

²⁰¹ The Air Force is the only branch with a regulation addressing breastfeeding in the work environment. In 2005, the Air Force recommended supervisors of breastfeeding Air Force members allow fifteen to thirty minutes every three to four hours to pump breast milk in an area with adequate privacy and cleanliness. Restrooms are specifically mentioned as an inappropriate location to pump. The reason stated is that the “importance of breastfeeding during the first year of life to infant nutrition and health and to family emotional support is recognized by numerous private and governmental authorities.” U.S. DEP’T OF AIR FORCE, INSTR. 44-102, MEDICAL CARE MANAGEMENT para. 4.15 (1 May 2006).

²⁰² The author was unable to find any evidence of any organization recommending formula over breast milk.

²⁰³ See generally Cohen et al., *supra* note 196.

in formula-fed babies.”²⁰⁴ Another study determined, “An extra week of postpartum job absence raises the duration of breast-feeding by 3 to 4 days, with an accompanying growth in frequency for those who do so [initiate breast-feeding].”²⁰⁵ The same study examined available evidence on the effects of such increased breastfeeding rates on the reduction of infant deaths. Evidence showed that “[a] 30 percentage point increase in the fraction of women intending to breast-feed was estimated to decrease post-perinatal death rates by more than 9%.”²⁰⁶ The study also determined that “[b]reast-feeding is associated with a 3.7 per thousand fall in post-perinatal mortality”²⁰⁷

The Army does not have a formal policy on breastfeeding, but the U.S. Army Surgeon General and Medical Services Corps encourage female dependants and servicemembers to breastfeed. However, the Soldier must solicit support and gain permission from her commander to breastfeed at work.²⁰⁸ Some posts have a program designed specifically for working mothers that enables mothers to borrow a breast pump, at no cost, to help facilitate expressing their milk while at work.²⁰⁹ While such programs are encouraging, they do not appear to change the statistics showing that the number one reason for choosing not to breastfeed, or to stop breastfeeding prior to the recommended six months, is due to early return to the work force. A more scientifically proven way to encourage more women to breastfeed is to extend maternity leave.

²⁰⁴ *Id.* at 152.

²⁰⁵ Ruhm, *supra* note 147, at 952 (citing Roe et al., *supra* note 191).

²⁰⁶ *Id.* (citing R.G. Carpenter et al., *Prevention of Unexpected Infant Death; An Evaluation of the First Seven Years of the Sheffield Intervention Program*, 83297 LANCELOT 723 (1983)).

²⁰⁷ *Id.* (citing A.S. Cunningham, *Breastfeeding and Health in the 1980s; A Global Epidemiologic Review*, 118 J. PEDIATRICS 659 (1991)).

²⁰⁸ See, e.g., Memorandum from Breastfeeding Servicemember to Commander, subject: Breastfeeding Support Plan on Return to Duty; Memorandum from Breastfeeding Servicemember, to Commander, subject: Breastfeeding Work Plan, *available at* <http://chppm-www.apgea.army.mil/dhpw/Population/SamplebreastfeedingmemocommanderFINAL0807.pdf>. (Sample memorandums available on the U.S. Army Ctr. for Health Promotion & Preventive Med. for servicemembers to present to their commanders), *available at* <http://chppm-www.apgea.army.mil/dhpw/Population/SamplebreastfeedingmemocommanderFINAL0807.pdf>.

²⁰⁹ E-mail from Lieutenant Colonel Noelle Briand, S3, 4th Psychological Operations Group, U.S. Army, to author (9 Mar. 2009) (on file with author) (describing program at Fort Bragg, N.C.).

B. Parent Health

Besides improved infant health associated with periods of longer maternity leave, improved parent health has also been linked to longer maternity leave. “Many first-time mothers find that the real experience of recovering from childbirth, while assuming the role of mother and resuming previous roles is more like a bad dream than the anticipated fairy tale.”²¹⁰ New parents seldom get enough sleep during the first few months of their child’s life. One study found, “Postpartum fatigue is progressive in nature and continues beyond the traditional 6-week postpartum period.”²¹¹

In addition to increased opportunity for rest, extending postpartum leave can positively affect a new mother’s mental and emotional health. One review examined thirteen original studies on the length of maternity leave, the mother’s mental health, and the duration of breastfeeding.²¹² The review classified short leaves as those lasting eight to twelve weeks.²¹³ It compared short leaves with a reference group of mothers taking only six to nine weeks of maternity leave.²¹⁴ The review found that a mother who takes leave for eight to twelve weeks has “[a] decrease in maternal depressive symptoms, an improvement in the quality of mother-infant interactions, better vitality, as well as longer breastfeeding durations . . .” compared with a mother taking only six to nine weeks of maternity leave.²¹⁵ Another study determined that short to moderate periods away from work (considered twelve to twenty weeks in this

²¹⁰ Nancy Wieland Troy, *A Comparison of Fatigue and Energy Levels at 6 Weeks and 14 to 19 Months Postpartum*, 8 CLINICAL NURSING RES. No. 2, at 135, 135 (1999) (citing D.K. Gjerdingen et al., *Changes on Women’s Physical Health During the First Postpartum Year*, 2 ARCHIVES OF FAM. MED. 277–83 (1993); R.A. Milligan, *Maternal Fatigue During the First Three Months of the Post-partum Period* (1989) (unpublished doctoral dissertation, University of Maryland, Baltimore); N.W. Troy et al., *The Development of a Self-care Guide for Postpartum Fatigue*, 8 APPLIED NURSING RES. 92–96 (1995)).

²¹¹ Troy, *supra* note 210, at 136. Of note, only 21% of the women studied were working at six weeks postpartum and only an average of forty hours per week. With a military duty day beginning for most at 0630 and ending at 1715, mothers returning to work in the military start working a fifty-four hour work week just six weeks after giving birth.

²¹² See Staehelin et al., *supra* note 148.

²¹³ *Id.* at 207. What is classified as a short leave is actually two to four weeks longer than what is available to active component servicemembers.

²¹⁴ *Id.* at 208.

