

TAKE YOUR GUN TO WORK AND LEAVE IT IN THE PARKING LOT: WHY THE OSH ACT DOES NOT PREEMPT STATE GUNS-AT-WORK LAWS

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INTRODUCTION

One generally can find anecdotes supporting any position on a divisive issue. These moving tales morph into “proof” that the supported position should reign victorious. The raging gun-control debate is no exception. Gun proponents recount stories where guns facilitated self defense and prevented serious harm to innocent victims. One such incident occurred in an Alabama restaurant where two robbers forced customers and employees into a walk-in refrigerator at gun point.¹ Fortunately, a hero hidden and armed with his pistol shot the robbers and ended the robbery before anyone else was injured.² A similar result occurred in New York City, where a potential victim shot her attacker with a loaded gun she was carrying in violation of local gun-control laws.³

Other stories do not end as happily but still make great anecdotal evidence of a need for guns in the “proper” hands. In one tragedy, a man drove his pickup truck through the glass doors of a crowded Texas restaurant, exited his car, removed two semi-automatic pistols, and opened

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¹ See J. Neil Schulman, *Perspective on Gun Control: A Massacre We Didn't Hear About*, L.A. Times, Jan. 1, 1992, at Metro.

² J. Neil Schulman, *Perspective on Gun Control: A Massacre We Didn't Hear About*, L.A. Times, Jan. 1, 1992, at Metro. The protagonist sustained minor injuries from the fire exchange. *Id.*

³ John R. Lott, Jr., *NY Gun Laws and the Granny*, The N.Y. Post, Sept. 14, 2006, at Op-Ed, http://www.nypost.com/seven/09142006/postopinion/opedcolumnists/ny_gun_laws__the_granny_opedcolumnists_john_r_lott_jr_.htm (last visited July 15, 2008).

fire.⁴ He continued shooting for ten minutes giving hostages ample time to return fire, especially during one of the many times his pistol jammed.⁵ Unfortunately, Texas law prevented hostages from accessing their weapons, and 23 innocent people died.⁶

But, gun proponents do not have a monopoly on gripping tales. Opponents have their own, which are equally as powerful and leave many demanding an immediate gun ban. One incident occurred recently in Henderson, Kentucky, where a plastics plant worker shot and killed five co-workers before turning his gun on himself.⁷ Apparently, he was upset because his supervisor had chosen to reprimand him for using a cell phone and failing to wear safety goggles while at work.⁸ That supervisor lost his life.⁹ Another tragedy occurred in New York where an executive summoned two employees to his office, shot them to death, and killed himself.¹⁰

Gun critics point to such incidents as proof that guns combined with heated encounters equals an increased likelihood of injury and death.¹¹ Eliminating guns, the argument goes, increases safety, which is particularly important for the American workplace where more than 12 workers are murdered each week, and 77% of these murders involve firearms.¹²

⁴ J. Neil Schulman, *Perspective on Gun Control: A Massacre We Didn't Hear About*, L.A. Times, Jan. 1, 1992, at Metro.

⁵ J. Neil Schulman, *Perspective on Gun Control: A Massacre We Didn't Hear About*, L.A. Times, Jan. 1, 1992, at Metro.

⁶ J. Neil Schulman, *Perspective on Gun Control: A Massacre We Didn't Hear About*, L.A. Times, Jan. 1, 1992, at Metro.

⁷ Bob Driehaus, *Worker Kills Five at Plant in Kentucky, Then Himself*, The N.Y. Times, June 26, 2008, at A. 20.

⁸ Bob Driehaus, *Worker Kills Five at Plant in Kentucky, Then Himself*, The N.Y. Times, June 26, 2008, at A. 20.

⁹ Bob Driehaus, *Worker Kills Five at Plant in Kentucky, Then Himself*, The N.Y. Times, June 26, 2008, at A. 20.

¹⁰ *Insurance Executive Kills Co-Workers, Self*, The Augusta Chronicle, Sept. 17, 2002, at A. 2. Two semi-automatic handguns were found on the floor, and a third was found elsewhere in the office; all three belonged to the gunman. *Id.*

¹¹ See Brady Campaign, Brian J. Siebel et al., *Forced Entry*, at 6-8, 11-12, <http://www.bradiycampaign.org/xshare/pdf/forced-entry-report.pdf> (last accessed Aug. 24, 2008); John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 355 (Spring 1997).

¹² See Brady Campaign, Brian J. Siebel et al., *Forced Entry*, at 6-8, <http://www.bradiycampaign.org/xshare/pdf/forced-entry-report.pdf>; see also John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 355 (Spring 1997).

Opponents of gun control predictably respond that there is no statistically significant evidence that reducing guns reduces crime.¹³ They point to data that shows guns may reduce violent crime by deterring criminals who realize victims may be armed.¹⁴ Enabling law-abiding citizens to arm increases safety for everyone, they argue, even the unarmed.¹⁵

In the midst of this debate, many states have begun enacting laws to protect individuals' rights to store their guns in their vehicles while at work.¹⁶ These laws (named "Workers Protection" laws by proponents, "Forced Entry laws" by opponents, but referred to here as "guns-at-work" laws)¹⁷ take various forms, but all limit an employer's ability to prevent employees from storing guns in their vehicles on employer property.¹⁸

As one might expect, these laws provide a litmus test for the gun debate. Supporters argue that such laws are necessary for employee self defense because many licensed gun owners

¹³ See John R. Lott, Jr., *Guns, Crime, and Safety: Introduction*, 44 J.L. & Econ., 605, 606 (Oct. 2001). Some scholars contend that gun control laws may actually lead to more victims. See, e.g., Gary Kleck & Marc Gertz, 86 J. Crim. L. & Criminology, 150, 180-81 (Fall 1995) (explaining that laws that reduce gun availability reduce defensive gun use that otherwise would save lives, prevent injuries, thwart rapes, and drive off burglars). According to Kleck and Gertz, as many as 400,000 people a year use guns defensively in situations where the defenders claim to have "almost certainly" saved a life by doing so." *Id.* at 180. Data also indicates that even in situations where an aggressor has a gun, victims who resist with guns are less likely to be injured than those who resist in other ways or who do not resist at all. *Id.* at 152

¹⁴ See John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 355, 358-61 (Spring 1997). See generally John R. Lott, Jr., *The Concealed-Handgun Debate*, 27 J. Legal Studies, 221 (Jan. 1998) (providing "additional evidence that allowing law-abiding citizens to carry concealed handguns deters criminals"); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Studies 1 (Jan. 1997) (finding that allowing citizens to carry concealed weapons deters violent crime without increasing accidental deaths).

¹⁵ See John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 359-60 (Spring 1997).

¹⁶ See Part III *infra*.

¹⁷ See National Rifle Association, Chris W. Cox, Chris W. Cox's Political Report: Workers Protection Laws—April 2006, <http://www.nra.org/Issues/Articles/Read.aspx?id=181&issue=53> (last visited July 22, 2008) (noting the dueling terminology); see also *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1286-87 (N.D. Okla. 2007) (noting that proponents and opponents use different terms to describe these laws). This article adopts the neutral phrase, "guns-at-work" laws, a phrase used by the United States District Court for the Northern District of Florida. See *Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *2 (N.D. Fla. July 28, 2008).

¹⁸ See Part III *infra*.

store their guns in their cars for protection as they commute through dangerous neighborhoods.¹⁹ According to this position, “[h]ard-working men and women are not immune from criminals in their employers’ parking lots. Nor are they impervious to carjackers, robbers or rapists during their commute or as they run errands before or after work.”²⁰ Employees working the graveyard shift deserve a means of self-defense too.²¹

Opponents disagree that these laws are justified, arguing instead that they decrease worker morale and safety by increasing the proximity to guns that can too easily turn a disagreement deadly.²² If employees have immediate access to guns, the argument goes, supervisors will not feel comfortable disciplining employees for fear of violent retaliation.²³ Moreover, employees will work in fear that a loose cannon may “go postal.”²⁴

At least two federal district courts have considered the legitimacy of state guns-at-work laws.²⁵ One found the laws preempted by the Occupational Safety and Health Act of 1970 (“OSH Act” or “Act”), which was enacted to promote worker safety.²⁶ According to that court, the laws create an obstacle to, and conflict with, the Act and therefore cannot stand.²⁷ The other

¹⁹ See, e.g., Marion P. Hammer, *Businesses May not Usurp Constitutional Rights*, Tallahassee Democrat, at 3B, Apr. 1, 2008.

²⁰ See Marion P. Hammer, *Businesses May not Usurp Constitutional Rights*, Tallahassee Democrat, at 3B, Apr. 1, 2008.

²¹ See Marion P. Hammer, *Businesses May not Usurp Constitutional Rights*, Tallahassee Democrat, at 3B, Apr. 1, 2008.

²² See, e.g., Brady Campaign, Brian J. Siebel et al., *Forced Entry*, at 6-12, <http://www.bradiycampaign.org/xshare/pdf/forced-entry-report.pdf> (last accessed Aug. 24, 2008); *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1334-35 (N.D. Okla. 2007).

²³ This concern is not without support when a supervisor loses his life simply for disciplining an employee about protecting his eyes with safety goggles. See *supra* p. 2 & nn. 7-9.

²⁴ See Brady Campaign, Brian J. Siebel et al., *Forced Entry*, at 6-8, 11-12, <http://www.bradiycampaign.org/xshare/pdf/forced-entry-report.pdf> (last accessed Aug. 24, 2008).

²⁵ See Fla. Retail Federation, Inc. v. Attorney Gen., No. 4:08cv179-RH/WCS, 2008 WL 2908003, at **2-15 (N.D. Fla. July 28, 2008); *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1286-87, 1296, 1330, 1340 (N.D. Okla. 2007).

²⁶ See *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1286-87, 1296, 1303-04, 1323, 1330-40 (N.D. Okla. 2007) (holding that the OSH Act preempts Oklahoma’s version of these laws and enjoining enforcement insofar as they conflict with the OSH Act).

