

VA



U.S. Department
of Veterans Affairs

Other Than Honorable (OTH) Discharge Policy Update Meeting

June 21, 2024

Welcome & Introductions



Dr. Catherine Porter

U.S. Department of Veterans Affairs
OTH Lead Facilitator

Agenda



1. OTH Updates
2. What to expect
3. Helping Veterans navigate

Leadership Remarks

Mr. Mike Frueh

Principal Deputy Under Secretary for Benefits
Veterans Benefits Administration (VBA)



Mr. Ryan Heiman

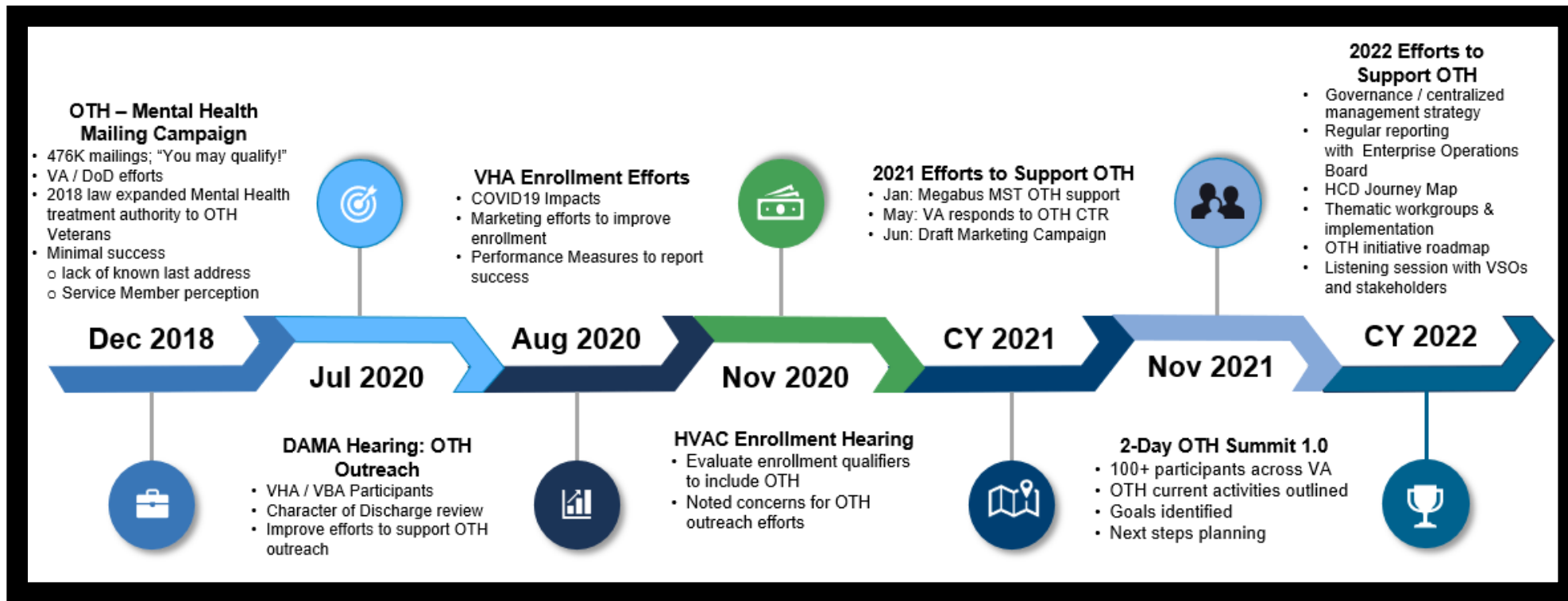
Acting Executive Director
Veterans Health Administration (VHA)
Member Services



OTH Timeline and Efforts (as of our last meeting)

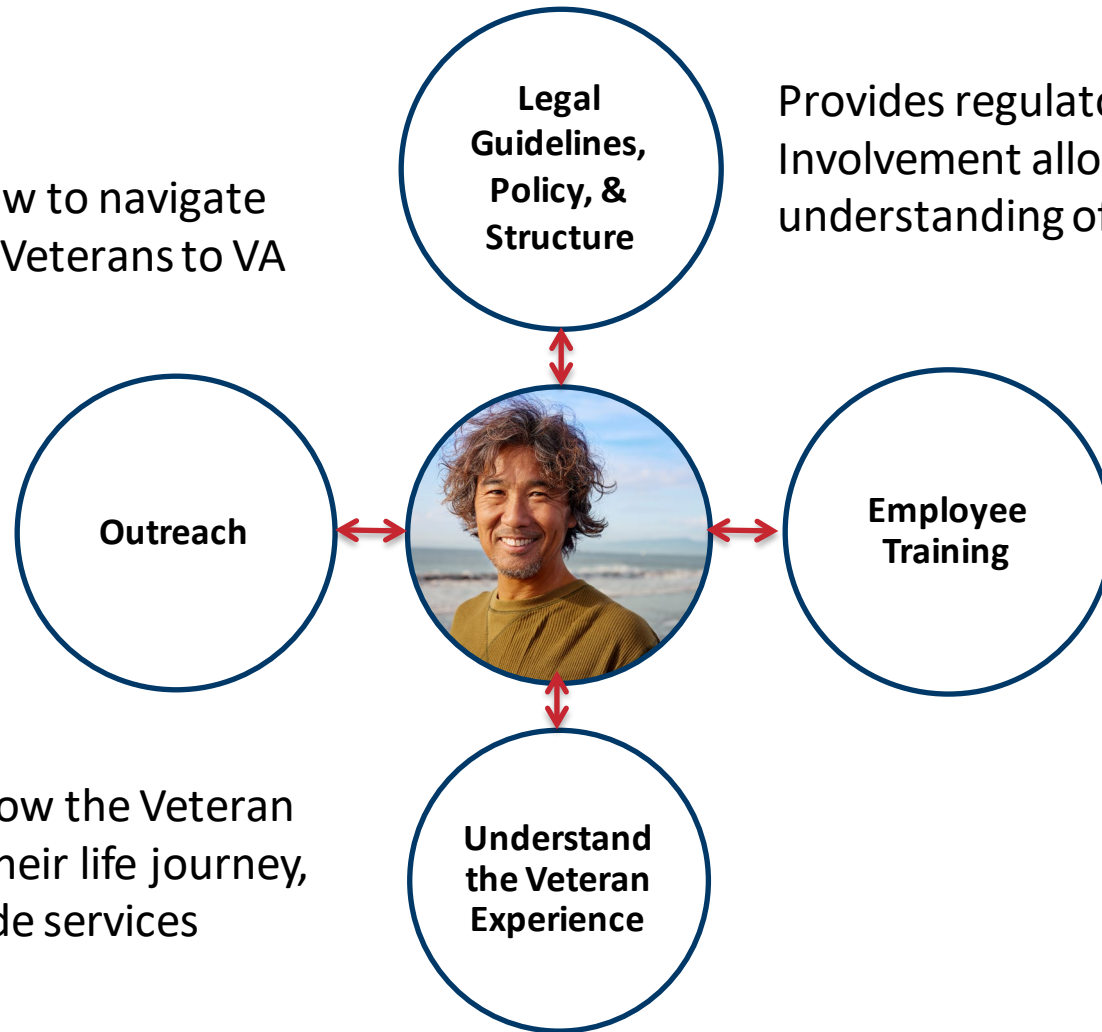
This timeline reflects where we were last time we met.

Much has happened to expand services and benefits, outreach, and staff training since then!