²¹⁵ *Id.* at 207–08.

study), are associated with worse mental health, vitality and role function than longer periods of more than twenty weeks.²¹⁶

Doctors recommend a minimum of six to eight weeks off after childbirth to recover physically.²¹⁷ This time is considered maternity disability. It does not account for the time necessary to adjust mentally and emotionally to parenthood while simultaneously battling fatigue and employment requirements. Increasing maternity leave would have a long-term positive effect on the mental health of servicemembers who have recently given birth by allowing them adequate time to adjust to balancing parenthood and military service.

C. Psychology, Development, and Bonding

“Much has been learned about the profound psychological, emotional, and physiologic dependence of the infant upon the mother during the first months of life, and its crucial impact on long-term physical and mental health.”²¹⁸ Shorter maternity leaves have a detrimental effect on the relationship between the infant and the mother. One study showed,

Four months after childbirth, mothers entitled to short maternity leaves (6 weeks) showed significantly more negative interactions with their infant than women with longer maternity leaves (12 weeks). In addition, women with more physical health symptoms, elevated levels of depressive symptoms, or having a child with a difficult temperament, interacted significantly less positively with their child if they were entitled to only 6 weeks of maternity leave than comparable women entitled to 12 weeks of leave.²¹⁹

²¹⁶ *Id.* at 205 (citing P. McGovern et al., *Time Off Work and the Postpartum Health of Employed Women*, 35 MED. CARE NO. 5, at 507 (1997)).

²¹⁷ *PDLA H.R. Hearing*, *supra* note 7 (statement of Ms. Sheila B. Kamerman, Professor, Columbia University School of Social Work).

²¹⁸ Staehelin et al., *supra* note 148, at 208 (citing A.N. Schor, *Back to Basics: Attachment, Affect Regulation, and the Developing Right Brain: Linking Developmental Neuroscience to Pediatrics*, 26 PEDIATRIC REV. 204 (2005)).

²¹⁹ *Id.* at 205 (citing R. Clark et al., *Length of Maternity Leave and Quality of Mother-Infant Interactions*, 68(2) CHILD DEV. 364 (1997)).

In 1985, during one of the first committee hearings for the FMLA, Dr. Berry Brazelton spoke about strengthening families.²²⁰ Dr. Brazelton is one of the most noted child development experts in the world.²²¹ He testified extensively throughout the eight years of FMLA hearings on two main aspects of separating infants and mothers prematurely: (1) the development of working families and (2) infant development.²²² He reiterated that labor statistics showed women as a key force in the labor market and argued that the old model of a mother staying at home with a baby was “no longer feasible.”²²³ He explained that holding on to that model was holding back the United States in making progress towards a realistic solution to the realities of working families.²²⁴ Almost twenty-five years later, it seems the Army is just starting to recognize this.

Dr. Brazelton explained that parents who have to leave their baby too soon guard themselves against attaching to the baby.²²⁵ Instead of focusing on learning about their baby, they are focused on “adjusting to time demands, to schedules, and to lining up the necessary substitute care.”²²⁶ His conclusions also included the role of the fathers. Dr.

²²⁰ *PDLA H.R. Hearing*, *supra* note 7, at 47 (statement of Dr. Berry Brazelton, Clinical Professor, Harvard Medical School and Professor of Psychiatry and Human Development, Brown University).

²²¹ Dr. Berry Brazelton graduated in 1943 from Columbia University College of Physicians and Surgeons in New York City. He conducted his pediatric training at Children’s Hospital in Boston and child psychiatry training at Massachusetts General Hospital. He established the Child Development Unit, a pediatric training and research center, at Children’s Hospital in 1972. Dr. Brazelton has published more than two hundred scientific papers and chapters. He developed and published the Neonatal Behavioral Assessment Scale used to assess physical, neurological, and emotional well-being of newborns. He is a Clinical Professor at Harvard Medical School and Professor of Psychiatry and Human Development at Brown University. Brazelton-Institute, <http://brazelton-institute.com/berrybio.html> (last visited Mar. 16, 2009).

²²² *See, e.g., PDLA H.R. Hearing*, *supra* note 7 (statement of Dr. Berry Brazelton, Clinical Professor, Harvard Medical School and Professor of Psychiatry and Human Development, Brown University); *Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Comm. on Labor and Human Resources*, 102d Cong. 18–34 (1991) [hereinafter *Brazelton Testimony*]. In addition to these hearings, Dr. Brazelton testified at several other hearings during that time frame.

²²³ *PDLA H.R. Hearing*, *supra* note 7, at 48 (statement of Dr. Berry Brazelton, Clinical Professor, Harvard Medical School and Professor of Psychiatry and Human Development, Brown University). Active component female servicemembers have never “stayed home” and have faced the challenges Dr. Brazelton refers to since 1974. And since 1993, active component servicemembers have received six weeks less than their civilian counterparts.

²²⁴ *Id.*

²²⁵ *Id.* at 49.

²²⁶ *Id.* at 54.

Brazelton mentioned how “having the father involved in labor and delivery and present at the birth of the baby has significantly increased his sense of himself as a person who is important to his baby and to his mate.”²²⁷ Studies have also shown that paternal involvement with a newborn empowers a father to better understand his baby and to better support his wife.²²⁸ Dr. Brazelton explains the difficulties in establishing a necessary parent-infant bond:

The initial adjustment to the new baby at home is likely to be extremely stressful to any set of new parents. Most first-time parents have had little or no prior experience with babies or with their own parents as they nurtured a smaller sibling. They come to this new role without enough knowledge or participational experience. The generation gap makes it difficult for them to turn back to parents or extended family for support. Professional support is expensive and difficult to locate. The mother (and father) is likely to be physically exhausted and emotionally depressed for a period after delivery. The baby is unpredictable and has not developed a reliable day-night cycle of states of sleep and waking. Crying at the end of the day often serves as a necessary outlet and discharge for a small baby’s nervous system after an exciting but overwhelming day. This crying can easily be perceived as a sign of failure in parenting by harassed, inexperienced parents, and the crying that starts as a fussy period is then likely to become a colicky, inconsolable period at the end of every day for the next 3 months. Any mother is bound to feel inadequate and helpless at this time. She may wish to run away and to turn over her baby’s care to a “more competent person.” If she must go back to work in the midst of this trying period, it seems to me that she will never develop the same sense of understanding her baby and feeling competent to him or her as she might have if she’d been able to stay at home and to “see it out.”²²⁹

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 54.