²⁷ See *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1330-40 (N.D. Okla. 2007).

court disagreed, finding that an express provision in the Act permits states to regulate in this area.²⁸

As the debate rages on, the Supreme Court's first Second Amendment case in nearly seventy years²⁹ adds more fuel to the fire. The Supreme Court recently held in *D.C. v. Heller* that the Second Amendment embodies an individual's right to keep and bear arms for self defense.³⁰ Laws violating this right—for instance, by completely banning handguns in homes—may not survive judicial scrutiny.³¹ *Heller*, which currently is limited only to guns in the home,³² fails to address guns in vehicles, but it suggests the stakes in this debate are high if individuals' constitutional rights potentially hang in the balance.³³

²⁸ See *Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 2908003, at **14-15 (N.D. Fla. July 28, 2008). The court did not discuss whether Florida's law created a conflict with the OSH Act. See *id.* Instead, the court found Section 18(a) of the Act applied to expressly prevent preemption. *Id.* at *14.

²⁹ The Supreme Court last considered the scope of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939). See Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 Geo. Mason U. Civ. Rts. L.J. 167, 170-71 (Spring 2008) (noting that the Supreme Court has only made one significant statement about the Second Amendment, and that was in *Miller*).

³⁰ See *D.C. v. Heller*, 128 S. Ct. 2783, 2801, 2817-18, 2799 (2008) (“[T]he inherent right of self-defense has been central to the Second Amendment right,” and “[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”). The Court did not consider the precise issue of carrying a gun at all times. Its opinion was limited to guns in the home for self defense. See *D.C. v. Heller*, 128 S. Ct. 2783, 2818-22 (2008). Thus, it is not yet clear whether the Second Amendment protects an individual's right to store her gun in her car while at work.

³¹ See *D.C. v. Heller*, 128 S. Ct. 2783, 2817-18 (2008) (finding handgun ban is unconstitutional and invalid).

³² *D.C. v. Heller*, 128 S. Ct. 2783, 2817-22 (2008). Because *Heller* involved the District of Columbia, see *id.* at 2787-88, it is not yet settled whether the Second-Amendment right recognized in *Heller* will be incorporated to apply against the states. See Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 Geo. Mason U. Civ. Rts. L.J. 167, 189-90 (Spring 2008) (noting *Heller* did not consider whether the Second Amendment is incorporated to apply against the states).

³³ It is not difficult to imagine that *Heller* may quickly be extended to apply to vehicles.

In the face of numerous states enacting guns-at-work laws,³⁴ this article explores whether such laws are preempted by the OSH Act and concludes they are not. Part I provides a general overview of preemption necessary to navigate any preemption problem. Part II analyzes the OSH Act and the specific provisions relevant here. Part III examines various state guns-at-work laws, reveals noteworthy characteristics many of these laws share, and addresses lower court cases that have considered OSH Act preemption of these laws. Part IV argues that these laws do not conflict with the OSH Act. Finally, Part V contends that because preemption requires promulgation of standards in accordance with the OSH Act, clear standards should be promulgated to address the issue of guns in workplace parking lots.

The Secretary of Labor and Occupational Safety and Health Administration (“OSHA”)³⁵ may not continue to sit on the sidelines refusing to solidify their position on this contentious clash of workers’ safety and gun owners’ rights. Both sides must know whether guns at work create an issue of occupational health and safety sufficient to displace validly enacted state laws.

³⁴ See Part III *infra*.

As states are enacting these statutes, the Supreme Court’s preemption jurisprudence has perhaps signaled a trend of receptivity towards preemption. See, e.g., *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2412 (2008) (finding NLRA preempts California law where California law regulates within zone protected and reserved for market freedom); *Preston v. Ferrer*, 128 S. Ct. 978, 981-83, 985-87 (2008) (holding when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act preempts state laws lodging primary jurisdiction in another forum); *Rowe v. N. Hampshire Motor Transp. Ass’n*, 128 S. Ct. 989, 993-98 (2008) (finding federal law preempts two provisions of Maine law, which regulate tobacco delivery); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1002- 11 (2008) (holding preemption clause in Medical Device Amendments of 1976 bars state tort claims challenging safety and effectiveness of medical devices that have been pre-approved by Food and Drug Administration). The Supreme Court heard yet another preemption case during its October 2008 Term. See *Wyeth v. Levine*, No. 06-1249, <http://www.supremecourtus.gov/docket/06-1249.htm> (last visited July 28, 2008). Despite any such trend favoring preemption, this article maintains why it is inappropriate to preempt state guns-at-work laws.

³⁵ “OSHA is the organization within the Department of Labor that addresses hazards in the workplace, including workplace violence.” See Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited Oct. 27, 2008).

This dispute should be resolved by the executive branch in accordance with the OSH Act, rather than by the courts through the doctrine of preemption.³⁶

I. PREEMPTION PRIMER

A. *Types of Preemption*

Preemption generally takes two forms, express and implied.³⁷ Implied preemption is often further subdivided into field and conflict preemption.³⁸ These categories are not rigidly distinct.³⁹

1. *Express Preemption*

Express preemption is straightforward.⁴⁰ It exists where Congress has expressly shown its intent to preempt state law through explicit statutory language.⁴¹ An express preemption clause is generally the starting point of a preemption analysis because it is arguably the best indicator of Congress's intent.⁴² When Congress has made its intent known through explicit statutory language, the preemption task is simply to give effect to that language.⁴³

2. *Implied Preemption*

³⁶ Despite clear constitutional underpinnings, considerable confusion has emerged over the scope and application of preemption and whether certain state laws must yield to federal law. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001).

³⁷ See *Am. Honda Motor Corp., Inc.*, 529 U.S. 861, 884 (2000) (stating that the Court has traditionally distinguished between express and implied preemption); see also *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

³⁸ See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (explaining that field and conflict preemption apply in the absence of express statutory language); see also *Geier v. Am. Honda Motor Corp., Inc.*, 529 U.S. 861, 884 (2000) (noting that Court typically treats conflict preemption as a species of implied preemption); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n. 6 (stating that field preemption may fall into the implied-preemption category).

³⁹ *Crosby*, 530 U.S. at 373 n. 6. For example, a state law that regulates in a preempted field may be said to conflict with Congress's intent. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 104 n. 2 (1992) (plurality). Thus, that state law could be considered a species of field or conflict preemption.

Part II of *Gade* received only a plurality of the Court. See 505 U.S. at 91. Unless otherwise indicated, citation to *Gade* is to the majority portions of the opinion.

⁴⁰ See *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

⁴¹ *English*, 496 U.S. at 78-79; see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001); see also *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1002-11 (2008) (interpreting the express preemption provision in the Medical Device Act).

⁴² See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

⁴³ See *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 841 (N. Dakota 2006).

A federal law lacking an express-preemption provision may still preempt state law.

Similarly, a federal law with an express-preemption provision that does not apply to the state law in question may still preempt that law.⁴⁴ In both cases, this occurs through implied preemption.⁴⁵

Implied preemption is generally divided into field and conflict preemption.⁴⁶

a. Field Preemption

Congress may intend that federal law “occup[ies] the field” and governs the conduct exclusively.⁴⁷ This is so-called “field preemption.”⁴⁸ Field preemption applies when there is a “field reserved for federal regulation” and “Congress has[s] left no room for state regulation of these matters.”⁴⁹ It is inferred where the federal interest is so dominant that it is presumed to preclude state laws on the subject.⁵⁰ Field preemption stems from the depth and breadth of the congressional scheme, which occupies the legislative field.⁵¹ Whether field preemption is present depends on the intent behind the federal scheme as a whole.⁵²

The Supreme Court has limited its application of the field preemption doctrine, especially where state law governs health and safety.⁵³ In arenas traditionally within the federal government’s purview, like foreign affairs, however, the Court is more likely to find field preemption.⁵⁴

⁴⁴ See *infra* n. 268.

⁴⁵ See *infra* n. 268.

⁴⁶ See *supra* p. 7 n. 38.

⁴⁷ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *English*, 496 U.S. at 79. “It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements.” *United States v. Locke*, 529 U.S. 89, 115 (2000). Rather, “[t]he appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation.” *United States v. Locke*, 529 U.S. 89, 115 (2000).

⁴⁸ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *English*, 496 U.S. at 79.

⁴⁹ *Sprietsma v. Mercury Maine*, 537 U.S. 51, 69 (2002) (quoting *United States v. Locke*, 529 U.S. 89, 111 (2000)).

⁵⁰ See *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985).

⁵¹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

⁵² See *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985).

⁵³ See, e.g., *Sprietsma*, 537 U.S. at 69 (declining to find field preemption where statute did not require the Coast Guard to promulgate “comprehensive regulations” covering “every aspect” of recreational boat safety and design; nor did statute require Coast Guard to certify acceptability of “every” recreational boat within its jurisdiction); see also *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719-20 (1985) (explaining even a national policy may not remove a regulation from the area of health and safety and convert it to one of overriding national concern warranting preemption).

b. Conflict Preemption

Preemption may also occur impliedly through conflict preemption.⁵⁵ Conflict preemption exists where it is impossible to comply simultaneously with state and federal law or where state law “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.”⁵⁶ These types of preemption are often called “impossibility” preemption and “obstacle” preemption respectively.⁵⁷ Both terms will be used here.

i. Impossibility Conflict Preemption

Impossibility conflict preemption is exactly as it sounds: if it is impossible simultaneously to comply with both state and federal law, state law yields.⁵⁸ “For conflict preemption based on impossibility, the question is whether [state law] is explicitly inconsistent with the federal law, not whether state law interferes with some purpose of the federal law.”⁵⁹ The Supreme Court has described the impossibility as a “physical impossibility.”⁶⁰

ii. Obstacle Conflict Preemption

The Court is even more reluctant to infer preemption simply from the comprehensiveness of agency regulations. *Id.* Instead, it has looked for a specific statement of preemptive intent. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000). This is particularly true for health and safety regulation: “Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, [the Court] will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety.” *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717-18 (explaining complex problems will often require intricate and complex congressional solutions without Congress intending to preempt the field).

⁵⁴ *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) (explaining that federal interest in foreign affairs stems from the Constitution and is “‘intimately blended and intertwined with responsibilities of the national government.’” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941))).

⁵⁵ *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000); *see also* *Oxygenated Fuels Ass’n, Inc. v. Pataki*, 158 F. Supp. 2d 248, 253 n. 2 (N.D.N.Y. 2001).