VA Approach

Socializes access to services, how to navigate exploring them, and welcomes Veterans to VA



Provides regulatory boundaries –
Involvement allows for consideration of new
understanding of needs and circumstance

Allows us to understand how the Veteran
experiences VA services, their life journey,
and the best way to provide services

Gives employees what they
need to understand how to
best provide services, what
the Veteran qualifies for, and
ways to answer questions if
they have them

VA Approach



- **Spring/Summer 2022** - VHA and VBA, partnering with VEO, engaged in mapping the OTH Veteran experience from time of discharge from active duty through to end of life. Insights will be incorporated in subsequent activities, outreach, training, planning, and decision making.
- **February 2022** - VHA and VBA, partnering with VEO, led an OTH Listening Session with participants from Veteran Service Organizations (VSO) and Legal Clinics to generate awareness, knowledge-share, cross-pollinate, identify collaboration opportunities, and identify gaps and challenges to triage.
- **November 2021** - VHA and VBA, partnering with Veterans Experience Office, led an OTH Summit with more than 100 experts from 20 offices, evaluating efforts to expand access for Veterans with OTH discharges.

Veterans Benefits Administration - OTH Activity



Jessica Pierce

Assistant Director, Policy Staff, Compensation Service
Veterans Benefits Administration (VBA)



Robert Parks

Chief, Part 3 Regulations, Compensation Service
Veterans Benefits Administration (VBA)

Claims for VA Benefits and Character of Discharge

- **Eligibility for VA benefits depends upon**
 - type of military service performed,
 - duration of service, and
 - character of discharge (COD) or separation.
- **Veterans must receive a COD under other than dishonorable conditions** (e.g., honorable, under honorable, general) **to be eligible for most VA benefits.**
- Veterans with a dishonorable discharge or **statutory** bar pertaining to a period of service **are** prohibited from receiving most VA benefits based on **that** period of service. * *Exception applies*
- Other types of discharges (e.g., Other Than Honorable, Undesirable, or Bad Conduct) require VA to make a COD determination to be eligible for **VA healthcare and/or compensation and other monetary benefits (38 CFR § 3.12(d)).**



COD Determinations and Health Care Eligibility

Under Public Law (PL) 95-126, eligibility for health care benefits (under Chapter 17 of Title 38, U.S.C.) for any disability incurred or aggravated in the line of duty during active service is extended to any former service member with an other-than-honorable (OTH) discharge, regardless of the date of that discharge. Even service members who are determined to have been discharged under the regulatory bars described in [38 CFR 3.12\(d\)](#), are eligible for health care.

Eligibility for health care is **not** extended to

- former service members with a bad conduct discharge (BCD), or
- former service members that were discharged under one of the conditions listed in [38 CFR 3.12\(c\)](#).



Summary of Benefit Eligibility Based on COD

	9/11 GI Bill	Mont. GI Bill	Veteran Readiness & Employment	Home Loans	VALife & VMLI	SGLI/VGLI/FSGLI/T SGLI	Compensation and Pension	VBA & NCA Burial Benefits	Enrollment in VA Health Care	VA Mental Health Care	Vet Centers	Homeless (HUD-VASH/SSVF/GPD)	Emergent Suicide Care	Health Care MST
Honorable	●	●	●	●	●	●	●	●	●	●	●	●	●	●
General (Under Honorable Conditions)	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Other Than Honorable	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Bad Conduct (Special Court-Martial)	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Bad Conduct (General Court-Martial)	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Dishonorable	●	●	●	●	●	●	●	●	●	●	●	●	●	●

● Ineligible (except for very limited circumstances)

● Eligible

● Case by Case

Important:

- This chart summarizes how VA considers Character of Discharge in the administration of various benefit programs.
- Even with a less than honorable discharge, Veterans may be able to access some VA benefits. We encourage all Veterans to apply and allow VA to make an eligibility determination.
- A “Veteran” for VA purposes is an individual who has:
 - qualifying military service (type and length of service), and
 - a discharge or release under conditions other than dishonorable
- Certain benefits have length of service and other specific requirements in addition to the Character of Discharge.

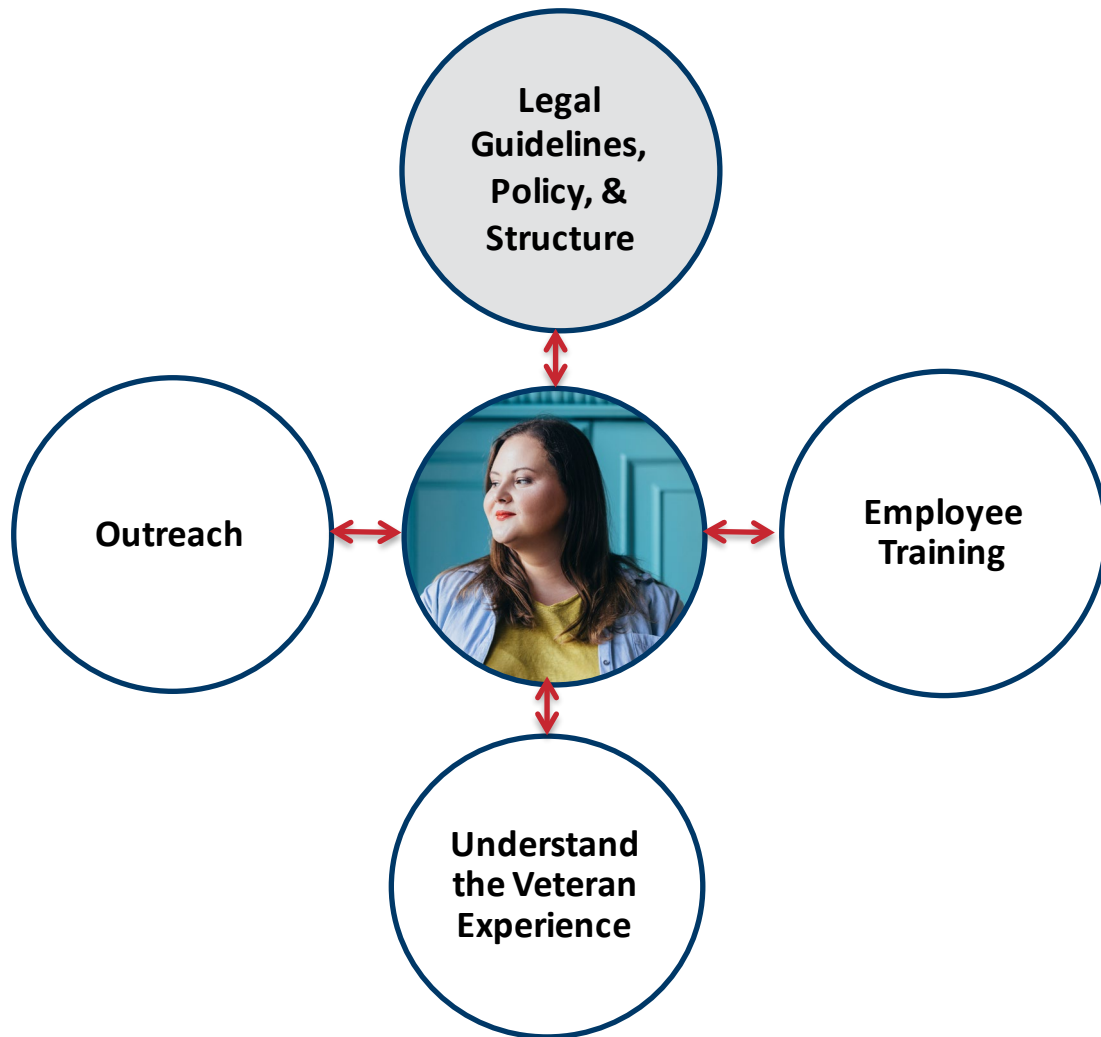
Statutory Bars to VA Benefit Payments

Under 38 U.S.C. § 5303, a release or discharge for any of the following reasons constitutes a **statutory bar to benefits**, unless it is determined that the Servicemember was insane at the time he or she committed the offense that resulted in the discharge:

- Sentence of a general court-martial,
- Being a conscientious objector who refused to perform military duty, wear the uniform, or otherwise comply with lawful orders of competent military authority,
- Desertion,
- Resignation by an officer for the good of the service,
- Absence without official leave (AWOL) for a continuous period of 180 days or more, *without compelling circumstances* to warrant such prolonged unauthorized absence (as determined by VA), and
- Requesting release from service as an alien during a period of hostilities.