Dr. Brazelton also testified extensively on the four levels of behavioral organization in the communication system between parents and their small infants over the first four months.²³⁰ During this time, parents provide “affective and cognitive information and form the base for the infant’s learning about the world.”²³¹ “These early experiences of learning about each other are the base for their shared emotional development in the future, and are critical as anlagen for the infant’s future ego.”²³² Dr. Brazelton further explains, “When parents are deprived too early of this opportunity to participate in the baby’s developing ego structure, they lose the opportunity to understand the baby intimately and to feel their own role in development of these four stages.”²³³

Dr. Brazelton further described the loss a mother feels when she must share her small baby with a secondary caregiver.

Her feelings of competition with the other caregiver may well be uppermost in her consciousness. But underneath this conscious feeling of competition is likely to be a less-than-conscious sense of grief. Lindeman described a syndrome which he labeled a grief reaction, which seems to fit the experiences which mothers of small babies describe when they leave them in substitute care. They are apt to feel sad, helpless, hopeless, inadequate to their babies. They feel a sense of loneliness, of depression, of slowed down physical responses, and even of somatic symptoms. To protect themselves from these feelings, they are likely to develop three defenses. These are healthy, normal and necessary defenses, but they can interfere with the mother’s attachment to her baby if they are not properly evaluated. The younger the baby and the more inexperienced the mother, the stronger and more likely are these defenses. They are correlated with the earliness with which she returns to work.²³⁴

²³⁰ *Id.* at 56.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 61.

²³⁴ *Id.* at 61–62.

The three defenses to which Dr. Brazelton refers are denial, projection, and detachment. With denial, “[a] mother is likely to deny that her leaving matters—to either the child or to herself.”²³⁵ This may prevent a mother from being involved with the secondary care provider because it is too painful.²³⁶ Projection refers to a parent projecting the responsibilities of caregiving to the substitute caregivers.²³⁷ And finally, with detachment a mother has a tendency to “distance her feelings of responsibility and intense attachment.”²³⁸

The military has recently made two changes that seem to exhibit its own better understanding of the importance of parent-infant bonding. First, Congress, upon a request from the military, recently passed a law granting ten days paternity leave following the birth of a child to allow a father more time to spend with the child and his wife.²³⁹ The main proponent of this law was the Navy, which was supported by the other services.²⁴⁰ Secondly, the Army and Air Force recently extended its postpartum deployment deferral from four months to six months.²⁴¹ This additional time was advocated for the main purpose of allowing mothers more time to bond with their infants.²⁴²

The Army should increase the length of time for paternity leave. Fathers are an important part of the bonding process. One study found, “Fathers and their efforts are important for the development of the newborn child and family.”²⁴³ In this study, all the men took two to four months of parental leave.²⁴⁴ The men reported that spending time alone with the child and learning to care for the child without the mother present was empowering.²⁴⁵ Additionally, it is difficult for a father who

²³⁵ *Id.* at 62.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 10 U.S.C.S. § 701(j)(1)–(2) (LexisNexis 2008), *amended by* NDAA 2009, Pub. L. No. 110-417, 122 Stat. 4356, 4449 (2008).

²⁴⁰ Clark Telephone Interview, *supra* note 119.

²⁴¹ Postpartum Deferment Policy Change, *supra* note 79.

²⁴² Neilsen Telephone Interview, *supra* note 108. Colonel Nielsen explained he strongly advocated for one year but was not supported due to mission requirements. He also explained the breastfeeding rationale was not addressed because of questions concerning how to apply the policy to females who did not breastfeed.

²⁴³ Asa Premberg et al., *Experiences of the First Year as Father*, 22 SCAND. J. CARING SCI. 56, 56 (2008).

²⁴⁴ *Id.* at 56.

²⁴⁵ *Id.* at 57.

does not take parental leave to develop the same skills in caring for his newborn that his wife develops. This “marginalizes” his role as a caregiver and “plac[es] the predominant burden on the mother.”²⁴⁶ Although the recent implementation of paternity leave is a positive step for members of the armed forces, ten days does not provide enough time for the bonding process advocated above.

D. Better Performance of Servicemember

Increasing postpartum leave will improve the work performance of postpartum parents for several reasons. First, the mother will be more rested and more physically and mentally prepared to perform her military duties. Expecting new mothers to return to work at six weeks postpartum in a more fatigued state than their peers could lead to an increased risk for injury and at a minimum, less efficient performance. By way of example, one of the strongest proponents of parental leave was the United Mine Workers of America Association.²⁴⁷ The Association found that longer parental leave resulted in its employees being less fatigued at work, which resulted in fewer accidents.²⁴⁸ The spokesman testified, “We believe that any additional cost of the Parental Leave Program would be minimal and offset by cost savings due to the reduction of stress-related accidents.”²⁴⁹

Second, when both parents work outside the home, their child’s illness is often a reason for missing work.²⁵⁰ Preschool children often have to stay home from daycare centers due to common side effects of exposure to other children with illnesses, to include fevers and diarrhea (both symptoms exclude children from childcare centers for at least twenty-four hours). Parents will miss less work because longer postpartum leave will enable an infant more time to build its immune system and to breastfeed, resulting in less illnesses and less absences for the parents. Although the unit would be without the servicemember for an additional six weeks, the extended leave would benefit the unit and the Army in the long run.

²⁴⁶ Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1057 (1994).

²⁴⁷ PDLA H.R. Hearing, *supra* note 7, at 82 (statement of Dr. Stephen F. Webber, International Executive Board Member of the United Mine Workers).

²⁴⁸ *Id.* at 81.

²⁴⁹ *Id.* at 82.

²⁵⁰ Cohen et al., *supra* note 196, at 149.

E. Improved Retention Rates

1. *Officer Attrition*²⁵¹

In FY 2007, the Army had 3000 fewer officers than required, with the most severe shortages being senior captains and majors with eleven to seventeen years of experience.²⁵² The Army expected the shortage to increase in FY 2008 to 3700.²⁵³ Retention rates for U.S. Army female servicemembers are lower than their male counterparts.²⁵⁴ As of 2008, females in the Army made up 16.9% of the officer corps, and 13.4% of the enlisted corps.²⁵⁵ In 2006, the retention rate for U.S. Army male captains was 89.96%, compared with only 85.81% for female captains.²⁵⁶ For majors, the retention rate for males was 93.10% versus only 90.87% for females.²⁵⁷ “Female military doctors, lawyers and chaplains are more likely than their male counterparts to leave the military after serving five to eight years.”²⁵⁸ After a successful company command at the eight-year mark, an active component female officer begins to consider remaining in the military for a full career; however, the desire to raise children becomes a reality.²⁵⁹ The Army’s shortage of mid-grade officers demands the Army pay special attention to a female’s desire to leave the service to raise a family.