⁵⁶ *Crosby*, 530 U.S. at 372-73 (internal quotation marks omitted). Conflict preemption turns on an actual conflict rather than an express statement of congressional intent. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000). Though clear evidence of a conflict is required, no formal congressional or agency statement identifying a conflict is necessary. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884-85 (2000).

⁵⁷ *See* Jeffrey A. Berger, *Phoenix Grounded: The Impact of the Supreme Courts Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 *Nw. U. L. Rev.* 941, 951 (Winter 2003); Caleb Nelson, *Preemption*, 86 *VA. L. Rev.* 225, 227-29 (Mar. 2000).

⁵⁸ *See Crosby*, 530 U.S. at 2294.

⁵⁹ *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 457 F. Supp. 2d . 324, 331 (S.D.N.Y. 2006)

⁶⁰ *See Boggs v. Boggs*, 520 U.S. 833, 843 (1997) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (plurality)).

Obstacle conflict preemption is less straightforward and has spawned much debate.⁶¹ In determining whether a state law is a sufficient obstacle, courts examine the federal statute as a whole to discern its purpose and intended effects.⁶² “If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of the delegated power.”⁶³ Where this happens, state law is said to create an obstacle to federal law that creates a conflict between state and federal law.⁶⁴ In the face of such a conflict, state law is preempted.

B. Effect of Savings Clauses

Congress seldom intends to preempt entire fields of state regulation.⁶⁵ Indeed, it is common for Congress to include a “savings clause” in federal legislation.⁶⁶ A savings clause is a provision in the federal law that legitimizes concomitant state regulation.⁶⁷ If it applies, it may save state law from federal preemption.⁶⁸

C. Important Background Principles to Guide Preemption Analysis

⁶¹ See, e.g., Jeffrey A. Berger, *Phoenix Grounded: The Impact of the Supreme Courts Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 Nw. U. L. Rev. 941, 951-52 (Winter 2003) (stating that academic battles have raged over obstacle preemption); Caleb Nelson, *Preemption*, 86, VA. L. Rev. 225, 265-90, 304 (Mar. 2000) (criticizing obstacle preemption as having no place as a constitutional law doctrine); see also Kathryn E. Picanso, Note, *Protecting Information Security Under a Uniform Data Breach Notification Law*, 75 Fordham L. Rev. 355, 371 (Oct. 2006) (noting that obstacle preemption has been criticized as a default doctrine used when congressional intent is unclear).

⁶² *Crosby*, 530 U.S. at 373.

⁶³ *Crosby*, 530 U.S. at 373. The Court places some weight on an agency’s opinion of whether the state law stands as an obstacle. See *Geier v. Am. Honda Co.*, 529 U.S. 861, 883 (2000); see also *Sprietsma v. Mercury Maine*, 537 U.S. 51, 68 (2002).

⁶⁴ See *Crosby*, 530 U.S. at 373.

⁶⁵ See Ronald D. Rotunda & John E. Nowak, 2 *Treatise on Const. L.* § 12.1 (4th ed.)

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See, e.g., *United States v. Mass.*, 493 F.3d 1, 21 (1st Cir. 2007) (noting that savings clauses at issue save state law from preemption); *Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 209 (3d Cir. 2007) (construing savings clause and finding it saves state law from preemption). But see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (concluding savings clause does not bar conflict preemption)

In determining what type of preemption, if any, applies two important principles guide the analysis. First, congressional intent is of paramount importance. Second, courts often apply a presumption against preemption in traditionally state-controlled arenas.

1. Congressional Intent as Lodestar

The ultimate task in any preemption analysis is clear: determine whether state law is consistent with the structure and purpose of the federal law as a whole.⁶⁹ This inquiry is guided by the provisions of the law, its objectives, and policies.⁷⁰ Congress enacts federal law, and it has the power, stemming from the Supremacy Clause of the Constitution,⁷¹ to preempt state law.⁷² Congressional intent is therefore the lodestar for determining whether state law is preempted.⁷³

⁶⁹ See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality).

⁷⁰ See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

⁷¹ The Supremacy Clause, U.S. Const. Art. VI, cl. 2, reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

⁷² See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001). “It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments.” *Lorillard*, 533 U.S. at 540 (quoting *McCulloch v. Maryland*, 4 Wheat 316, 427, 4 L.Ed. 579 (1819)). Both federal statutes and regulations can preempt state law. *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985). Even a compelling state interest cannot save a preempted state law. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). “[A]ny state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” *Free v. Bland*, 369 U.S. 663, 666 (1962) (citing *Gibbons v. Ogden*, 9 Wheat 1, 210-11 (1824)).

⁷³ See *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). Congress’s purpose has been termed the “touchstone” of the preemption analysis. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Only portions of *Medtronic* garnered a majority of the Court. Unless otherwise indicated, citation is to the majority opinion.

Whether the federal agency that enforces the federal law believes there is preemption is also considered in the analysis. See *Sprietsma v. Mercury Maine*, 537 U.S. 51, 67-68 (2002); see also *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 721-22 (1985) (explaining where Congress has delegated to an agency administration of a federal program, and the agency has not suggested interference with federal goals, the Court is reluctant to find preemption). *But see Geier v. Am. Honda Motor co., Inc.*, 529 U.S. 861, 884-85 (2000) (cautioning that no formal agency statement of preemptive intent is necessary before finding conflict preemption).

This intent is discerned from the statutory language and overall framework of the federal law.⁷⁴ “The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject.”⁷⁵ Congressional intent is analyzed against a backdrop presumption that Congress does not cavalierly pre-empt state law.⁷⁶

2. *Presumption against Preemption*

Particularly in areas states have traditionally controlled,⁷⁷ the preemption analysis begins with an assumption that the historic police powers of the state⁷⁸ are not superseded absent evidence of a clear and manifest congressional purpose to do so.⁷⁹ This is the so-called “presumption against pre-emption,”⁸⁰ and it stems from notions of federalism and respect for state sovereignty.⁸¹

⁷⁴ See *Lohr*, 518 U.S. at 486.

⁷⁵ *Hines v. Davidowitz*, 312 U.S. 52, 71 (1941).

⁷⁶ See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Medtronic, Inc.*, 518 U.S. at 485.

⁷⁷ Crime prevention is one such area. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”).

⁷⁸ State police powers extend to the health, safety, and welfare of its citizens. *Lohr*, 518 U.S. at 485.

⁷⁹ See *id.*; see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

⁸⁰ This presumption applies even where state authority allegedly conflicts with federal authority. See *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 17-18 (2002); see also *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 430 n. 12 (Cal. 2004) (rejecting argument that presumption against preemption should not apply to implied preemption cases).

When states regulate in areas with a history of significant federal presence, however, there is no presumption against preemption. See *United States v. Locke*, 529 U.S. 89, 108 (2000). Similarly, where a federal agency is acting within its congressionally delegated authority to preempt state law, there is no presumption against preemption. *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 18 (2002). In this case, the question is simply whether Congress has conferred this power on the agency. *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 18 (2002). A federal agency acting within the scope of its congressionally delegated authority may preempt state law. See *United States v. Locke*, 529 U.S. 89, 110 (2000).

⁸¹ See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Lohr*, 518 U.S. at 485.

The Supreme Court has not always been consistent in applying this presumption.⁸² Thus, though the presumption clearly exists, it is unclear exactly how it applies in practice.⁸³

Minimally, it should provide a moment of pause before a court holds that federal law preempts state law that is plainly enacted pursuant to state police powers, and it should require that Congress speak clearly when it intends to preempt in areas traditionally left to the states.⁸⁴

When adjudicating cases involving these state-controlled arenas, courts should not strain to find preemption where Congress has not clearly communicated that it intends to preempt state law.

The federal law therefore is the appropriate starting point to determine whether Congress has clearly communicated its intent to preempt state law.⁸⁵ It is thus to the OSH Act this article turns.

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

The OSH Act brought the federal government into an area traditionally addressed by the states.⁸⁶ Congress enacted the Act to assure “safe and healthful working conditions”⁸⁷ to every

⁸² See Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 K.Y. L.J. 913, 940-67 (2003-2004) (analyzing the Supreme Court’s preemption jurisprudence and noting that “[d]uring the past decade, the Court has referred to the presumption against preemption in some cases and ignored it completely in others.”).

⁸³ See Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 K.Y. L.J. 913, 932-68, 971-74 (2003-2004) (discussing the Supreme Court’s inconsistent treatment of the presumption against preemption).

⁸⁴ See Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 K.Y. L.J. 913, 932-68, 971-74 (2003-2004) (arguing the presumption should act as a “clear statement rule,” requiring Congress to state expressly its intent to preempt, and any statutory ambiguity should militate against preemption). Cf. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002) (explaining that when Congress intends to alter the balance between the states and federal government by preempting the historic powers of states or by legislating in traditionally sensitive areas that affect the federalism balance, Congress must make its intentions “unmistakably clear in the language of the statute” (internal quotation marks omitted)).

⁸⁵ See *N.Y. State Conference of BCBS Plans*, 514 U.S. 645, 655 (1995) (“Since pre-emption claims turn on Congress’s intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.” (internal citations omitted)); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

⁸⁶ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992) (plurality). The OSH Act is codified at 29 U.S.C. §§ 651-700.

⁸⁷ The circuits define “working conditions” slightly differently. Compare, e.g., *Oil, Chem. & Atomic Workers Int’l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 448 (D.C. Cir. 1984) (defining “working conditions” as the

man and woman in the Nation.⁸⁸ The Act effectuates its purpose by imposing important obligations on employers.⁸⁹ Two obligations relevant here are to comply with occupational health and safety standards promulgated under the Act and to comply with the Act's general duty clause.⁹⁰ Though the Act imposes important duties, it simultaneously recognizes that ensuring worker safety is not solely a job for the federal government, and it provides for a system of cooperative federalism.⁹¹

A. *Employer Obligations: Standards and the General Duty Clause*

The OSH Act imposes two primary obligations on employers relevant to the guns-at-work debate. First, it authorizes the Secretary of Labor (“Secretary”) to promulgate occupational health and safety standards⁹² and requires employers to comply with them.⁹³ Second, it imposes on every employer a general duty to “furnish to each of his employees employment and a place of employment which are free from recognized hazards⁹⁴ that are causing or are likely to cause

environmental area in which employees customarily go about their daily tasks), *Columbia Gas of Penn., Inc. v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980) (same), *and S. Ry. Co. v. OSHRC*, 539 F.2d 335, 339 (4th Cir. 1976) (same), *with S. Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976) (explaining that “working conditions” embraces both surroundings, such as the problem of toxic liquid use, and physical hazards, “which can be expressed as a location (maintenance shop), a category (machinery), or a specific item (furnace)”). These definitions are actually similar in substance. *See, e.g., Oil, Chemical & Atomic Workers Int’l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 448 (D.C. Cir. 1984) (explaining that the aggregate of hazards and surroundings undergirds the definition of “working conditions” as the environmental area in which employees customarily perform their daily tasks). The Secretary of Labor has maintained that “working conditions” includes both the environment and discrete hazards of the job. *See Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1245 (9th Cir. 1998).