VBA Approach



- **July 2020** – Proposed Rule published to amend 38 CFR 3.12, clarifying definitions and adding a compelling circumstances exception
- **September 2021** – VA Secretary Memo on Benefits Eligibility for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) Former Service Members, indicating that any former Service member (SM) discharged due to sexual orientation or gender identity was to be deemed Veterans and eligible for VA benefits, as long as another statutory or regulatory bar did not preclude such a finding.
- **October 2021** – RFI/Listening session on proposed rule to seek answers to specific questions and gather insight from the public
- **February 2023** – Updated M21-1 based on stakeholder feedback, to include improved guidance on topics including COD determinations rendered under 38 U.S.C. 5303B, finality, favorable findings, and completion of the administrative decision template
- **November 2023** – Final rule draft sent to Office of Management and Budget, VA and DoD engage in interagency process
- **April 2024** – Final rule published, interim guidance to claims processors to hold claims without fully favorable decision

Publication of AQ95 Final Rule

VA's final rule (AQ95), "Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge," was published April 26, 2024, and becomes effective June 25, 2024.

- The final rule implements the proposed rule with some modifications.
- This will expand VA benefits eligibility, bring more consistency to the process, and ensure COD determinations consider all pertinent factors.
- VA considered all comments received from the proposed rule, RFI, and listening sessions and feedback from the interagency process.
- The final rule respects concerns of the Military Departments regarding the impact of changes to the COD determination process would have on their ability to maintain good order and discipline among their troops.
- VA sought to strike a balance between bestowing benefits to those who have earned them, even those whose service was not without blemish, and limiting benefits for those whose service involved serious misconduct.

Summary of AQ95 Final Rule

The final rule:

1. Removes the bar for aggravated homosexual acts,
2. Defines the bar of willful and persistent misconduct,
3. Adds a compelling circumstances exception and outlines factors that can mitigate the regulatory bars of moral turpitude and willful and persistent misconduct, and
4. Provides additional compelling circumstances that can mitigate the statutory bar of Absent Without Leave (AWOL) of 180 days or more.

The preamble to the final rule also clarifies evidentiary considerations for when regulatory bars should be applied:

- Regulatory bars shall only be applied when they are clearly supported by the military record.
- Benefit of the doubt will be resolved in favor of the former Service member under VA's authority in 38 U.S.C. 5107(b) and 38 C.F.R. 3.102. (Per 38 CFR 3.102, it is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or **any other point**, such doubt will be resolved in favor of the claimant.)
- Regulatory bars shall only be applied if the misconduct underlying the bar formed the basis of the discharge. (If the military decided that the misconduct did not preclude continued service, then it also should not preclude benefits eligibility. This limitation will prevent conduct unrelated to the basis of the discharge from contributing to a bar from benefits.)

Regulatory Bars to VA Benefit Payments

Effective June 25, 2024, under 38 CFR § 3.12(d), Benefits are not payable where the former service member was discharged or released under one of the conditions:

1. **Discharge in lieu of trial.** Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial (compelling circumstances exception **does not** apply),
2. **Mutiny or espionage.** Mutiny or spying (compelling circumstances exception **does not** apply),
3. **An offense involving moral turpitude.** Generally including conviction of a felony) (compelling circumstances exception **does** apply), and
4. **Willful and persistent misconduct.** (compelling circumstances exception **does** apply)
 - a) Instances of minor misconduct occurring within two years of each other are persistent.
 - b) An instance of minor misconduct occurring within two years of more serious misconduct is persistent.
 - Minor misconduct is misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.
 - c) Instances of more serious misconduct occurring within five years of each other are persistent.



Compelling Circumstances

Compelling circumstances are defined as:

1. Length and character of service exclusive of the period of prolonged AWOL or misconduct, which is of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation.
2. Mental or cognitive impairment at the time of the prolonged AWOL or misconduct
 - Including clinical diagnoses of any mental health disability, including congenital conditions, substance abuse, and/or or cognitive disabilities.
 - Evidence that may be medically determined to demonstrate existence of any mental health disability, including congenital conditions, substance abuse, and/or or cognitive disabilities.
3. Physical health, to include physical trauma and any side effects of medication.
4. Combat-related or overseas related hardship.
5. Sexual abuse/assault.
6. Duress, coercion, or desperation.
7. Family obligations or comparable obligations to third parties.
8. Age, education, cultural background, and judgmental maturity

- ❖ **Important:** Although not specifically included in the regulatory text, VA will consider discrimination, including based on race or sex, in the compelling circumstances analysis.
- ❖ **For only AWOL:** Whether a valid legal defense (for substantive issue of absence or misconduct) would have precluded a conviction for AWOL or misconduct under the Uniform Code of Military Justice.

Evidentiary Considerations

Application of reasonable doubt:

- Claims processors may apply the regulatory bars ONLY if:
 1. The misconduct leading to the discharge is clearly supported by the military record,
 2. Reasonable doubt has been considered and cannot be resolved in the former Service member's favor under 38 CFR 3.102, and
 3. Misconduct relating to the regulatory bar formed the basis for the discharge.
- Reasonable doubt will be considered for every element of the COD decision, not only the overall determination of whether a bar applies.

Lay statements:

- All lay, medical, and military information will be considered in determining whether a regulatory bar applies and whether a compelling circumstance applies, in accord with 38 U.S.C. § 5107(b).
- VA acknowledges that in some cases, there will not be evidence in the military records to corroborate a former Service member's account of compelling circumstances. That does not preclude the lay statement from being sufficient to prove a compelling circumstance.
- A former Service member's lay statement may be sufficient to prove a compelling circumstance if the claims processor finds the statement credible, after considering: facial plausibility, consistency with other evidence, and internal consistency.
- If VA rejects the lay statement as proof of compelling circumstances, the reasons for that decision will be documented in the final COD determination.

What You Can Do: Previous unfavorable decisions

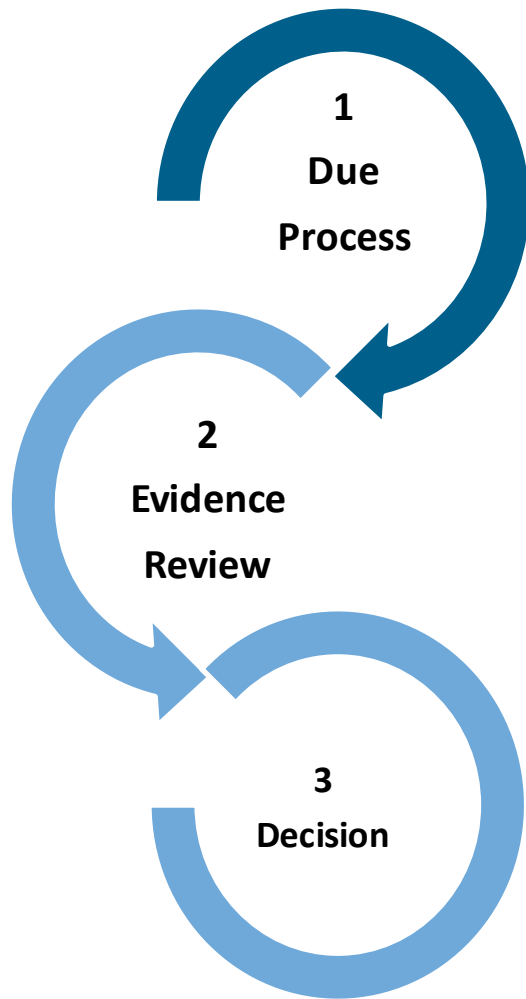
- **Any former SM with a prior unfavorable COD determination (to include the no longer used undesirable discharge), may request a new COD determination under new § 3.12.** Any request for a new COD determination will be completed without the need for new and relevant evidence.
- **VA will accept both freestanding claims for a new COD determination and those submitted with a claim.**
- **If VA makes a favorable decision,** VA will invite a claim for any previously denied issues related to that period of service.
 - The former Service member would need to submit a VA Form 20-0995 for a supplemental claim. The favorable COD decision would be considered new and relevant evidence to support a decision on the merits.
- **VA will not overturn previous favorable COD determinations** because it may now constitute a bar under the updated regulations, such as under the application of the new *persistence* criteria for willful and persistent misconduct.