²⁵¹ Army enlisted females have much lower retention rates than their male counterparts. ANNUAL REPORT ON FEMALES, *infra* note 254, at 37–40. Across most enlisted ranks, the difference between male and female retention is even greater than in the officer corps. Because HRC has an office dedicated to examining issues surrounding officer retention, the underlying data for this article was more accessible for officers than for the enlisted ranks.

²⁵² Colonel Samuel T. Piper III, Improving Retention Under the U.S. Army’s Captain Incentive Program 3 (Mar. 15, 2008) (unpublished Master of Strategic Studies Degree Research Paper, U.S. Army War College) (on file with author).

²⁵³ *Id.* at 3.

²⁵⁴ DEF. DATA MANPOWER CTR. & SERVS.’ HUMAN RES. STAFFS & COMMANDS, ANNUAL REPORT ON STATUS OF FEMALE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES, FY2002–06, at 41–44 (2007) [hereinafter ANNUAL REPORT ON FEMALES].

²⁵⁵ FY08 ARMY PROFILE, *supra* note 144.

²⁵⁶ ANNUAL REPORT ON FEMALES, *supra* note 254, at 42.

²⁵⁷ *Id.* at 43.

²⁵⁸ Steven Donald Smith, *Committee Examines Issue of Women Separating From Military*, AM. FORCES PRESS SERVS. NEWS ART., Aug 28, 2006, <http://www.defenselink.mil/news/NewsArticle.aspx?ID=612>.

²⁵⁹ Telephone Interview with Lieutenant Colonel Lindenmeyer, Officer Personnel Military Strength Task Force, U.S. Army Human Res. Command (Jan. 16, 2009) [hereinafter Lindenmeyer Telephone Interview].

A majority of officers, both male and female, state family reasons as one of the main reasons for leaving the service.²⁶⁰ There are two common scenarios affecting retention rates. The first scenario impacts female retention rates. Female officers are more likely than male officers to leave military service to start a family or to pursue employment more suited to raising young children.²⁶¹ The Defense Department Advisory Committee on Women in the Service found women often leave the military to start a family.²⁶² One study determined female graduates from the U.S. Military Academy are the most likely group of officers to leave the military after their first term.²⁶³

Jane Waldfogel, a sociologist, hypothesized in her study on the effect of children on women's wages "that women minimize 'work and family conflict' by shifting occupations or jobs, altering their place of work—that is, making changes that enhance their ability to retain control of their children's lives but also exact a price in terms of their own earnings trajectories."²⁶⁴ In the civilian sector, the Department of Labor statistics indicate "only about one-third of mothers have returned to full-time work

²⁶⁰ Smith, *supra* note 258 ("The main reasons women are getting out after five to eight years of service is to start a family.") (quoting Mary Nelson, Chairwoman of the Defense Department Advisory Committee on Women in the Services); Telephone Interview with Lieutenant Colonel Douglas Ingros, Leader Development Division, Chief of Officer Retention (Jan. 12, 2009) [hereinafter Ingros Telephone Interview]. Lieutenant Colonel Ingros explains the Army does not specifically request officers' reasons for leaving military service during the expiration of term of service (ETS) process. *Id.* However, he is familiar with reasons officers provide prior to separation, and one of the top three reasons stated is because of the officer's spouse. *Id.* Often, the spouse is also trying to maintain a career made difficult by multiple moves or because of the servicemember's multiple deployments. *Id.*; Telephone Interview with Major Emily Schiffer, Judge Advocate Gen.'s Corps, Plans & Operations Branch (Manpower & Budget) (Jan. 13, 2009) [hereinafter Schiffer Telephone Interview] (explaining almost every exit survey submitted with an unqualified resignation listed family reasons as a main reason for leaving military service); U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE COMM. ON ARMED SERVS., HOUSE OF REPRESENTATIVES, MILITARY PERSONNEL, STRATEGIC PLAN NEEDED TO ADDRESS ARMY'S EMERGING OFFICER ACCESSION AND RETENTION CHALLENGES (2007) [hereinafter OFFICER ACCESSION AND RETENTION CHALLENGES REPORT].

²⁶¹ Smith, *supra* note 258; OFFICER ACCESSION AND RETENTION CHALLENGES REPORT, *supra* note 260.

²⁶² Smith, *supra* note 258.

²⁶³ Lindenmeyer Telephone Interview, *supra* note 259; OFFICER ACCESSION AND RETENTION CHALLENGES REPORT, *supra* note 260.

²⁶⁴ Suzanne M. Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?*, 37.4 DEMOGRAPHY 401, 408 (2000) (citing J. Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209–17 (1997)).

six months after the birth of their first child.”²⁶⁵ This, in conjunction with the Army’s own statistics on women leaving military service, are factors the Department of Defense retention personnel should consider as dispositive of what females desire during child-bearing years. Our most talented officers have several more flexible employment options available to them than service in the military.

The second scenario impacts male retention rates and is referred to as “equality of service.”²⁶⁶ This describes the desire of servicemembers’ spouses to maintain their own careers and quality of life while supporting their spouses’ military career.²⁶⁷ A societal consequence of more spouses having careers is the need for mothers and fathers to share more equally in caring for the children, which has historically been an area dominated by the mother. Suzanne M. Bianchi’s study finds the following:

In 1965[,] the time fathers reported spending primarily on childcare was about one-quarter the mothers’ estimate of their time with children; this figure increased to 30% of mothers’ estimates if secondary childcare time was included. By 1998, fathers’ (primary) childcare time was 56% of mothers’ time, and 45% of mothers’ time when secondary childcare time was added. In 1965, fathers reported having children with them about half as often as did mothers. By 1998, fathers’ time with children was two-thirds that of mothers.²⁶⁸

U.S. Army retention policies should adequately reflect these societal conditions in its efforts to retain the Army’s most talented, mid-level servicemembers. Adjusting parental leave policies is one way to do this.