⁸⁸ *See* 29 U.S.C. § 651(b); *see also* *Am. Smelting & Refining Co. v. OSHRC*, 501 F.2d 504, 505 (8th Cir. 1974) (“The [OSH] Act’s general purpose and its ‘general duty’ clause evidence a clear Congressional purpose to provide employees a safe and nonhazardous environment in which business, including commercial and industrial, operations, is to be conducted.”).

⁸⁹ *See* 29 U.S.C. §§ 651(b)(3), 654(a).

⁹⁰ *See* discussion *infra* Part II.A.

⁹¹ “[W]here Congress has the authority to regulate private activity under the Commerce Clause, [the Supreme Court has] recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.” *New York v. United States*, 505 U.S. 144, 167 (1992). This has been termed cooperative federalism. *Id.*; *see infra* Part II B.

⁹² *See* 29 U.S.C. § 651(b)(3).

⁹³ *See* 29 U.S.C. § 654(a)(2).

⁹⁴ “Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.” *Oil, Chem. & Atomic Workers Int’l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984) (internal quotation marks omitted).

death or serious physical harm to his employees.”⁹⁵ This second obligation, known as the “general duty clause,” creates an independent, mandatory obligation for employers distinct from the specific health and safety standards.⁹⁶ Even if no specific standard exists, employers may still face liability for a general-duty-clause violation.⁹⁷

1. *Promulgating Standards*

The OSH Act sets forth an intricate scheme for promulgating standards.⁹⁸ This process includes conference with an advisory committee, publication of the proposed rule with a set period of time for notice, comments, objections, and an opportunity for hearing.⁹⁹ Only after the procedural pre-requisites are satisfied may the Secretary issue a rule promulgating, modifying, or revoking a standard.¹⁰⁰ This process produces informed decision-making by enabling all interested parties to participate in developing fair standards, and it provides employers with advanced notice of conduct the government considers safe as well as conduct that will result in

Examples of the hazards contemplated are air pollutants, industrial poisons, combustibles, explosives, unsafe work practices, and inadequate training. *Id.*

⁹⁵ See Section (5)(a)(1), 29 U.S.C. § 654(a)(1); *see also* Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980). (characterizing section 654(a)(1) as the OSH Act’s general duty clause).

⁹⁶ Whirlpool Corp. v. Marshall, 445 U.S. 1, 12-13 (1980); *see also* Safeway, Inc. v. Occupational Safety & Health Review Comm’n, 382 F.3d 1189, 1194 (10th Cir. 2004) (“Therefore, the plain language of the statute and its structure indicate that an employer’s duty to provide a safe working environment extends beyond compliance with specific safety and health standards that are included in regulations promulgated under the act.”); Int’l Union, United Auto., Aerospace & Agricultural Implement Workers v. Gen. Dynamics Land Sys. Div., 815 F.2d 1570, 1575-76 (D.C. Cir. 1987) (“Section 5(a)(1) clearly and unambiguously imposes on an employer a general duty to provide for the safety of his employees that is distinct and separate from the employer’s duty, under section 5(a)(2), to comply with administrative safety standards promulgated under section 6 of the Act.”); ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1324 (N.D. Okla. 2007).

⁹⁷ See Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1018 n.9 (7th Cir. 1975); ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1325 (N.D. Okla. 2007); *see also* 29 U.S.C. § 666 (a)-(c) (providing liability for violations of Section 654, which encompasses the general duty clause, *or* for violations of any standard promulgated under Section 655); *In re* Establishment Inspection of the Kelly-Springfield Tire Co., 13 F.3d 1160, 1167 (7th Cir. 1994). Civil penalties for “serious violations” are mandatory. *See* 29 U.S.C. § 666 (b). An employer may receive enhanced fines of up to \$70,000 for willful violations of the general duty clause. *See* 29 U.S.C. § 666(a). A willful violation may occur the first time an employer violates the general duty clause. *See* Ensign-Bickford co. v Occupational Safety & Health Review Comm’n, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). All that is required for liability is that an employer demonstrates plain indifference towards the safety requirements of the general duty clause. *Id.*

⁹⁸ *See* 29 U.S.C. § 655(b).

⁹⁹ *See* 29 U.S.C. § 655(b)(1)-(3).

¹⁰⁰ *See* 29 U.S.C. § 655(b)(4).

citation.¹⁰¹ The spirit of the Act is to regulate employer conduct through this predictable system rather than by ad hoc decision-making.¹⁰² Though the OSH Act requires employers to comply with both specific standards and the general duty clause, the general duty clause is not a supplement for promulgation of standards where appropriate. No standards have been promulgated to address guns in vehicles at the workplace.¹⁰³

2. *The General Duty Clause*

The general duty clause has traditionally addressed hazards arising from some condition inherent in the workplace environment.¹⁰⁴ The standards for establishing a general-duty clause violation are “exacting.”¹⁰⁵ The Secretary must prove that (1) the employer failed to render its workplace free of a hazard, which was recognized¹⁰⁶ as a hazard either by the employer¹⁰⁷ or

¹⁰¹ See *Am. Smelting & Refining Co. v. Occupational Safety & Health Review Comm’n*, 501 F.2d 504, 511-12 (8th Cir. 1974).

¹⁰² See S. Rep. No. 91-1282, at 5186 (1970) (“The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted.”); *Am. Smelting & Refining Co. v. Occupational Safety & Health Review Comm’n*, 501 F.2d 504, 511-12 (8th Cir. 1974) (noting a similar argument made in dissent by Chairman Moran of the Occupational Safety and Health Review Commission). The *American Smelting* court ultimately declined to adopt the chairman’s opinion as applied in this case, explaining that “the general duty clause should be available at least under the facts of this case in which a specific standard was under review and in which the Petitioner was allegedly violating a health standard that had been recognized nationally for many years;” but it found the chairman’s position generally sound).

¹⁰³ See *infra* p. 39 & n. 246.

¹⁰⁴ *Midwest Fin., Inc.*, OSHRC Docket No. 93-2879, 1995 OSAHRC LEXIS 80, at *24 (May 8, 1995). Some courts have found employers owe this general duty regardless of whether the employer controls the workplace, is responsible for the hazard, or has the best opportunity to abate it. See *Teal v. DuPont*, 728 F.2d 799, 804 (6th Cir. 1984); see also *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999) (“The duty is considered general because it asks employers to protect employees from all kinds of serious hazards, regardless of the source.”); *Nat’l Realty & Constr. Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1963) (noting that employer has duty to prevent hazardous conduct by employees); cf. *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 (7th Cir. 1975) (“[I]f an employee is negligent or creates a violation of a safety standard, that does not necessarily prevent the employer from being held responsible for the violation.”). At least one court has found the general duty clause does not apply to a policy, though it applies to a physical condition of the workplace. See *Oil, Chem. & Atomic Workers Int’l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 448 (D.C. Cir. 1984).

¹⁰⁵ *Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm’n*, 660 F.2d 439, 444 (10th Cir. 1981).

¹⁰⁶ A “recognized” hazard is one that is known as a hazard within the particular industry. *Nat’l Realty & Constr., Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1265 n. 32. Unpreventable instances of hazardous conduct are not “recognized.” *Nat’l Realty & Constr., Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1266.

generally within the industry,¹⁰⁸ (2) the hazard was causing or was likely to cause death or serious bodily harm, and (3) there was a feasible¹⁰⁹ means to eliminate or materially reduce the hazard.¹¹⁰

The general-duty clause does not impose an absolute duty to make the work environment safe.¹¹¹ Courts have held that employers may not face liability under the general duty clause unless abatement of the hazard is possible.¹¹² The government bears the burden of specifying the particular steps an employer should have taken to avoid a citation for violating the general duty clause.¹¹³ The government must also demonstrate the feasibility and likely utility of the alternative measures.¹¹⁴

Courts have consistently held that because the general duty clause is a tool of last resort, standards are the preferred enforcement mechanism for the Act.¹¹⁵ If a specific hazard is a

¹⁰⁷ Proof of an employer's actual knowledge of a hazard is sufficient to prove it was "recognized," but the Secretary has the burden of showing the employer's safety precautions were unacceptable in the industry. *Magma Copper Co. v. Marshall*, 608 F.2d 373, 376-77 (9th Cir. 1979).

¹⁰⁸ *See Pratt & Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96, 100 (2d Cir. 1981).

¹⁰⁹ "Feasible" means capable of being done, executed, or effected. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981).

¹¹⁰ *See Fabi Const. Co., Inc. v. Secretary of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007); *Safeway, Inc. v. Occupational Safety & Health Review Comm'n*, 382 F.3d 1189, 1195 (10th Cir. 2004); *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 & n. 9 (7th Cir. 1975). "In other words, 'the *Secretary* must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary's citation.'" *Fabi Const. Co., Inc. v. Secretary of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007) (quoting *L.R. Willson & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 698 F.2d 507, 513 (D.C. Cir. 1983) (emphasis in original)).

¹¹¹ *Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 660 F.2d 439, 446 (10th Cir. 1981); *see also Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1160 (3d Cir. 1992) (collecting and citing supporting cases).