Effective Dates

- **The revision to 38 CFR 3.12 is considered liberalizing law.** A liberalizing law is one which brings about a substantive change in the law creating a new and different entitlement to a benefit.
- **For benefits granted based on a COD determination completed *on or after June 25, 2024*,** an effective date under 38 CFR 3.114(a) will be considered.
- **To be eligible for an effective date under liberalizing law,** a former Service member must have been discharged prior to June 25, 2024. Any Service member discharged on or after June 25, 2024, is not eligible for an effective date under liberalizing law, because the reason(s) for the discharge occurred after the date of the law change.
- **For those claimants who received a favorable decision under new § 3.12, are granted benefits, and are eligible for an effective date under § 3.114,** the effective date of such benefits would be considered as follows:
 - If a claim is received within 1 year from the effective date of this liberalizing law, benefits may be authorized from the effective date of the law (which is June 25, 2024).
 - If a claim is received more than 1 year after the effective date of this liberalizing law, benefits may be authorized for a period of 1 year prior to the date of receipt of such request.



COD Process



VA sends a letter of proposed adverse action to the former service member asking them to furnish any evidence or statements pertaining to the discharge and providing 60 days for a response.

VA submits a request to the appropriate service department for:

- Verification of an individual's COD, and
- Facts and circumstances surrounding the incident(s) resulting in the discharge.

VA considers all available evidence of record to assess basic eligibility for VA benefits:

- Any **compelling circumstances** presented by the claimant, when applicable.
- Any supporting evidence provided by third parties who were familiar with the circumstances surrounding the incident(s) in question.
- Length of service,
- Performance and accomplishments during service,
- Nature of the infraction(s), and
- Character of service preceding the incident(s) resulting in the discharge.

VA documents its determination in a format referred to as an administrative decision.

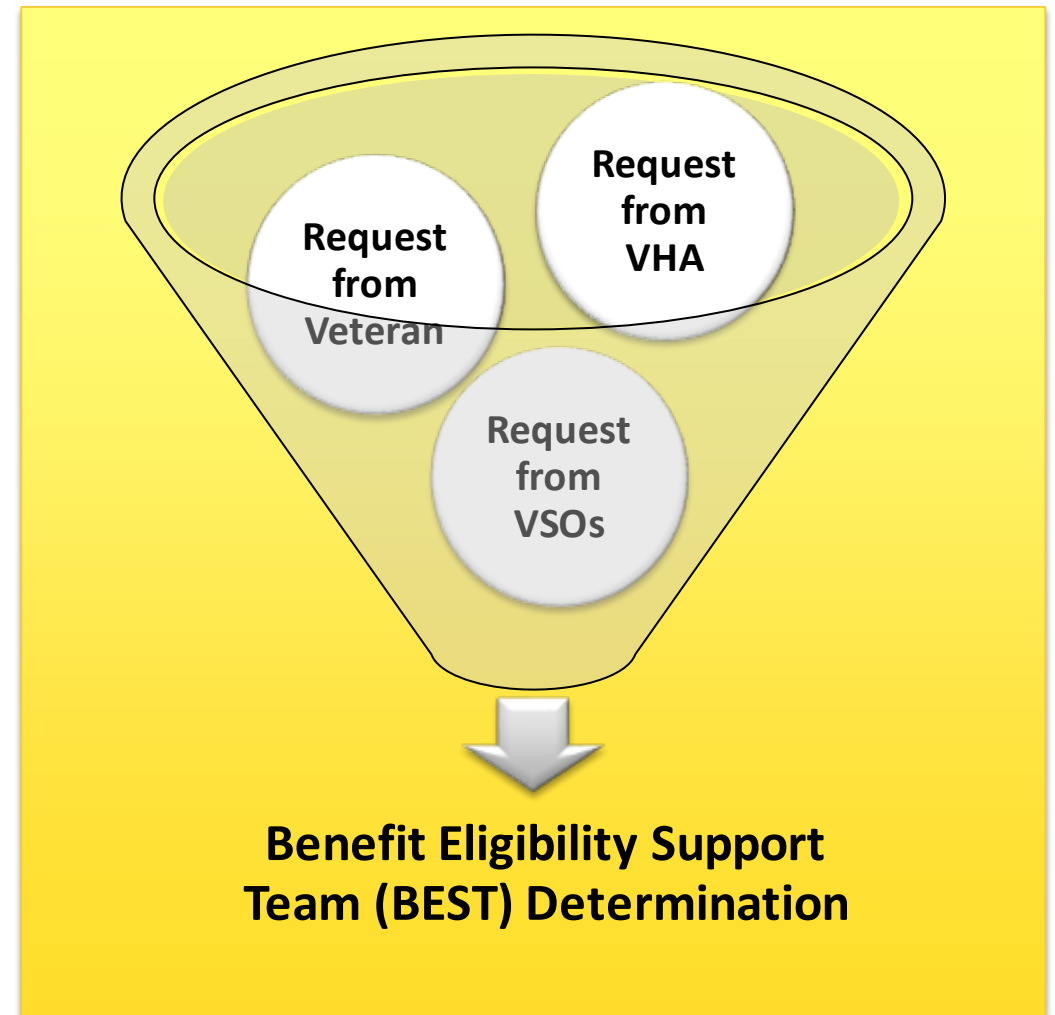
•Veterans can appeal VA's character of discharge determination.