2. Retention and the U.S. Army Menu of Incentives

The Human Resources Command Retention Office examines and recommends policies to retain military officers. The retention office is currently examining a menu of incentive offerings to determine retention

²⁶⁵ *Id.* at 408.

²⁶⁶ Lindenmeyer Telephone Interview, *supra* note 259.

²⁶⁷ *Id.*

²⁶⁸ Bianchi, *supra* note 264, at 410–11.

models that allow decision makers to look at quality of life initiatives.²⁶⁹ Part of the study includes an analysis of what motivates different generations of officers. The generation the Army is currently focused on retaining is labeled the Millennial generation.²⁷⁰ The Millennial generation is especially focused on balancing life and work throughout their careers, as opposed to at the end of their careers.²⁷¹ The military must compete to both recruit and to retain military personnel. Because the military is a “closed society,” there is a much higher cost to replace a servicemember than to replace a civilian employee.²⁷² For these reasons, and in a greater effort to retain talented officers, the Army is looking closely at how to retain more officers.

The Army Officer Menu of Incentives Program ran from September 2007 through November 2008 in an effort to retain more mid-grade officers.²⁷³ Critical Skills Retention Bonuses were offered but “[were] not large enough to entice officers to take this incentive.”²⁷⁴ Only 68% signed up for the incentives, and the Army was expecting 80%.²⁷⁵ Furthermore, many believe that the Incentives Program was just a temporary fix and has “simply delayed an inevitable train wreck or exodus of junior officers which will now occur in 2011.”²⁷⁶ Therefore, “continuing the momentum purchased by the Menu of Incentives is the U.S. Army’s next logical step for an Officer Retention strategy.”²⁷⁷

²⁶⁹ Lindenmeyer Telephone Interview, *supra* note 259.

²⁷⁰ Lieutenant Colonel Vincent Lindenmeyer, Menu of Incentives Feedback Survey (Jan. 2009) (unpublished PowerPoint Presentation) (on file with author); *see generally* Piper, *supra* note 252.

²⁷¹ Lieutenant Stephanie Miller, Women’s Policy, U.S. Navy, Task Force Life Work (Jan. 2009) (unpublished PowerPoint Presentation) (on file with author) [hereinafter Miller Presentation]; Interview by Pat Galagan with Marcus Buckingham, Author and Authority on Discovering and Maximizing Your Strengths, location unknown (Aug. 2006) (discussing engaging and developing Millennials’ special strengths).

²⁷² JEC PAID FAMILY LEAVE, *supra* note 135, at 4 (determining lowering turnover rates can reduce costs significantly for employers. The average cost of turnover for an employer is about twenty-five percent of an employee’s salary. A good estimate of costs includes the costs to search for a new employee and also training costs). Those costs are significantly higher in the military.

²⁷³ Piper, *supra* note 252, at 3.

²⁷⁴ *Id.* at 6.

²⁷⁵ *Id.*

²⁷⁶ Lieutenant Colonel Vincent Lindenmeyer, Maintaining the Officer Retention Momentum Through Low-Cost Options (9 Feb. 2009) [hereinafter Officer Retention Info. Paper] (on file with author).

²⁷⁷ *Id.*

While “cash is king,” it should be the final resort. During this time of economic crisis and future lack of additional funding, the U.S. Army must now consider low cost options other than cash to maintain the same level of engagement and retention with this generation.²⁷⁸ A comprehensive and integrated strategy focused on engaging and retaining the millennial generation through additional low cost options is the next step to maintain the momentum of the recently closed \$440 million Menu of Incentive Program. When cash is used, an institution is not motivated to change its culture. In the low cost options arena, the Army’s culture must be willing to change.²⁷⁹

The JAG Corps is one example of an area where the Army is losing talent in its mid-level grades, and low cost options could make a difference. The JAG Corps recently conducted a survey of its servicemembers to determine what incentives might convince JAG officers to remain in the service for another tour of duty.²⁸⁰ Options considered were financial incentives, duty station of choice, job of choice, and a possible sabbatical. Financial incentives ranked the highest, and the sabbatical option ranked lower on the list.²⁸¹ Results were not separated by gender so it is not possible to determine if mostly females chose the sabbatical option.²⁸²

More dispositive of the desires of young female law associates is the practice of civilian law firms, which have found offering extensive maternity leave benefits is essential to recruiting the most qualified female attorneys.²⁸³ Considering 50% of law school graduates are female, it is easy to understand why this benefit is important to new associates. Additionally, 25.8% of JAG officers are female, almost 9% more than the overall percentage of females in the Army as a whole.²⁸⁴

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ U.S. ARMY JUDGE ADVOCATE GEN. PERS., PLANS & TRAINING OFFICE, OFFICER SURVEY ON RETENTION: ACTIVE AND RESERVES (2008).

²⁸¹ Schiffer Telephone Interview, *supra* note 260.

²⁸² *Id.* Mostly female officers use the Coast Guard sabbatical option. Interview with Lieutenant Commander Scott Herman, USCG, Senior Coastguardsmen, Ctr. for Law & Military Operations, TJAGLCS, Charlottesville, Va. (Mar. 5, 2009).

²⁸³ Associate Pirate, *supra* note 138.

²⁸⁴ E-mail from Jagman Singh, Office of the Judge Advocate Gen., to author (21 Jan. 2009 1045 EST) (on file with author). The Medical Corps also has a higher percentage

A more generous maternity leave policy in the Army would likely have a positive impact on recruiting and retaining mid-grade female judge advocates.

Based on parental leave policies offered by civilian corporations, the statements of servicemembers who have left the service for family reasons, and the Navy's recent surveys conducted of its fleet,²⁸⁵ it is likely the Army could increase the retention of mid-level officers and enlisted members by providing better postpartum leave benefits. The retention of females is lower than for males.²⁸⁶ In a time where retention of talented servicemembers is a significant issue, and money for bonuses is limited, low cost options, such as better parental leave, should be given greater consideration. Furthermore, such consideration would also be in line with the Army's recent promise to provide more support to Army families through the implementation of the Army Family Covenant.