¹¹² *See Teal v. DuPont Nemours & Co.*, 728 F.2d 799, 804 n.7; *Brennan v. Occupational Safety & Health Rev. Comm'n*, 502 F.2d 946, 951 (3d Cir. 1974) (explaining that duty must be capable of achievement); *Titanium Metals Copr. of Am. v. Usery*, 579 F.2d 536, 543-44 (9th Cir. 1978); *see also Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1265-66 & n. 35 (D.C. Cir. 1973) (noting Congress did not intend the general duty clause to impose strict liability; rather the duty was to be an obligation capable of achievement).

¹¹³ *See Steel & Iron Works, Inc. v. Occupational Safety & Health Review Comm'n*, 601 F.2d 717, 724 (4th Cir. 1979).

¹¹⁴ *See id.*; *see also Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267-68 (D.C. Cir. 1973).

¹¹⁵ *See Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 & n. 7 (5th Cir. 1997) (collecting cases in support).

concern, a regulation should be promulgated to address it rather than relying on the general duty clause after there has been a failure to prevent the hazard.¹¹⁶

B. Cooperative Federalism Under the OSH Act

The OSH Act provides a balance for state and federal control over occupational health and safety. While granting the federal government latitude, the Act simultaneously encourages states to assume full responsibility for the administration and enforcement of their occupational health and safety laws.¹¹⁷ In this respect, the OSH Act embodies cooperative federalism.¹¹⁸

¹¹⁶See *R.L. Sanders Roofing Co. v. Occupational Safety & Health Review Comm'n*, 620 F.2d 97, 101 (5th Cir. 1980) (per curiam); *Am. Smelting & Refining Co. v. Occupational Safety & Health Review Comm'n*, 501 F.2d 504, 511-12 (8th Cir. 1974); see also S. Rep. No. 91-1282, at 5186 (1970) (“The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted.”). *But see* *Puffers Hardware, Inc. v. Donovan*, 742 F.2d 12, 17 (1st Cir. 1984) (finding Secretary did not abuse discretion by proceeding under the general duty clause rather than establishing standards).

R.L. Sanders Roofing Co. should not be read too broadly because it really just illustrates the need to satisfy the general duty clause requirements before enforcing it. In that case, the Secretary sought to hold an employer liable under the general duty clause for a hazard that was not recognized in the industry. *Id.* The court emphasized that where the government seeks to hold an employer to a stricter standard of safety than customary industry practice, it must do so through a standard. *Id.* Thus, the court is essentially finding one of the elements of the general duty clause (recognized hazard) lacking, which is its basis for declining to enforce the general duty clause. *See id.*

¹¹⁷ See 29 U.S.C. § 651(b)(11).

¹¹⁸ See *New York v. United States*, 505 U.S. 144, 167-68 (1992) (providing that the OSH Act is a program of cooperative federalism); see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA Law Rev.* 1353, 1383 (Aug. 2006) (characterizing the OSH Act’s objective as “cooperative federalism”); Robert L. Fischman, *Cooperative Federalism & Natural Resources Law*, 14 *NYU Env’tl. L.J.* 179, 188 (2005) (noting that the term “cooperative federalism” has been loosely applied to OSHA); Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 *Chap. L. Rev.* 147, 156-57 & n. 80 (2001) (stating that cooperative federalism is where the federal and state governments share regulatory responsibilities and providing that the OSH Act is a statute subject to cooperative federalism); Alan Van Gelder, *Abolishing the Supervisor Exception to the Independent Employee Action Defense in Cal-Osha Cases*, 31 *Sw. U. L. Rev.* 125, 129 (2001) (acknowledging that the OSH Act was intended to be an example of cooperative federalism); Jose L. Fernandez, *Dynamic Statutory Interpretation: Occupational Safety And Health Act Preemption and State Environmental Regulation*, 22 *Fla. St. U. L. Rev.* 75, 97 (Summer 1994) (explaining that through the OSH Act, Congress has contemplated state participation in achieving the legislative goal of safe and healthy workplaces for employees.”); Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *Fordham L. Rev.* 469, 553 (Dec. 1993) (“OSHA’s preemption provisions uniquely establish a system of cooperative federalism”). Where statutes embody cooperative federalism, the Supreme Court has not been reluctant to leave a range of permissible choices to the states. See *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

The Act accomplishes this balance in its Sections 18.¹¹⁹ Section 18(a) provides that nothing in the Act shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue where no federal standard is in effect.¹²⁰ Where no federal standard is in place, states may freely regulate over any given occupational health or safety issue.¹²¹

Even where federal standards are in place, states are not foreclosed from regulating.¹²² Where federal standards exist, Section 18(b) permits a state to submit a plan for the development and enforcement of state standards, and if approved, *state standards preempt federal law*.¹²³ Absent a state plan, however, state law is entirely preempted in the face of federal standards.¹²⁴

¹¹⁹ See 29 U.S.C. § 667.

¹²⁰Section 18(a), 29 U.S.C. § 667(a). The Secretary promulgates standards in accordance with Section 655. Section 655 dictates that the Secretary shall “by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees.” 29 U.S.C. § 655(a).

¹²¹ See 29 U.S.C. § 667(a).

¹²² See 29 U.S.C. § 667(b).

¹²³ 29 U.S.C. § 667(b). Section 667 sets forth conditions for approval of state plans. See 29 U.S.C. § 667(c).

¹²⁴ See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 92, 103-05, 111-13 (1992) (plurality, Kennedy, J., concurring) (“Looking at the provisions of § 18 as a whole, we conclude that the OSH Act precludes any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved pursuant to § 18(b).”). Though preemption by a federal standard seems more akin to express or field preemption, the Court characterized this as conflict preemption. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98-99 (1992) (plurality) (holding that “nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act”). *But see id.* at 104 n. 2 (acknowledging that the preemption at issue does not fit neatly into a category and could just as easily be characterized as field preemption); *ConocoPhillips Co. v. Henry*, 520 F. Supp.2d 1282, 1325 n. 55 (N.D. Okla. 2007) (maintaining that *Gade* preemption is best considered a type of field preemption and terming it simply “*Gade* preemption” because conflict preemption invokes a different analysis).

The *Gade* plurality and concurrence disagreed over how to categorize this preemption. The plurality fashioned its holding from implied preemption principles while Justice Kennedy believed Section 18(b) expressly preempts state law. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98-104, 111 (1992). According to the plurality, Section 18(b) suggests that when a federal standard is in effect, non-approved state standards are in conflict with the full purposes and objectives of the OSH Act, thus conflict preemption is present. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98-99 (1992) (plurality). Justice Kennedy believed the express terms of Section 18(b) mandated preemption, thus the preemptive scope of the OSH Act is limited to the language of the statute. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring). At least one court agrees that the plurality’s preemption is really more akin to express (or even field) preemption. See *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1327 (N.D. Okla. 2007).

The *Gade* plurality dismissed the disagreement as labeling, “implied” versus “express,” which is merely technical. See 505 U.S. at 104 n. 2 (plurality). Though this is generally correct, there is also a substantive distinction between the plurality and concurrence. Justice Kennedy would limit the scope of the OSH Act to the text

States may not even supplement federal standards.¹²⁵ Where a standard exists, the Supreme Court has rejected concurrent state and federal jurisdiction.¹²⁶

C. *The OSH Act's Savings Clauses*

of Section 18(b), but the plurality is willing to look beyond and find implied preemption. *Compare* *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111, 114 (1992) (Kennedy, J., concurring) (“[T]he pre-emptive scope of the Act is also limited to the language of the statute. When the existence of pre-emption is evident from the statutory text, our inquiry must begin and end with the statutory framework itself.”), *with id.* at 98-104 & n. 2 (plurality). Per Justice Kennedy’s rationale, OSH Act preemption is defined by Section 18, and if it does not apply, state law is not preempted. *See* *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111, 114 (1992) (Kennedy, J., concurring). Justice Kennedy would not look to implied preemption where an express preemption clause exists but does not govern. *See* *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109-111, 114 (1992) (Kennedy, J., concurring). Justice Kennedy’s view has lost. *See infra* n. 268.

¹²⁵ *See* *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-100 (1992) (plurality). This is from the portion of *Gade* receiving only a plurality; however, Justice Kennedy’s concurrence agrees in substance, making this the court’s holding. *See id.* at 111-13 (Kennedy, J., concurring).

¹²⁶ *See id.* at 98-103, 112-13; *see also* *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 51-52 (1st Cir. 1991) (“At its outer reaches section 18 preemption *does not* obtain unless there is an unapproved assertion of jurisdiction under State law over any occupational safety or health issue as to which a federal standard is already in place.” (internal quotation marks omitted)); *Nat'l Solid Waste Mgmt. Ass'n v. Killian*, 918 F.2d 671, 675 (7th Cir. 1990). According to *Gade*, the design of the OSH Act suggests Congress intended only one set of regulations to govern, and a state may only regulate OSHA-regulated occupational safety and health issues pursuant to an approved state plan that displaces federal standards. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality). All state regulations relating to an “issue” already addressed by a federal standard are preempted even if they do not conflict with the federal scheme. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103, 112-13 (1992) (plurality, Kennedy, J., concurring); *see also* *Indus. Truck Ass'n v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997) (“[U]nder the [OSH Act] . . . when OSHA promulgates a federal standard, that standard totally occupies the field within the ‘issue’ of that regulation and preempts all state occupational safety and health laws relating to that issue, conflicting or not, unless they are included in the state plan.”).

A state occupational safety and health law is one that directly, substantially, and specifically regulates occupational safety and health. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992). According to the Act, an “occupational safety and health standard” is “a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” 29 U.S.C. § 652(8). Any state law designed to promote health and safety in the workplace falls within this definition, and any state law regulating occupational health and safety is preempted by an OSHA standard regulating the same subject matter. *See* *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992).

This is true even if the state law serves several objectives. *See* *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106 (1992). “That such a law may also have a nonoccupational impact does not render it any less of an occupational standard for purposes of pre-emption analysis.” *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992). State laws of general applicability, however, (such as traffic or fire safety laws) *that do not conflict* with OSHA standards and that regulate conduct of workers and non-workers alike are generally not preempted. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992). Stated simply, in the absence of the Secretary’s pre-approval of a state plan, “the OSH Act pre-empts all state law that constitutes, in a direct, clear and substantial way, regulation of worker health and safety” even if the legislation also regulates matters outside of worker health and safety. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107-08 (1992) (internal quotation marks omitted). If a state wants to enact a dual-impact law that regulates an occupational safety or health issue for which a federal standard is in effect, it must first submit a plan. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992).