COD Determination Requests to VBA

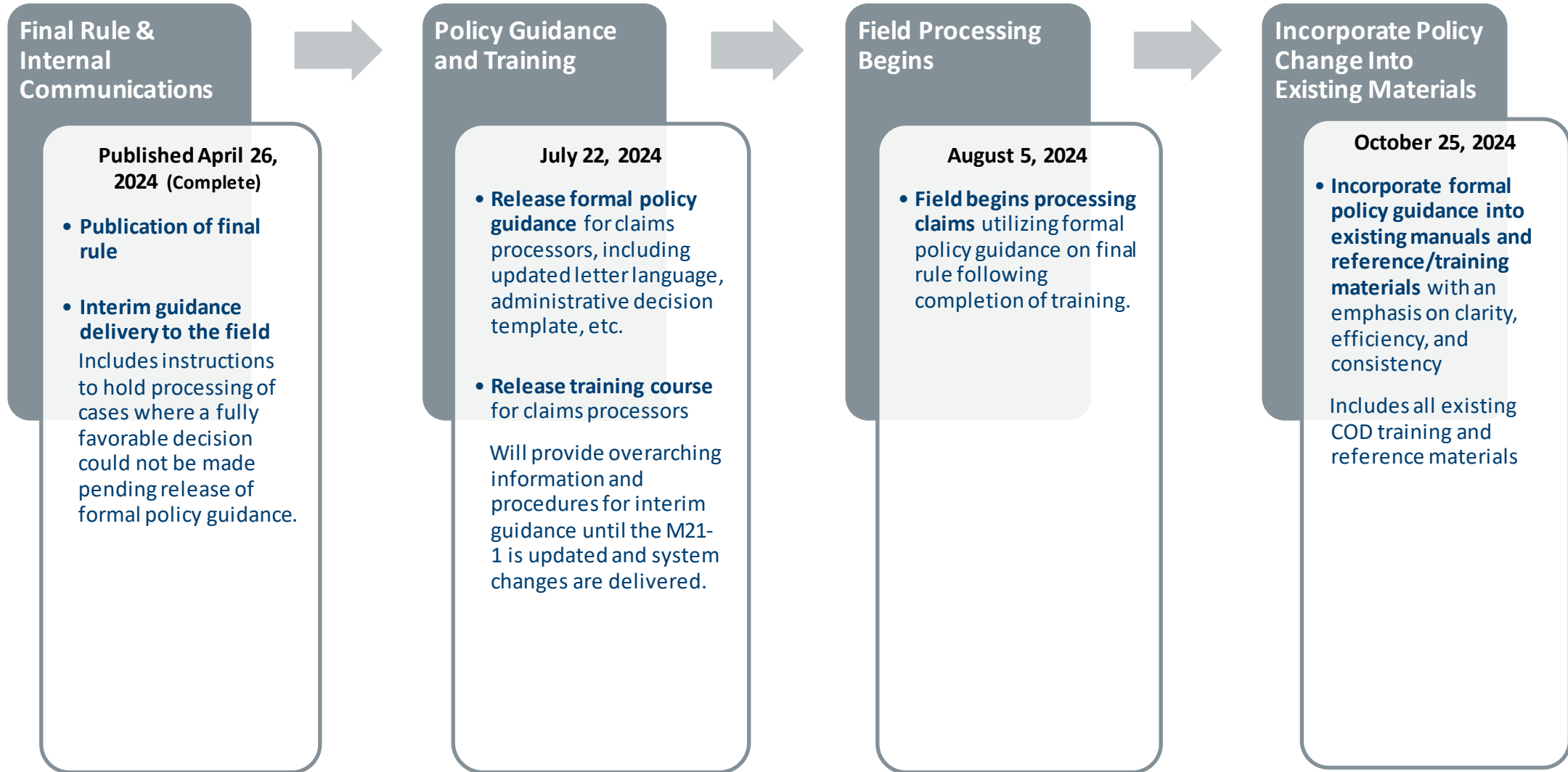
Due to the complexity of COD determinations, VBA has centralized the processing of these claims to nine regional offices:

- Winston-Salem
- Nashville
- Little Rock
- San Diego
- Milwaukee
- Muskogee
- St. Paul
- Los Angeles
- Detroit

Centralized processing maximizes VBA's operational efficiency and enhances the accuracy and consistency of COD decisions.



Final Rule Implementation Timeline



Human-Centered Design of COD Letters

December 2023: COD Letters Recommendations & Findings Report

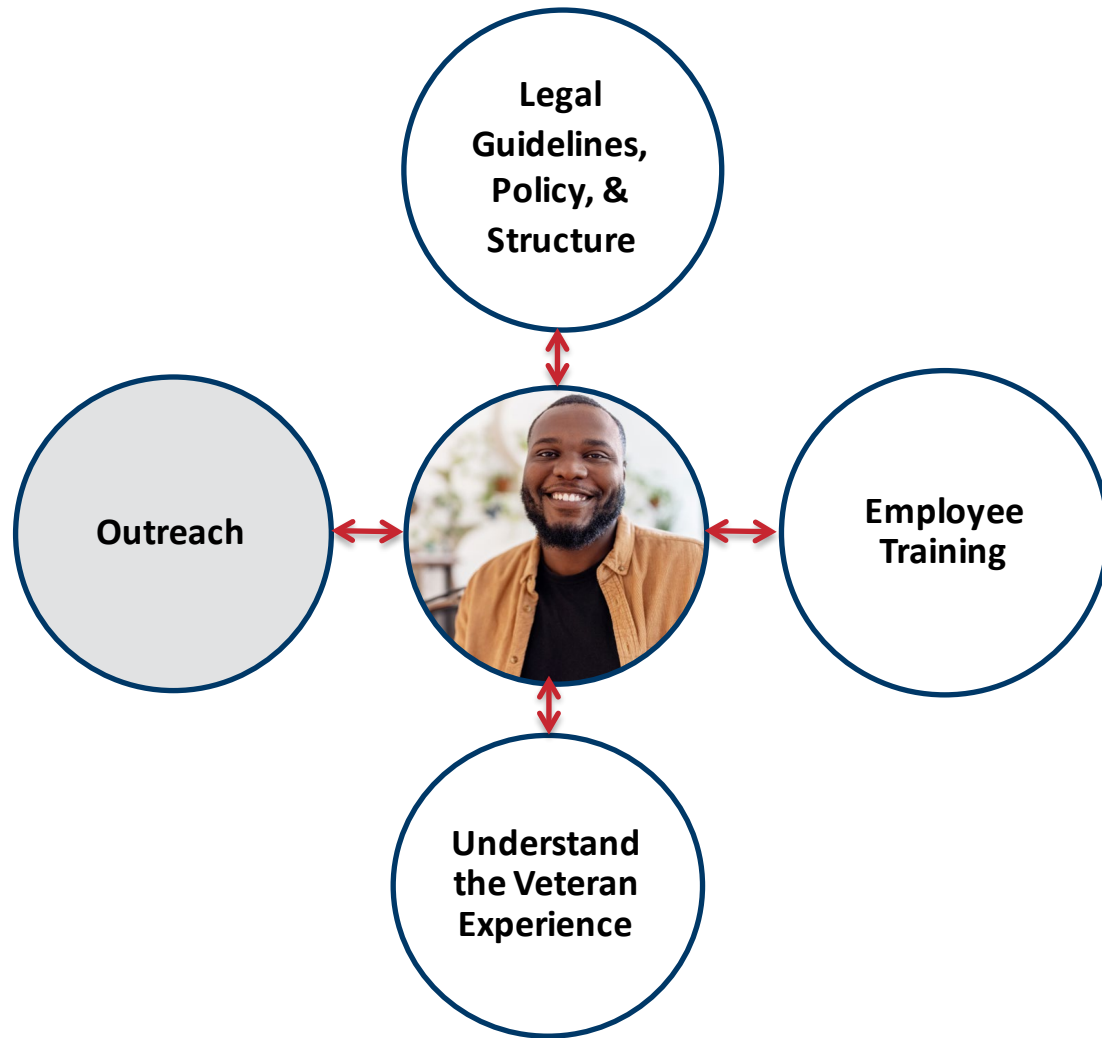
- Collaborative project between VBA and the Veterans Experience Office (VEO) to redesign COD letters sent to Veterans regarding COD determinations.
- VEO engaged with Veterans (representing a diverse range of experiences and backgrounds and who are customers of the VA).
- Identified the need for changes including conciseness and clarity, clear headings, clear recommendations, direct contact information, and overall design and layout.

Next Steps:

1. Updating language in letters and other materials to de-emphasize “dishonorable for VA purposes.”
2. Designing prototypes based on Human-Centered Design and new regulation parameters.
3. VBA will seek VSO and stakeholder input and feedback on the changes.