VI. Counterarguments

Opponents of extending postpartum leave have several counterarguments. This section addresses those arguments.

First, some may argue the military leave policy is better than the FMLA offered to civilians because the military provides paid leave. This is inaccurate. Many companies provide paid leave for their employees,²⁸⁷ and many civilians have the option to purchase short-term disability leave to compensate for any leave.²⁸⁸ Also, many states have laws supplementing income while on parental leave.²⁸⁹ Additionally, federal legislation providing paid leave has been introduced several times over the past few years and has been introduced again in 2009.²⁹⁰ It is only a matter of time before this legislation becomes law, especially under the current administration and Congressional composition. Soon,

of females than the rest of the Army, and it also struggles with retention. Nielsen Telephone Interview, *supra* note 108.

²⁸⁵ Miller Presentation, *supra* note 271.

²⁸⁶ ANNUAL REPORT ON FEMALES, *supra* note 254.

²⁸⁷ JEC PAID FAMILY LEAVE, *supra* note 135, at 4.

²⁸⁸ *Id.* at 12.

²⁸⁹ *Id.*

²⁹⁰ Federal Employees Paid Parental Leave Act, S. 354, 111th Cong. (2009); H.R. 626, 111th Cong. (2009).

the military will be even further behind societal norms in the parental leave benefits it offers its servicemembers.

Second, in countering improved health benefits to infants, opponents might argue that (1) improving the quality of daycare centers eliminates the risk of exposure to viruses or bacteria, and (2) having more illnesses as infants builds immune systems and leads to fewer illnesses when they reach school-age.

Improving the quality of daycare centers would not be enough to improve infant health. Most homes are more sterile than daycare facilities because large numbers of other children are not present and exposure to germs is, therefore, limited. Additionally, not all children can be admitted into the military Child Development Centers, or parents may opt to take their infant somewhere less expensive. For example, the Fort Myer, Virginia, Child Development Center opened in June 2008 and currently has a one-year waiting list for all preschool-aged children.²⁹¹

Additionally, the argument that being ill as an infant helps build the immune system and leads to fewer illnesses as a school-age child ignores the health benefits of breastfeeding, which is easier to provide when the mother is afforded adequate time to establish breastfeeding.²⁹² This argument also ignores the disruption caused by the numerous illnesses the infant and parent must suffer prior to the child reaching school-age, and it does not consider that the infant actually has to survive to reach school-age children.

Third, opponents may argue that providing maternity leave to female servicemembers for reasons other than to convalesce would violate the Equal Protection Clause of the U.S. Constitution because it would not afford the same benefits to male servicemembers. First, male servicemembers are now entitled to paternity leave.²⁹³ Second, biological differences between males and females, to include the female's exclusive ability to breastfeed, must be acknowledged. Additionally, these same biological differences cause discrimination against women and prevent them from serving in various positions in the

²⁹¹ Telephone Interview with Patty Sanders, Dir. of Cent. Enrollment, Fort Myer, Virginia Child Dev. Ctr., Fort Myer, Va. (Mar. 10, 2009).

²⁹² Ball et al., *supra* note 172, at 154.

²⁹³ 10 U.S.C.S. § 701(j)(1)–(2) (LexisNexis 2008), *amended by* NDAA 2009, Pub. L. No. 110-417, 122 Stat. 4356, 4449 (2008).

military.²⁹⁴ This discrimination is considered acceptable in the military with courts giving great deference to the military in its determinations of what is necessary to accomplish its mission.²⁹⁵ The law would give the Army similar discretion in applying its parental leave policies for the same reasons.

The Army's primary mission is to serve the national interest and to fight and win our nations wars. To accomplish this mission, the Army can and does discriminate between males and females.²⁹⁶ Females are not allowed to serve in various specialties and positions, and openly homosexual individuals are not allowed to serve at all. Similarly, if it is determined that the Army could not accomplish its mission if male servicemembers were afforded the same parental leave as female servicemembers, the Army would be given the discretion to afford such benefits only to females. This would be justified by a female's biological and exclusive ability to breastfeed, and the reality that mission accomplishment would be affected much more by the absence of both female and male servicemembers for twelve-week intervals. Therefore, females should be afforded the opportunity to take the leave even if it cannot be afforded to both sexes.

Also, the Army's diversity policy should embrace and accept the differences that nature cannot change, and regulate accordingly. If one of the reasons stated for the extended leave is the establishment and maintenance of breastfeeding, the equal opportunity argument loses strength. Statistics show that more female servicemembers will breastfeed if given more postpartum leave.²⁹⁷

Fourth, opponents to extending postpartum leave may argue it will degrade mission accomplishment in various ways. Foremost, female servicemembers are not deployable for six months after childbirth, so

²⁹⁴ National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 542, 107 Stat. 1547, 1659 (1993), as amended by Pub. L. No. 106-398, 114 Stat. 1654 (2000) and Pub. L. No. 107-107, 115 Stat. 1125 (2001).

²⁹⁵ See, e.g., *Parker v. Levy*, 417 U.S. 733, 758-59 (1975); *Schlesinger v. Councilmen*, 420 U.S. 738, 757 (1975).

²⁹⁶ See, e.g., § 542, 107 Stat. at 1547; U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 15-2 (6 June 2005) (explaining homosexual conduct is grounds for separation); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (11 Feb. 2009) (providing guidance to military commanders on maintaining well-being of the force); Military Selective Service Act, 50 U.S.C. App. 451-473 (2000) (requiring only males to register).

²⁹⁷ Calnen, *supra* note 153, at 39.

extending postpartum leave to twelve weeks will not interfere with deployments. Next, opponents may argue that increasing postpartum leave will incentivize childbirth in the military, further degrading mission accomplishment. There are three problems with this argument. First, does that counterargument mean the Army will not consider providing what is best for a new mother and her infant in order to discourage women in the military from having children? Second, fertility rates have actually dropped in the United States²⁹⁸ and pregnancy rates of female servicemembers are likely the same or lower than the national average.²⁹⁹ At any given time, only ten percent of all active component females are pregnant.³⁰⁰ Third, it seems unlikely that female servicemembers will make a lifelong commitment to raise a child simply to obtain a few extra weeks of leave.