The OSH Act contains two savings clauses: Sections 4(b)(4) and 18(a).¹²⁷ Both provisions are discussed here to provide a basis to determine whether either will save state guns-at-work laws from preemption.

1. Section 4(b)(4)

Section 4(b)(4) is entitled in relevant part “workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected.”¹²⁸ It states that nothing in the OSH Act shall be construed to:

supersede or in any manner affect any workmen's compensation law *or* to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.¹²⁹

Sparse legislative history exists for Section 4(b)(4).¹³⁰ One court has interpreted it very narrowly, finding “the provision [is] merely to ensure that OSHA [is] not read to create a private right of action for injured workers which would allow them to bypass the otherwise exclusive remedy of worker’s compensation.”¹³¹ At least one court has disagreed that the provision is so limited, arguing such an interpretation “defies traditional principles of statutory interpretation”

¹²⁷ See Sections 18(a), 4(b)(4), 29 U.S.C. §§ 667(a), 653(b)(4); see also *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96-97, 100 (1992) (plurality) (explaining that Congress expressly “saved” some state law from federal preemption in Sections 4(b)(4) and 18(a) and referring to Section 18(a) as a “saving clause”); *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52-53 (1st Cir. 1991) (terming Section 4(b)(4) the Act’s “savings clause”); *Associated Indus. v. Snow*, 898 F.2d 274, 278 (1st Cir. 1990) (describing Section 18 as a “savings clause”). The *Pedraza* court does not characterize Section 18(a) as a “savings clause” but instead describes it as a general statement of preemptive intent. See 942 F.2d at 53.

¹²⁸ 29 U.S.C. § 653(4).

¹²⁹ 29 U.S.C. § 653(4) (emphasis added).

¹³⁰ See *Ries v. Nat’l R.R. Passenger Corp.*, 960 F.2d 1156, 1160-61 (3d Cir. 1992); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1235 n.70 (D.C. Cir. 1980).

¹³¹ See *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 266 (1st Cir. 1985). But see *Elliott v. S.D. Warren Co.*, 134 F.3d 1, 4 (1st Cir. 1998) (questioning the continued validity of *Pratico*).

by ignoring the plain meaning of 4(b)(4), which is not so narrow.¹³² Yet another court offered its interpretation of Section 4(b)(4).¹³³ According to the United States Court of Appeals for the District of Columbia, Section 4(b)(4) bars workers from asserting a private cause of action against employers under OSHA standards, and when a worker actually asserts a claim under workmen's compensation or some other state law, Section 4(b)(4) means neither the worker nor her adversary can assert the OSH Act preempts any element of state law.

2. Section 18(a)

The second savings clause, Section 18(a) is straightforward.¹³⁴ It expressly permits states to assert jurisdiction under state law over *any* occupational health or safety issue where no federal standard is in effect.¹³⁵ This suggests that where no federal standard is in effect, the savings clause saves state occupational safety and health law. In such instances, resolving the preemption inquiry should be simple with a result of no preemption. As revealed in Part IV(A)(2), however, this is not necessarily true. With the relevant provisions of the OSH Act set forth, it is appropriate to turn to the state guns-at-work laws because preemption analysis requires examining the interplay between the OSH Act and these laws.

III. GUNS-AT-WORK LAWS

¹³² *Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1161-62 (3d Cir. 1992); *see also* *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53-54 & n. 6 (1st Cir. 1991) (rejecting argument that 4(b)(4) saves only worker's compensation laws and noting "[t]here is a solid consensus that section 4(b)(4) operates to save state tort rules from preemption"); *Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 209 (3d Cir. 2007) ("We join with those courts whose holdings have formed a solid consensus that [the savings clause] operates to save state tort rules from preemption." (internal quotation marks omitted)). Courts have also found that Section 4(b)(4) saves criminal laws, *see, e.g.*, *People v. Pymm*, 561 N.Y.S.2d 687, 692 (N.Y. 1990) (finding Section 4(b)(4) supports conclusion that OSH Act does not preempt state criminal laws), and rights granted by statute, *see, e.g.*, *Startz v. Tom Martin Constr. Co.*, 823 F. Supp. 501, 505-06 (N.D. Ill. 1993). *See generally* Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535 (1987) (arguing OSH Act does not preempt criminal prosecutions). *See also* Judy K. Broussard, Note, *The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities*, 45Clev. St. L. Rev. 135, 154-57 (1997) (contending that most compelling argument OSH Act does not preempt state criminal laws is language of Section 4(b)(4) and citing cases finding no preemption of state criminal laws).

¹³³ *See* *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1235-36 (D.C. Cir. 1980).

¹³⁴ *See* 29 U.S.C. § 667(a).

¹³⁵ *See* 29 U.S.C. § 667(a).

A number of states have enacted guns-at-work laws as of this writing, and many more have legislation pending.¹³⁶ States with these laws include Alaska, Florida, Georgia, Kansas, Louisiana, Minnesota, Mississippi, and Oklahoma. The laws are generally similar, but each has its own nuances. This Part surveys the various statutes and highlights noteworthy aspects common to many of the laws that are relevant to the preemption inquiry.¹³⁷ It also discusses two recent federal district court cases that reached opposite conclusions on the precise question considered here: whether the OSH Act preempts guns-at-work laws.

A. *Guns-At-Work Laws Across the Country*

1. *Alaska*

¹³⁶ The states with such legislation pending include Alabama, Arizona, Indiana, Missouri, Pennsylvania, and Tennessee. *See* H.B. 512, 2008 Reg. Sess. (Ala. 2008) (providing no property owner, tenant, employer, or owner of a business may maintain any policy that prohibits any person from parking a motor vehicle on any property set aside for parking when person lawfully possesses a firearm or stores a firearm in a locked vehicle: violation is a misdemeanor, which may also subject violator to civil liability); H.B. 2536, 48th Leg., 2d Reg. Sess. (Ariz. 2008) (providing employer shall not prevent a person from transporting, possessing, or storing a gun in a locked motor vehicle parked in employer’s parking lot, parking garage, or other parking area); S.B. 66, 115th Gen. Assem. 2d Reg. Sess., Ch. 7 (Ind. 2008) (providing notwithstanding any other law, a person may not enforce a policy prohibiting an individual from possessing a firearm locked in the individual’s vehicle while on the person’s property, and providing civil liability for violations); H.B. 1383, 94th Gen. Assem., 2d Reg. Sess., §§ 537.785-87 (Mo. 2008) (preventing owners or operators of businesses from restricting any person from lawfully possessing a firearm in a motor vehicle except one owned or leased by the business, and providing for civil action enforcement); H.B. 1185, 190th Gen. Assem., 2007-08 Reg. Sess. (Pa. 2007-08) (prohibiting employers from discharging, threatening, or otherwise discriminating or retaliating against an employee regarding the employee’s compensation, terms conditions, location, or privileges of employment because the employee exercises “self-defense rights,” which include right to carry firearm in vehicle, and providing for civil action against violators); H.B. 3063, 105th Gen. Assem., 2d Reg. Sess., § 1 (Tenn. 2007) (providing no person, “including but not limited to an employer,” who is the owner, lessee, or occupant of property shall prohibit any person who is legally entitled to possess a firearm from possessing it in a vehicle on property, and providing for civil damages against an employer who fires, disciplines, demotes, or otherwise punishes an employee for exercising these rights); S.B. 2928, 105th Gen. Assem., 2d Reg. Sess., § (Tenn. 2007) (same); *see also* S.B. 153, 105th Gen. Assem., 1st Reg. Sess. (Tenn. 2007) (Bill Tracking – Summary – Netscan) (older Tennessee guns-at-work bill that never left committee).

¹³⁷ This survey does not include every law addressing firearm possession or firearms in vehicles. It focuses only on laws that have the effect of preventing private employers from prohibiting employees from storing guns in their vehicles while at work—what this article has termed “guns-at-work” laws.

Utah, for instance, has a law that is similar to the guns-at-work laws, but it applies only to local authorities and state entities. *See* UT Stat. § 53-5a-102(2). It states that unless specifically provided by state law, no local authority or state entity may prohibit an individual from transporting, or keeping a firearm in any vehicle lawfully in the individual's possession or lawfully under the individual's control. UT Stat. § 53-5a-102(2)(a). It does not, however, prevent private employers from enacting policies prohibiting weapons in vehicles (as is the case with the guns-at-work laws discussed herein). *See* Hansen v. Am. Online, 96 P.3d 950, 954-56 (Utah 2004) (analyzing UT Stat. § 63-98-101, which was re-numbered as § 53-5a-102, *see* UT Stat. § 63-98-101).

Alaska's guns-at-work law provides that notwithstanding any other provision of law, neither the state, nor municipality, nor any person may adopt or enforce a law, ordinance, policy, or rule prohibiting individuals from lawfully possessing firearms in vehicles.¹³⁸ Nor may they prohibit storing firearms in locked vehicles legally parked on state, municipal, or another person's property.¹³⁹ The statute immunizes from liability for any injury or damage resulting from storing firearms in vehicles in accordance with the statute.¹⁴⁰ Importantly, the statute does not limit rights or remedies under other law,¹⁴¹ nor does it apply to individuals who are prohibited from possessing a firearm under state or federal law.¹⁴²

2. Florida

On April 15, 2008, Florida enacted the "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008," which took effect July 1, 2008.¹⁴³ It prohibits employers from preventing customers, employees, or invitees from possessing legally owned firearms locked in (or on) vehicles in parking lots when lawfully in the area.¹⁴⁴ Employers may not stop these individuals from entering parking lots with firearms in their vehicles so long as the

¹³⁸ Alaska Stat. § 18.65.800(a).

¹³⁹ Alaska Stat. § 18.65.800(a).

¹⁴⁰ Alaska Stat. § 18.65.800(c).