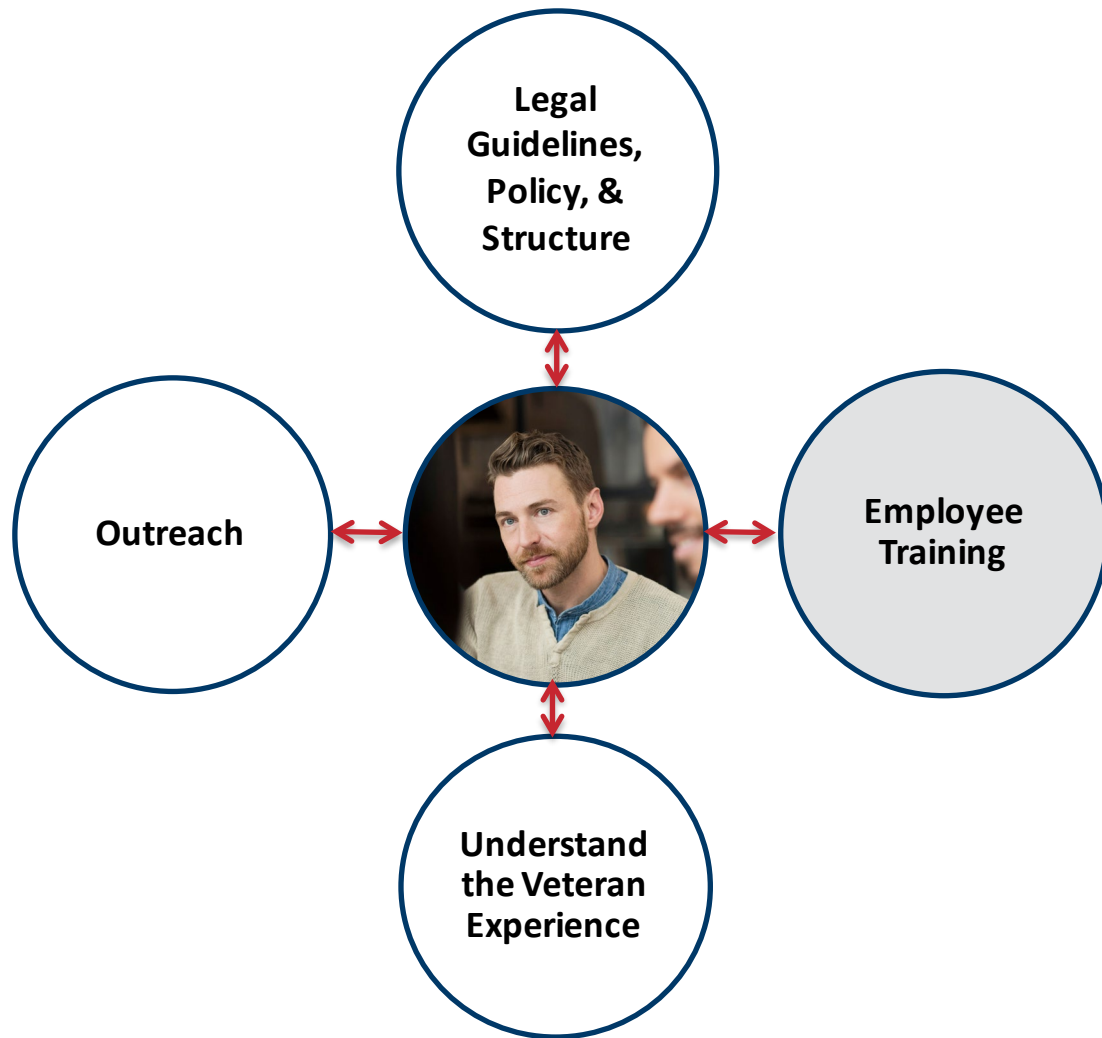


VBA Approach



- **Cover OTH discharges as part of the Transition Assistance Program (TAP) curriculum** during the VA Benefits Brief portion to educate those leaving military service about VA's COD process and that there are certain benefits those with OTH discharges are eligible to receive.
- **July 2023 – Released a micro-learning Military Life Cycle module on COD determinations** which is online and open to the public. The satisfaction rate for those who completed the course evaluation is 94%.
- **Continue to encourage Veterans and former SMs to apply for compensation benefits and healthcare** with events such as the Virtual Homeless and Justice-Involved Veteran Outreach symposium held January 25, 2024, and the Virtual LGBTQ+ Veteran Outreach Symposium held June 6, 2024.
- **VA.gov has a discharge upgrade tool** as well as information on how to get assistance from our VSO partners or accredited representatives.

VBA Approach



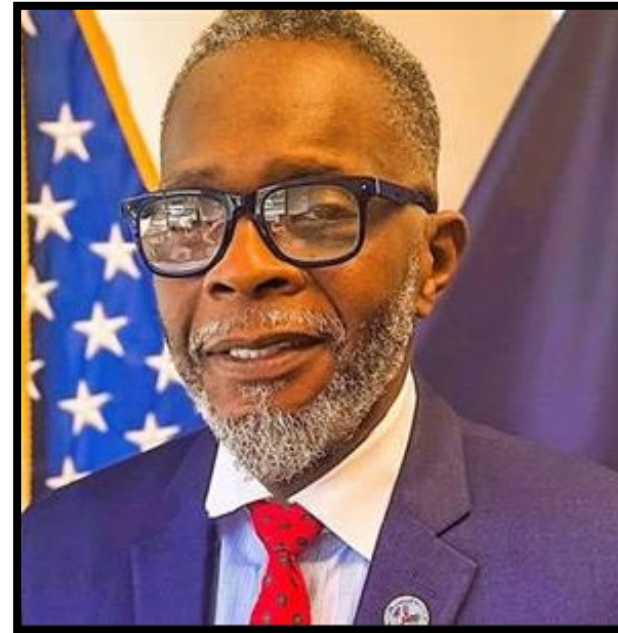
- **FY 2022 – Pre-decisional review on all potential unfavorable COD decisions**, more than 14,000 cases. Identified procedural deficiencies leading to improvements in training, system updates, M21-1 updates. As a result, benefit entitlement accuracy for COD decisions improved from 92% in FY2020 to 98% in FY2022.
- **January/March 2022 – Provided targeted training to specialized teams processing COD decisions and quality review staff** incorporating findings and best practices from special review
- **April and June 2022 – Updated national training courses** to reflect revised procedures per SecVA memo on Lesbian, Gay Bisexual, Transgender, Queer, and Related Identities Benefits Eligibility (LGBTQ+).
- **July/August 2022 – Administered COD Practicum** for quality review staff in regional offices and provided live feedback on results
- **December 2022 – System enhancement implemented** for automatic issuance of COD due process notice and automatic retrieval of military records

Veterans Health Administration - OTH Activity



Mr. John Saulmon

Chief of Staff Member Services
Veterans Health Administration (VHA)