Although extending parental leave might temporarily affect mission accomplishment, the argument cannot stop there. Overall, improving such policies will benefit the Army organization and improve mission accomplishment by improving servicemember performance and reducing attrition. As mentioned in Part IV.A, 59% of all women work and 71% of working women have children under the under the age of eighteen.³⁰¹ Sixteen percent have children under the age of six.³⁰² “In 2007, women accounted for about 51% of all persons employed in management, professional, and related occupations”³⁰³ Women are going to work, but the question is where? It is up to the Department of Defense to decide if they want to recruit and retain working women, or whether they want them to work somewhere other than the military. The Army should consider a culture change in the way it thinks about providing for new mothers and newborn dependents if it wants to maintain more of its most talented mid-level female servicemembers. If the Army is truly committed to its military families as the Army Family Covenant states, it should give serious consideration to modifying its postpartum policies.³⁰⁴

²⁹⁸ U.S. CENSUS BUREAU, REPORT ON U.S. FERTILITY RATES (2008).

²⁹⁹ The author believes current operational tempo has delayed many female servicemembers from starting families.

³⁰⁰ Nielsen Telephone Interview, *supra* note 108.

³⁰¹ HOUSEHOLD DATA ANNUAL AVERAGES, *supra* note 133.

³⁰² *Id.*

³⁰³ U.S. BUREAU OF LABOR SERVICES, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (Dec. 2008).

³⁰⁴ The author believes the Army is not making this culture change. Instead of increasing the hours of the Child Development Centers on posts as has been touted as an accomplishment under the new Army Family Covenant, the Army should be looking at

Opponents may argue the Army should not expend much effort on retaining females, especially if it means offering an additional six weeks of postpartum leave following childbirth. Such opponents might argue those positions could then be filled with males. That argument would overlook the challenges of maintaining an all volunteer military and the reason women were fully integrated into the military in the first place.³⁰⁵ As of September 30, 2008, the overall strength of women in the Army was 13.58%.³⁰⁶ Most of the females are between the ages of twenty and thirty-eight,³⁰⁷ the medically best ages to bear children.³⁰⁸ The reality is that only 10% of those 13.58% will be pregnant at any time.³⁰⁹ When the Army eliminated the Women's Army Corps and integrated females into the regular Army in 1978,³¹⁰ the Army committed to the reality that female servicemembers would bear children during their time in service.

Furthermore, suggesting the Army eliminate or reduce the number of women in the military would overlook the qualities and diversity females add to the military. One of the Army's goals is to have a diverse force. Department of the Army Pamphlet 350-20, Unit Equal Opportunity Training, defines diversity as "[a] way of creating an environment that will enable all people to reach their full potential in pursuing organizational objectives."³¹¹ It further explains that managing equal opportunity can be defined by enabling the "[f]ull use of one's potential regardless of race, color, religion, or national origin."³¹² There also needs to be a recognition that the organization will have to change its culture to create an environment to meet the needs of its Soldiers.³¹³

more ways to allow Soldiers to take care of their children rather than providing more hours for someone else to take care of them.

³⁰⁵ See generally *supra* Section III.A.1; MORDEN, *supra* note 81, at 257 (explaining the end of the draft required the need for women as a manpower resource).

³⁰⁶ FY08 ARMY PROFILE, *supra* note 144.

³⁰⁷ OFFICE OF ARMY DEMOGRAPHICS, FY08 AGE DISTRIBUTION FOR THE ACTIVE COMPONENT, BY GENDER AND RANK (2008) (on file with author).

³⁰⁸ Emma Dickinson, *Best Age for Childbearing Remains 20-35—Delaying Risks Heartbreak Says Experts*, MED. NEWS TODAY, Sept. 16, 2005, <http://www.medicalnewstoday.com/articles/30737.php>.

³⁰⁹ Neilsen Telephone Interview, *supra* note 108.

³¹⁰ MORDEN, *supra* note 81, at 397.

³¹¹ U.S. DEP'T OF ARMY, PAM. 350-20, UNIT EQUAL OPPORTUNITY TRAINING fig.9-2 (1 June 1994) [hereinafter DA PAM. 350-20].

³¹² *Id.* para. 9-3.

³¹³ *Id.* The training example used actually refers to retaining unmarried, pregnant Soldiers; years ago, they would have been separated.

The Army has embraced females in the service. General MacArthur called the Women's Army Corps Soldiers "my best soldiers," adding that "they worked harder, complained less, and were better disciplined than men."³¹⁴ The chairwoman of the Defense Department Advisory on Women in the Services (DACOWITS) stated in an article about retaining women in the military,

Numerous high-ranking military officials of both genders stressed . . . that women offer something the military would not have without them. They offer a different perspective. They offer a different way of looking at things, a different way of communicating, a different way of gathering points of view and getting consensus. It's a different way of doing things, and it's something the military members I've talked to feel very strongly that the military needs.³¹⁵

Striving for a diverse military force should be embraced to make the strength of the whole stronger. Therefore, women should continue to serve despite the necessity to occasionally accommodate the biological reality of childbearing.

VII. Proposal

The portions of the FMLA that should be extended to servicemembers include modified versions of maternity leave and paternity leave. Postpartum leave should be extended to twelve weeks for female servicemembers and four weeks for male servicemembers. For females, six weeks should be allocated for recovery from childbirth, and six weeks should be designated for bonding with the infant, adjusting to parenthood, and facilitating breastfeeding. Specifically allocating such intervals would give flexibility to servicemembers who deliver prematurely or whose infant spends a significant amount of time in the hospital before returning home. Providing only four weeks for males, as opposed to the twelve weeks they would receive as civilians, realistically addresses the mission requirements of the Army. Male servicemembers

³¹⁴ Melissa K. Wilford, *Army Observes 30th Anniversary of Integrating WACs*, Oct. 20, 2008, <http://www.army.mil/-news/2008/10/20/13428-army-observes-30th-anniversary-of-integration>.

³¹⁵ Smith, *supra* note 258.

should be able to take the four weeks at any time during the sixteen weeks following the birth. This would allow the unit flexibility, and it would also allow the parents to elect to keep the infant at home for a maximum of sixteen weeks should the father opt to take his paternity leave after the mother takes her maternity leave. If the Army is really going to care for its families, it must let the father play a larger role in his own family. Four weeks is a small accommodation in an effort to make the military a more appealing place to spend a career.