¹⁴¹ Alaska Stat. § 18.65.800(b). This provision could be interpreted to avoid any OSH Act conflict. If the OSH Act grants employees a right to be free from unsafe workplaces with guns in vehicles, Alaska's guns-at-work law presumably would not limit this right by compelling employers to permit guns. *See id.*

¹⁴² Alaska Stat. § 18.65.800(a). This too may eliminate conflict with the OSH Act. Section 18.65.800(a) only applies to firearm possession by individuals who may legally possess them under state and federal law. *See* Alaska Stat. § 18.65.800(a). This necessarily means it does not apply to individuals possessing firearms unlawfully under state or federal law. *See* Alaska Stat. § 18.65.800(a). If it were unlawful under federal OSH Act to possess firearms in vehicles while at work, this exception arguably would apply. Employers may argue that the exception is satisfied because employees may not possess firearms under federal law (at least while on the employer's property). It is not clear from the language of the exception whether this argument would succeed. It seems more likely that this exception means if federal law prevents an individual from possessing a firearm at all, a person need not permit the individual to possess the firearm in her vehicle. If, however, the person is permitted under federal and state law to possess a firearm, Section 18.65.800(a) seems to require that she be permitted to possess/store it in her vehicle. The argument that this provision eliminates an OSH Act conflict is plausible, however, and no court has held otherwise.

¹⁴³ Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008, 2008 Fla. Sess. Law Serv. ch. 2008-7 (West) (codified as amended at Fla. Stat. § 790.251).

¹⁴⁴ Fla. Stat. § 790.251(4)(a).

firearms are out of sight within the vehicle.¹⁴⁵ Employers may not inquire whether there are firearms in vehicles, nor may they conduct searches of vehicles.¹⁴⁶ Only on-duty law enforcement may conduct vehicle searches, and searches must comport with due process and all other constitutional protections.¹⁴⁷

Employers may not take any action against employees, customers, or invitees based on statements regarding firearms in vehicles.¹⁴⁸ Employers may not condition employment on an agreement not to maintain such firearms.¹⁴⁹ Nor may they terminate, expel, or otherwise discriminate against employees, customers, or invitees for exercising these rights (so long as the firearms are never exhibited on company property for any reason other than lawful, self defense).¹⁵⁰

Like Alaska, Florida's statute limits liability for compliance.¹⁵¹ It immunizes employers from civil liability for acting pursuant to the statute.¹⁵² It also provides that the statute shall not be interpreted to expand any existing duty or create any additional duty for employers.¹⁵³

The Attorney General is granted authority to enforce the statute.¹⁵⁴ Nothing in the statute, however, prevents the aggrieved from bringing a civil action for violations of rights

¹⁴⁵ Fla. Stat. § 790.251(d).

¹⁴⁶ Fla. Stat. § 790.251(4)(b).

¹⁴⁷ Fla. Stat. § 790.251(4)(b).

¹⁴⁸ Fla. Stat. § 790.251(4)(b).

¹⁴⁹ Fla. Stat. § 790.251(c)(2).

¹⁵⁰ Fla. Stat. § 790.251(4)(e).

¹⁵¹ *See* Fla. Stat. § 790.251(5).

¹⁵² *See* Fla. Stat. § 790.251(5)(b). The Florida statute also purports to eliminate an employer's duty of care when the employer is subjected to the provision preventing the employer from taking the above actions. *See* Fla. Stat. § 790.251(5)(a).

¹⁵³ Fla. Stat. § 790.251(5)(c). The exact meaning of this provision is unclear and seemingly paradoxical. The statute clearly creates additional duties for employers. It requires them to permit various activities on their property that they otherwise might not, and it prevents them from acting when they otherwise might. *See* Fla. Stat. § 790.251(4).

¹⁵⁴ Fla. Stat. § 790.251(6). The Attorney General may commence a civil or administrative action to enforce the statute. Fla. Stat. § 790.251(6).

protected by the statute.¹⁵⁵ “[C]ourt[s] shall award all reasonable personal costs and losses suffered,” and they “shall award all court costs and attorney’s fees to the prevailing party.”¹⁵⁶

The statute contains numerous exceptions.¹⁵⁷ It does not apply to vehicles owned, leased, or rented by employers.¹⁵⁸ Nor does it apply to any property owned or leased by employers (or landlords of employers) upon which possession of firearms is prohibited pursuant to federal law, by contract with a federal-government entity, or under the general law of Florida.¹⁵⁹

3. Georgia

Georgia has followed suit and enacted a guns-at-work law, but it differs from the others.¹⁶⁰ It does not expressly ban employers from enacting policies prohibiting weapons in vehicles, though it effectively accomplishes this result.¹⁶¹

Georgia’s Business Security and Employee Privacy Act provides that employers shall not establish, maintain, or enforce any policy or rule that has the effect of allowing employers or its agents to search locked, privately owned vehicles of employees or invited guests in employer parking lots.¹⁶² Employers also may not condition employment on any agreement prohibiting prospective employees from entering parking lots when their vehicles contain firearms locked in

¹⁵⁵ Fla. Stat. § 790.251(6).

¹⁵⁶ Fla. Stat. § 790.251(6).

¹⁵⁷ Fla. Stat. § 790.251(7).

¹⁵⁸ Fla. Stat. § 790.251(7)(f).

¹⁵⁹ Fla. Stat. § 790.251(6). This provision may be interpreted broadly to prevent conflict with the OSH Act. If it were determined that the OSH Act required banning guns from vehicles, and an employer did so to adhere to the OSH Act, this exception suggests that Florida’s guns-at-work law would not be violated. *See id.* This is because the employer would be acting pursuant to its OSH Act obligations. Because, in this scenario, possession of firearms would be prohibited pursuant to federal law, the exception would enable employers to prohibit guns. Thus, Florida’s guns-at-work law may be interpreted to avoid any OSH Act conflict entirely.

¹⁶⁰ *See* Business Security & Employee Privacy Act, 2008 Ga. Laws 802 (codified at O.C.G.A. § 16-11-135). This Act was approved May 14, 2008. *See id.* The law became effective July 1, 2008. *See* O.C.G.A. § 1-3-4(a)(1). Georgia also has a guns-at-work bill currently pending before its legislature. *See infra* p. 27 n. 177.

¹⁶¹ *See* O.C.G.A. § 16-11-135.

¹⁶² *See* O.C.G.A. § 16-11-135(a).

trunks, glove boxes, or other enclosed compartments out of site—provided the employee has a Georgia firearms license.¹⁶³

Like other guns-at-work laws, Georgia’s statute has many exceptions.¹⁶⁴ It excepts searches by certified law enforcement officers pursuant to valid warrants; searches of vehicles owned or leased by employers; “any situation in which a reasonable person would believe that accessing a locked vehicle of an employee is necessary to prevent an immediate threat to human health, life, or safety” and searches by licensed private security officers (with employee consent) for loss prevention based on probable cause that the employee unlawfully possesses employer property.¹⁶⁵ Nor does the statute apply to secure parking areas that restrict general access, provided any policy allowing vehicle searches is applied uniformly.¹⁶⁶ It does not apply to any penal institution, jail, or similar place of confinement.¹⁶⁷ It does not apply to an employee who is restricted from possessing a firearm on the premises due to disciplinary action;¹⁶⁸ where transport of a firearm on the premises is prohibited by state or federal law or regulation;¹⁶⁹ and interestingly, to any area used for parking on a temporary basis.¹⁷⁰ As do many other states, Georgia limits employer liability for compliance.¹⁷¹

Georgia’s statute contains two interesting provisions. First, it provides that an employer’s effort to comply with other applicable federal, state, or local safety laws, regulations, guidelines, or ordinances is a *complete* defense to liability.¹⁷²

¹⁶³ See O.C.G.A. § 16-11-135(b).

¹⁶⁴ See O.C.G.A. § 16-11-135(c), (d), (e), (f), (h), (k).

¹⁶⁵ See O.C.G.A. § 16-11-135(c)(1)-(4).

¹⁶⁶ See O.C.G.A. § 16-11-135(d)(1).

¹⁶⁷ See O.C.G.A. § 16-11-135(d)(2).

¹⁶⁸ See O.C.G.A. § 16-11-135(d)(5).

¹⁶⁹ This could be used to argue Georgia’s statute may not conflict with the OSH Act. See *infra* pp. 33-34.

¹⁷⁰ See O.C.G.A. § 16-11-135(d) (8).

¹⁷¹ See O.C.G.A. § 16-11-135(e).

¹⁷² See O.C.G.A. § 16-11-135(f). Like with Florida’s law, this provision should eliminate any OSH Act conflict because OSH Act compliance should be a complete defense to this statute. See *id*; see also *infra* pp. 33-34.

Second, it contains a very broad provision that highlights the narrowness of the statute's restrictions.¹⁷³ It provides that nothing in the statute shall restrict rights of private property owners (or persons in legal control of property) to control access to their property.¹⁷⁴ Even for employers, private property rights govern.¹⁷⁵ Because many employers either own or lease the properties in which their businesses are housed, one has difficulty envisioning a situation in which their private property rights would not trump the statute.¹⁷⁶

The Georgia Assembly also has a bill pending that is more similar to the other states' guns-at-work laws.¹⁷⁷ It prohibits employers from establishing, maintaining, or enforcing any policy or rule that has the effect of prohibiting employees from transporting or storing firearms in locked vehicles in parking areas.¹⁷⁸ It contains the usual exceptions, including if the transport of a firearm on the premises is prohibited by state or federal law.¹⁷⁹ It also contains a provision immunizing employers from liability for compliance.¹⁸⁰

4. *Kansas*

¹⁷³ See O.C.G.A. § 16-11-135(k).

¹⁷⁴ See O.C.G.A. § 16-11-135(k).

¹⁷⁵ See O.C.G.A. § 16-11-135(k).

¹⁷⁶ This subsection is in clear tension with subsection (b), which prevents employers from conditioning employment (in a sense, access to property) upon agreement that prospective employees will not enter the parking lot with firearms in vehicles. See O.C.G.A. § 16-11-135(b). Perhaps this means an employer may not condition employment on an agreement not to bring guns, but once an employee brings her guns, an employer (who also owns or leases the business property) may prevent access to the property. This seems like an illogical result if it is in fact what the Georgia legislature intended.

¹⁷⁷ See S.B. 43, 149th Gen. Assem., Reg. Sess. (Ga. 2007-2008) (Full Text – Netscan).