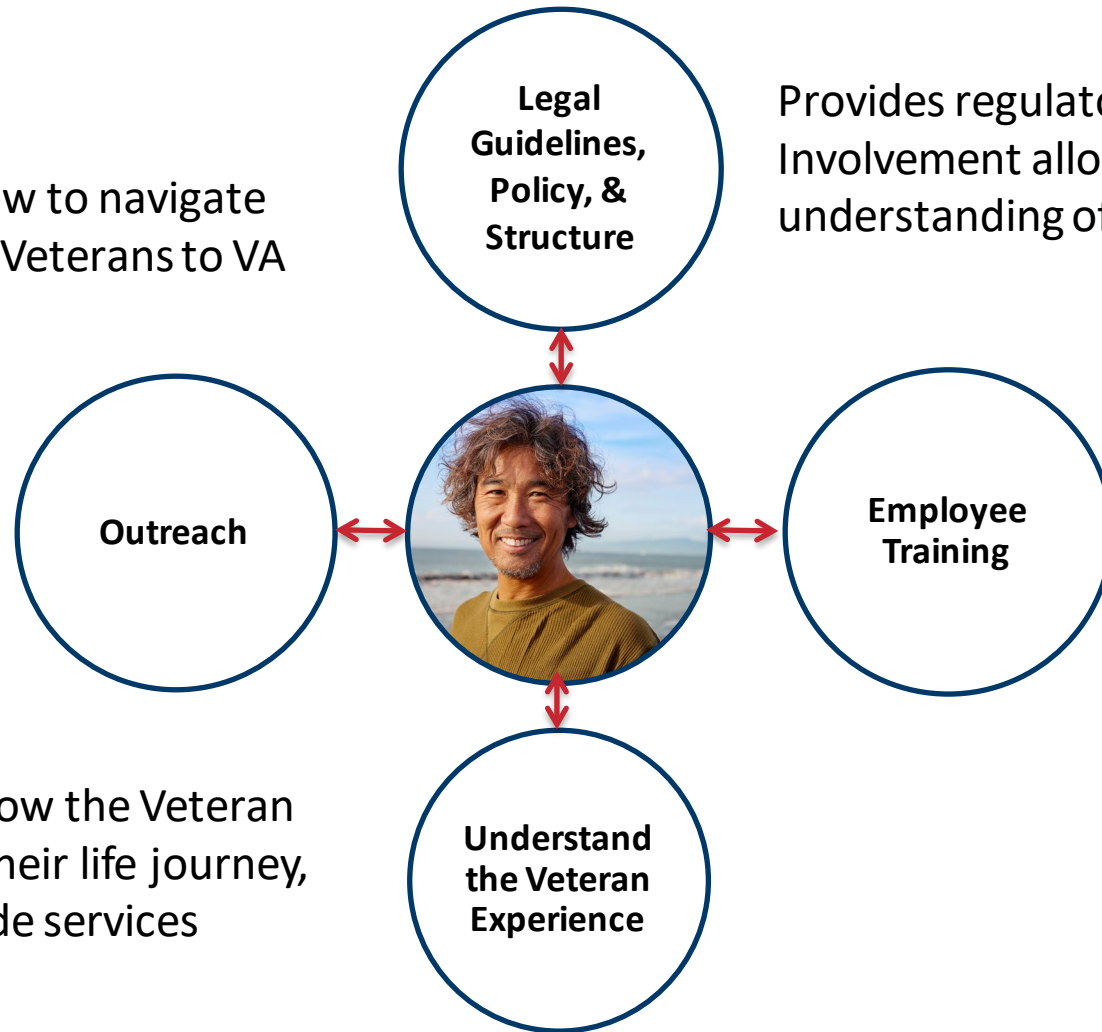


Mr. Stacey Echols

Acting Chief Operations Officer Member Services
Veterans Health Administration (VHA)

VA Approach

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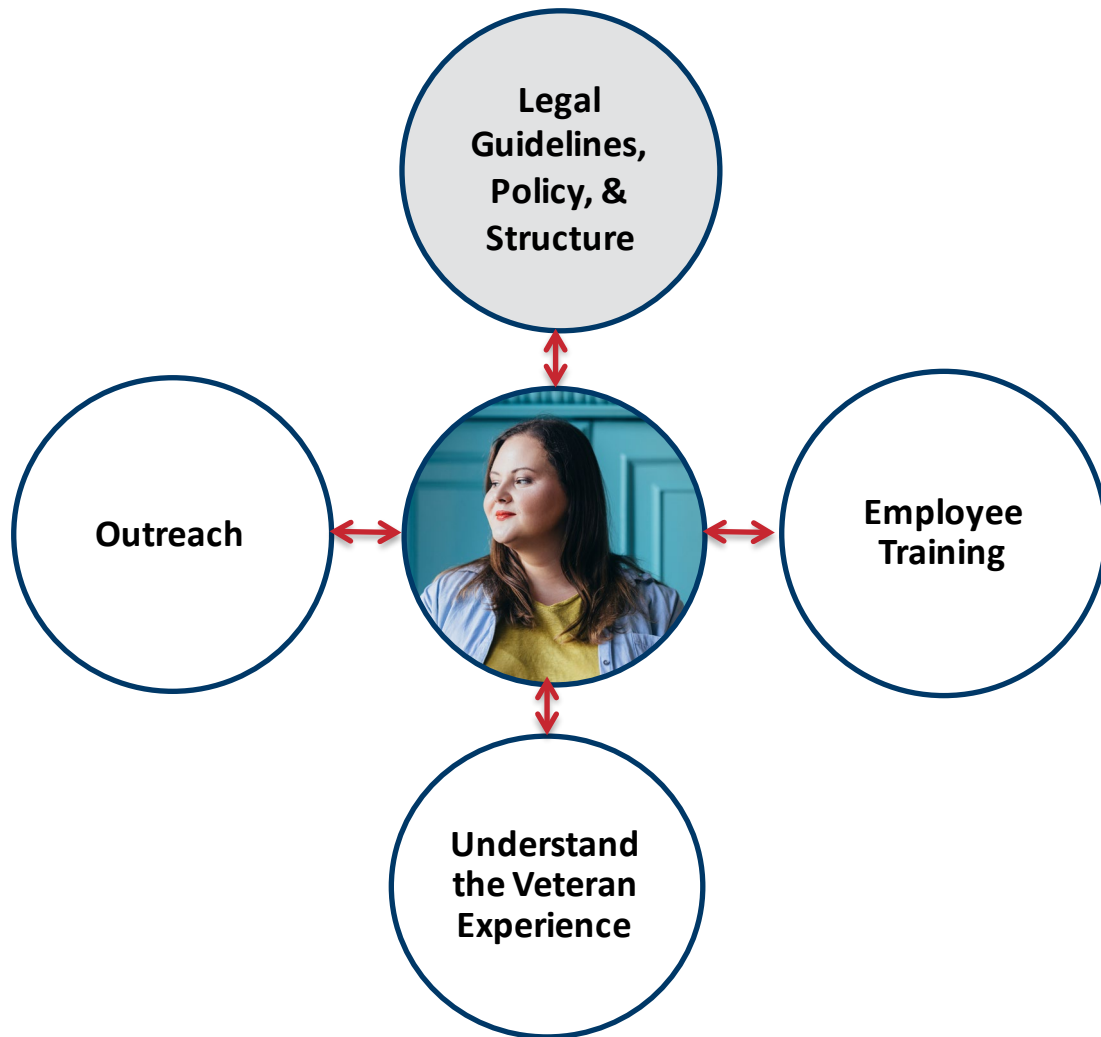


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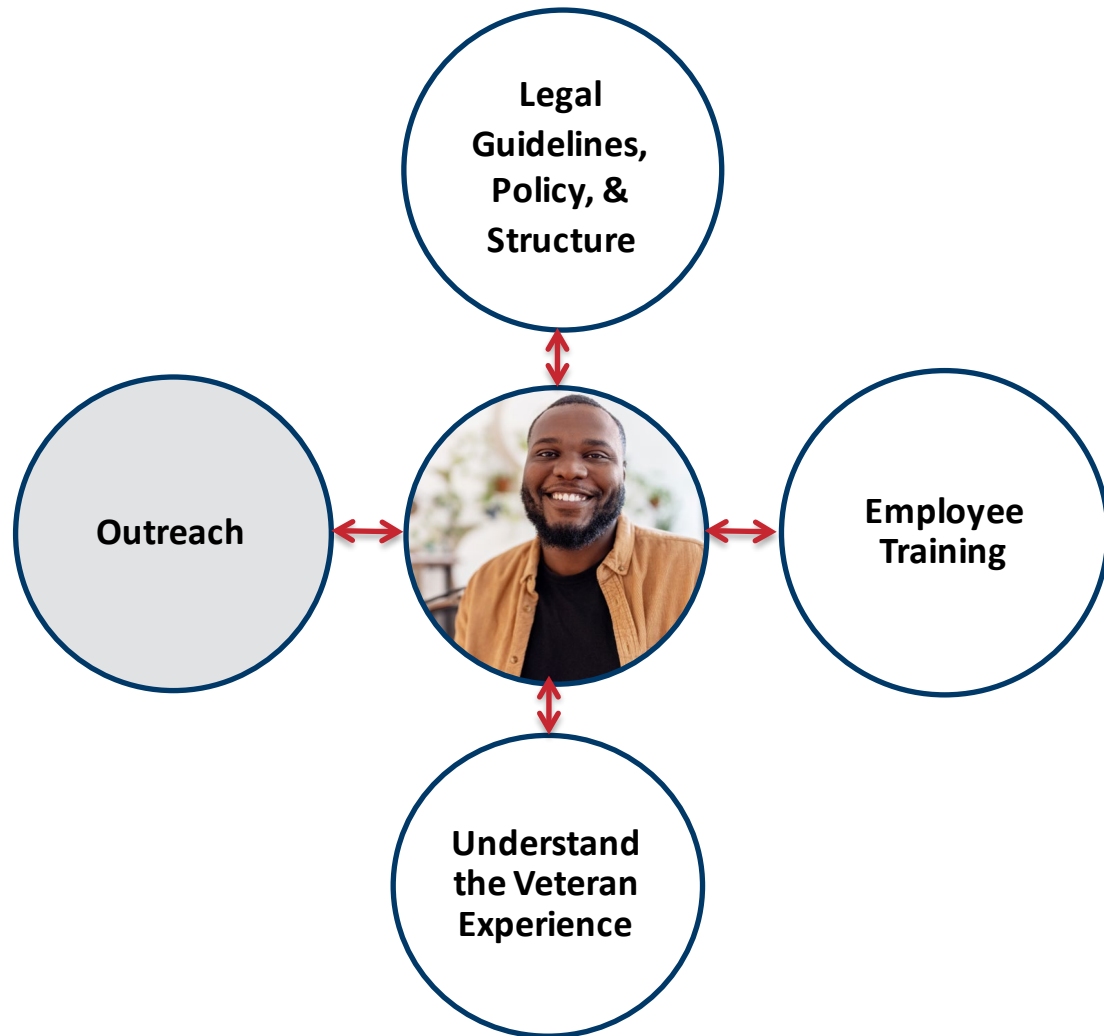
Gives employees what they
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VHA Approach