The entire postpartum leave period should be paid. Too many eligible employees cannot take full advantage of FMLA benefits because it is unpaid. To make the Army maternity policy realistic, and to make it available regardless of pay grade, maternity leave must be paid. Furthermore, several civilian companies offer paid maternity leave benefits, and the Army must do the same to recruit and retain the most talented servicemembers.

In the alternative, servicemembers should be given the option of taking an additional six weeks of leave beyond the currently provided six weeks of convalescent leave, and the six weeks should be added to their active duty service obligation.³¹⁶ This would only apply if the military continued to pay the servicemember while on leave; otherwise, the active duty service obligation would remain the same.

One final recommendation is to allow servicemembers to take a one-year unpaid sabbatical in addition to postpartum leave.³¹⁷ Should units have difficulty filling certain critical positions during the period of absence, reservists should be considered to serve as temporary replacements during this time period.

³¹⁶ Although longer active duty service obligation (ADSO) periods were considered, the author believes caring for an infant is not the same type of benefit to a Soldier as, for example, earning a civilian degree, which normally increases a Soldier's ADSO by two years for every one year of education. Rather, the benefit is to the infant and the Army, and postpartum leave should be a right provided to a new mother. See U.S. DEP'T OF ARMY, REG. 350-100, OFFICER ACTIVE DUTY OBLIGATIONS (8 Aug. 2007) [hereinafter AR 350-100].

³¹⁷ The 2009 NDAA allocated each service twenty slots to pilot a sabbatical program. NDAA 2009, Pub. L. No. 110-417, 122 Stat. 4356, 4449 (2008). The implementation may not occur for approximately two years because of legal and administrative details. Lindenmeyer Telephone Interview, *supra* note 259. Additionally, the Coast Guard provides its officers the option for a two-year sabbatical. COMDSTINST M1000.6A, *supra* note 79.

This proposal is supported by the five reasons discussed above. First, longer postpartum leave will lead to the improved health of the infant. The FMLA provides twelve weeks of maternity leave to male and female employees following the birth of a child. Although advocates fought for even more, twelve weeks was determined to be the absolute minimum reasonable time for the health of the baby and for bonding. A female's choice to serve in the military as opposed to the civilian work force should not deny her newborn child the same health standards Congress has determined are required for infants of civilian parents.

Second, in addition to improving infant health, increased postpartum leave will improve parent health. As infants begin to sleep for longer periods of time during the night, mothers will also benefit from greater sleep intervals. Also, studies show women's mental and emotional health improves with longer periods of maternity leave.³¹⁸

Third, the length of postpartum leave for servicemembers should be extended to improve the quality of bonding between the infant and the mother. Military service demands much time from its members, often at the expense of time away from immediate family members. Long duty days including morning physical training, overnight training exercises, and deployments cause military parents to miss much of their children's lives. As this article explained, the first few months in an infant's life are essential in establishing a foundation of communications and intimacy between parents and a child.³¹⁹ It is also during this time that parents become secure in their role as nurturers for their child.³²⁰ This is especially true for mothers. This bond is difficult to secure in six short weeks before returning to twelve-hour duty days. Developing a policy regarding "maternity" leave that includes more adequate time to bond, in conjunction with convalescent leave, would alleviate some of this problem.

Fourth, improvements in all of the above-stated areas will improve servicemembers' overall performance. Better infant health will result in less parental absences from work to care for a sick child. Additionally, mothers would be more rested and mentally prepared to balance motherhood and childcare responsibilities.

³¹⁸ Baker et al., *supra* note 149, at 874.

³¹⁹ Brazelton Testimony, *supra* note 222.

³²⁰ *Id.*

Finally, expanding parental and family benefits to servicemembers can contribute to an overall effort to provide low-cost options to increase long-term retention of our most talented and experienced Soldiers. Each time a Soldier leaves the military, the military incurs the costs, time, and risks associated with training another Soldier to take his or her place.³²¹ Unlike civilian corporations, the Army only promotes from within. Because many Soldiers cite family as a significant reason for leaving the military,³²² expanding the Army's leave policy to include portions consistent with the FMLA would have a positive long-term effect on retention and morale.

VIII. Conclusion

The time has come for Congress to expand military leave entitlements³²³ to include provisions similar to those provided by the FMLA. The Army needs a better parental leave policy.³²⁴ This article proposes Congress amend 10 U.S.C. § 701 to entitle active component female servicemembers twelve weeks maternity leave following the birth of a child, active component male servicemembers four weeks paternity leave following the birth of a child, and male and female servicemembers six weeks following the adoption of a child. This would provide benefits more consistent with the FMLA, current state laws, international policy, and the Army's own renewed commitment to families.³²⁵

In 1978, when women were first allowed to remain in military service after becoming a parent, it could be said the Army was on the "cutting edge." It was one of the few places of employment that offered job protection and benefits by granting female servicemembers paid

³²¹ Ingros Telephone Interview, *supra* note 260.

³²² Smith, *supra* note 258; Ingros Telephone Interview, *supra* note 260; Schiffer Telephone Interview, *supra* note 260.

³²³ 10 U.S.C. § 701 (2006).

³²⁴ The Army does not appear concerned with adjusting its policies to retain female servicemembers. The Navy, on the other hand, has collected data on female servicemembers' concerns. Miller Presentation, *supra* note 271. In addition to data stating 45% of Sailors leave the service because of children, the Navy has found 16% believe better pregnancy support is important, and 12% believe better paternity leave is important. *Id.* Suggestions made from the fleet to the Task Force Life/Work included six weeks of maternity leave followed by four weeks of four hour days and having maternity leave match corporate America. *Id.* Fifty-eight percent of all college graduates are women, and this is talent that must be recruited and retained. *Id.*

³²⁵ See *Army Family Covenant*, *supra* note 2.

convalescent leave after childbirth. However, the Army has failed to revisit its policy on postpartum leave since that time.³²⁶ The rest of American society, to include Congress and private industry, as well as other industrialized nations, have examined the medical and social policy reasons to afford opportunities for parents to care for new infants while providing job protection, benefits, and pay following childbirth. It is time for the Army to do the same and truly acknowledge the role of Army families in today's military.

³²⁶ See sources cited *supra* note 108.