- **July 2020 - HVAC Subcommittee on Disability Assistance and Memorial Affairs Hearing** to support Character of Discharge reviews and OTH Veteran outreach efforts
- **November 2020 - HVAC Enrollment Hearing**, evaluating OTH enrollment qualifiers and OTH outreach concerns
- **Collaborated with VBA in 2018 to develop VA Form 20-0986** Eligibility Determination for Character of Discharge (COD) Request Form
- **Created process to submit VA Form 20-0986** to VBA on behalf of all OTH Veterans presenting to VHA for care.
- **Established an emergent mental health treatment process** for expedited review for all OTH Veteran.
- **Submitted over 38k request to VBA for COD determinations.**

VHA Approach



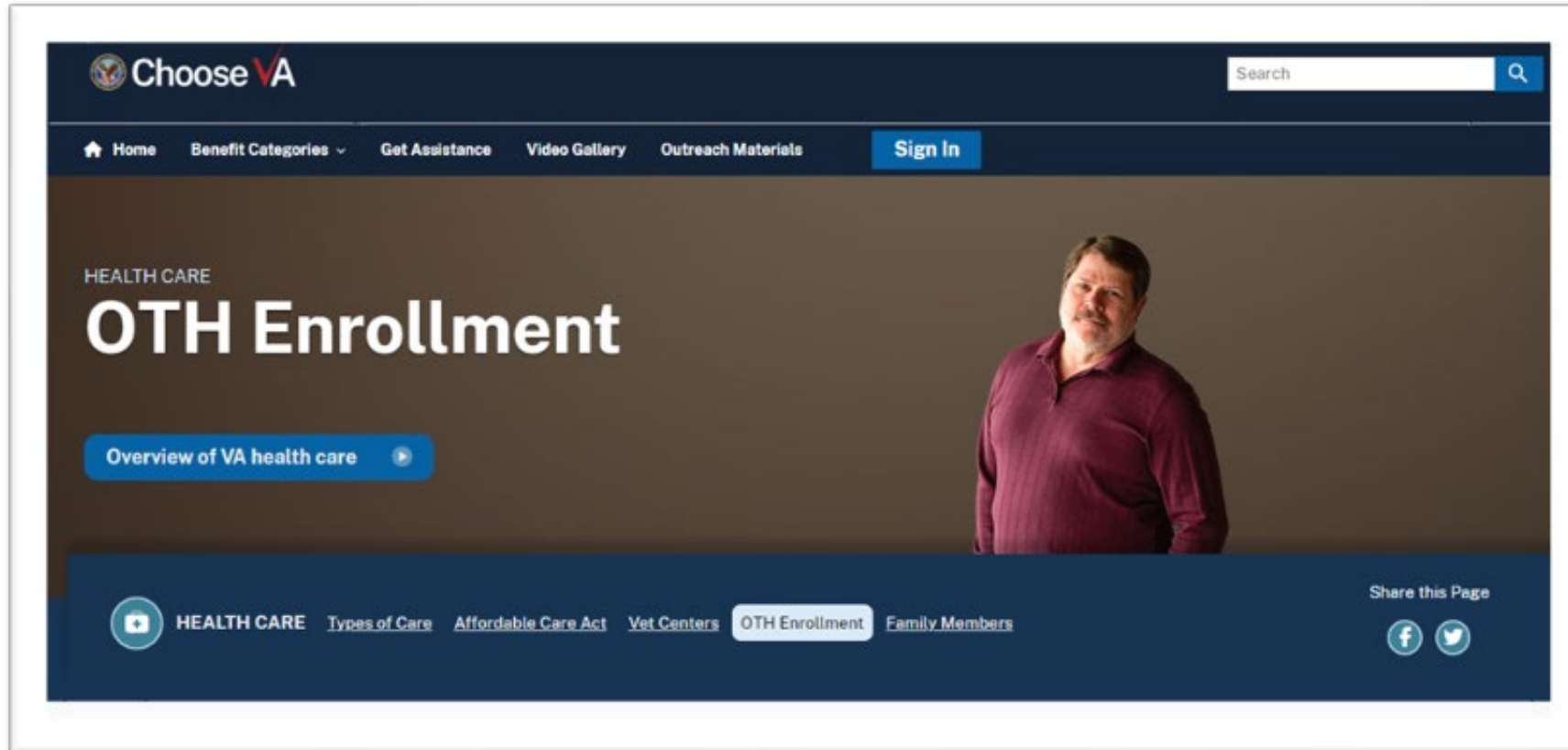
- **Collaborated with Office of Mental Health and Suicide Prevention (OMHSP)**, sponsoring a mental health mailing campaign to 476K OTH Veterans to support a 2018 Mental Health treatment authority (that gives most OTH Veterans immediate access to mental health care services prior to Character of Discharge review).
- **May - October 2021, VHA OTH marketing campaign** released through two modalities (OTH Brochure (English and Spanish versions) and a digital footprint) supporting 2.2M views and 3.7K OTH Veteran health care registrations.

VHA Approach



- **VHA MS updated and created 12 OTH knowledge management articles**, supporting VHA Team Member ability to provide timely and accurate information to OTH Veterans.
- **VHA MS and OMHSP led or supported 58 unique training and staff support sessions** on OTH or related topics, training approximately 5.3K VHA Team Members, empowering Team Members with what they need to provide caring, professional, and aligned customer service/care to OTH Veterans.
- **Conducted 13 training sessions** with approximately 7.5K VHA Team Members during implementation of the Comprehensive Prevention, Access To Care, And Treatment (COMPACT) Act Of 2020 to provide free emergent suicide care to OTH Veterans who served in combat or experienced MST.
- **Provides quarterly training** to enrollment eligibility staff on OTH Veterans eligibility.

How You Can Help – Website Link



- ❑ Provides up-to-date guidance
- ❑ Specifically addresses questions that Veterans with OTH discharges are likely to be asking
- ❑ For website link: ([OTH Enrollment | ChooseVA](#)) or use this QR code:



Implementation Q & A



Do you have any questions regarding VA implementation of the new OTH guidance?



Thank you

VA



U.S. Department
of Veterans Affairs