¹⁷⁸ See S.B. 43, 149th Gen. Assem., Reg. Sess., § 1(a) (Ga. 2007-2008) (Full Text – Netscan).

¹⁷⁹ See S.B. 43, 149th Gen. Assem., Reg. Sess., § 1(b) (Ga. 2007-2008) (Full Text – Netscan) (excepting employers who provide secure parking areas restricting general access; vehicles owned or leased by employers and used by employees in course of business; employees who are restricted from carrying or possessing a firearm due to disciplinary actions; and penal institutions and similar places of detention).

¹⁸⁰ S.B. 43, 149th Gen. Assem., Reg. Sess., § 1(c) (Ga. 2007-2008) (Full Text – Netscan).

Kansas’s concealed weapons law permits employers to restrict carrying concealed weapons while on business premises, but it expressly prevents employers from prohibiting possession of firearms in private vehicles even while parked on employer premises.¹⁸¹

5. Kentucky

Kentucky has at least two laws that may be deemed guns-at-work laws.¹⁸² The first—located in the firearms and destructive devices chapter—provides, “[n]o person, including but not limited to an employer, who is the owner, lessee, or occupant of real property shall prohibit any person who is legally entitled to possess a firearm from possessing a firearm, part of a firearm, ammunition, or ammunition component in a vehicle on the property.”¹⁸³ Any employer who “fires, disciplines, demotes, or otherwise punishes” an employee exercising a right guaranteed by this statute will face civil liability.¹⁸⁴ The law permits employers to remove weapons for self-defense, defense of another, defense of property, or as authorized by the owner of the weapon.¹⁸⁵ It also contains exceptions for when the law will not apply, including if the vehicle is parked on land the United States owns upon which possession is prohibited or controlled.¹⁸⁶

¹⁸¹ See Kan. Stat. Ann. §75-7c11(a)(1). That provision provides:

(a) Nothing in this act shall be construed to prevent:

(1) Any public or private employer from restricting or prohibiting by personnel policies persons licensed under this act from carrying a concealed weapon while on the premises of the employer's business or while engaged in the duties of the person's employment by the employer, except that no employer may prohibit possession of a firearm in a private means of conveyance, even if parked on the employer's premises[.]

Id.

¹⁸² See Ky. Rev. Stat. Ann. §§ 237.106, 527.020.

¹⁸³ See Ky. Rev. Stat. Ann. § 237.106(1).

¹⁸⁴ Ky. Rev. Stat. Ann. § 237.106(4).

¹⁸⁵ Ky. Rev. Stat. Ann. § 237.106(3).

¹⁸⁶ Ky. Rev. Stat. Ann. § 237.106(5)(a). None of the exceptions are applicable to the OSH Act. See Ky. Rev. Stat. Ann. § 237.106(5).

Another relevant section is part of the Kentucky Penal Code.¹⁸⁷ It states in part that “[n]o person or organization, public or private, shall prohibit a person licensed to carry a concealed deadly weapon from possessing a firearm, ammunition, or both, or other deadly weapon in his or her vehicle in compliance with the provisions of KRS 237.110¹⁸⁸ and 237.115.”¹⁸⁹ Violators may face damages or other “appropriate relief.”¹⁹⁰

The provision also provides that a firearm or other weapon shall not be deemed concealed if it is located in an unlocked glove compartment of a vehicle, and “[n]o person or organization, public or private, shall prohibit a person from keeping a firearm or ammunition, or both, or other deadly weapon in a glove compartment of a vehicle”¹⁹¹ Any attempt to do so may result in damages or other appropriate relief.¹⁹²

6. Louisiana

¹⁸⁷ See Ky. Rev. Stat. Ann. § 527.020.

¹⁸⁸ This statute governs licenses to carry concealed, deadly weapons. It also contains a subsection regarding locking guns in vehicles. See Ky. Rev. Stat. Ann. § 237.110(17). It states in relevant part:

A private but not a public employer may prohibit employees or other persons holding a concealed deadly weapons license from carrying concealed deadly weapons, or ammunition, or both in vehicles owned by the employer, *but may not prohibit employees or other persons holding a concealed deadly weapons license from carrying concealed deadly weapons, or ammunition, or both in vehicles owned by the employee*, except that the Justice and Public Safety Cabinet may prohibit an employee from carrying any weapons, or ammunition, or both other than the weapons, or ammunition, or both issued or authorized to be used by the employee of the cabinet, in a vehicle while transporting persons under the employee's supervision or jurisdiction.

Ky. Rev. Stat. Ann. § 237.110(17) (emphasis added). Section 237.110 has been amended, but subsection 17 has not changed. See 2008 Ky. Laws Ch. 96 (HB 639).

¹⁸⁹ Ky. Rev. Stat. Ann. § 527.020(4). Section 237.115 provides, *inter alia*, that except as provided in Section 527.020, nothing in Section 237.110 shall be construed to limit or prohibit the right of postsecondary education facilities to control the possession of deadly weapons on any property owned or controlled by them. See Ky. Rev. Stat. Ann. § 237.115(1).

¹⁹⁰ Ky. Rev. Stat. Ann. § 527.020(4).

¹⁹¹ Ky. Rev. Stat. Ann. § 527.020(8). This subsection reads in full:

A firearm or other deadly weapon shall not be deemed concealed on or about the person if it is located in a glove compartment, regularly installed in a motor vehicle by its manufacturer, regardless of whether said compartment is locked, unlocked, or does not have a locking mechanism. No person or organization, public or private, shall prohibit a person from keeping a firearm or ammunition, or both, or other deadly weapon in a glove compartment of a vehicle in accordance with the provisions of this subsection. Any attempt by a person or organization, public or private, to violate the provisions of this subsection may be the subject of an action for appropriate relief or for damages in a Circuit Court or District Court of competent jurisdiction.

Id.

¹⁹² Ky. Rev. Stat. Ann. § 527.020(8).

Louisiana recently enacted its own guns-at-work law.¹⁹³ It provides that a person who lawfully possesses a firearm may store it in a locked, privately owned motor vehicle in any parking lot, parking garage, or other designated parking area, and “[n]o property owner, tenant, public or private employer, or business entity shall prohibit any person from transporting or storing a firearm” pursuant to this statute.¹⁹⁴ Like many of the other statutes, it contains a clause immunizing from damages for compliance.¹⁹⁵

It also contains many of the familiar exceptions, including if the possession of firearms is prohibited under state or federal law.¹⁹⁶ Interestingly, one exception permits prohibiting stored firearms if access to the parking area is restricted and facilities for temporarily storing firearms are provided, or if there is another parking area reasonably close where individuals may store firearms in vehicles.¹⁹⁷

7. *Minnesota*

Minnesota’s guns-at-work law, which is part of the criminal statutes, states in part, “the owner or operator of a private establishment may not prohibit the lawful carry or possession of firearms in a parking facility or parking area.”¹⁹⁸ It also provides that employers and public postsecondary institutions may establish policies restricting carrying firearms, but neither may prohibit lawful carrying or possession in parking facilities or parking areas.¹⁹⁹

8. *Mississippi*

¹⁹³ See S.B. 51, 34th Reg. Sess. (La. 2008) (Full Text –Netscan) (to be codified at LA Rev. Stat. § 32:292.1).

¹⁹⁴ See S.B. 51, 34th Reg. Sess., (La. 2008) (Full Text –Netscan) (to be codified at LA Rev. Stat. § 32:292.1(A), (C)).

¹⁹⁵ See S.B. 51, 34th Reg. Sess., (La. 2008) (Full Text –Netscan) (to be codified at LA Rev. Stat. § 32:292.1(B)).

¹⁹⁶ See S.B. 51, 34th Reg. Sess., (La. 2008) (Full Text –Netscan) (to be codified at LA Rev. Stat. § 32:292.1(D)(1)-(3)). This suggests no OSH-Act conflict. See *supra* note 172.

¹⁹⁷ See S.B. 51, 34th Reg. Sess., (La. 2008) (Full Text –Netscan) (to be codified at LA Rev. Stat. § 32:292.1(D)(3)).

¹⁹⁸ Minn. Stat. Ann § 624.714(17)(c), *held unconstitutional as applied to church parking lots in Edina Community Lutheran Church v. State*, 745 N.W. 2d 194, 206-10, 213 (Minn. App. 2008) (finding exemption for churches using their property for religious reasons and basing decision on religious freedom and not property rights or the OSH Act).

¹⁹⁹ Minn. Stat. Ann § 624.714(18), *held unconstitutional as applied to church parking lots in Edina Community Lutheran Church v. State*, 745 N.W. 2d 194, 206-10, 213 (Minn. App. 2008).

Mississippi’s guns-at-work law appears under the title on “Public Safety and Good Order.”²⁰⁰ It states that employers generally “may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area.”²⁰¹ Employers may do so, however, if the parking area restricts or limits general public access to the property.²⁰² The section does not apply to vehicles that employers own or lease for employees to use in the course of business.²⁰³ Employers will not face civil liability for damages resulting from occurrences “involving the transportation, storage, possession or use of a firearm covered by this section.”²⁰⁴ The statute does not authorize transportation or storage of firearms on any premises where possession is prohibited by state or federal law.²⁰⁵

9. *Oklahoma*

Oklahoma has two guns-at-work laws. The Oklahoma Firearms Act of 1971 prohibits any “person, property owner, tenant, employer, or business entity” from “maintain[ing], establish[ing], or enforce[ing] any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle, or from transporting and storing firearms locked in or locked to a motor vehicle on any property set aside for any motor vehicle.”²⁰⁶ Civil action may be brought to enforce this section, and damages, attorney’s fees, and court costs may be awarded to a prevailing plaintiff.²⁰⁷ The statute

²⁰⁰ See Miss. Code Ann. § 45-9-55.

²⁰¹ Miss. Code Ann. § 45-9-55(1).

²⁰² Miss. Code Ann. § 45-9-55(2).

²⁰³ Miss. Code Ann. § 45-9-55(3).

²⁰⁴ Miss. Code Ann. § 45-9-55(5).

²⁰⁵ Miss. Code Ann. § 45-9-55(4). This exception may prevent conflict with the OSH Act. See *infra* pp. 33-34.

²⁰⁶ See Okla. Stat. tit. 21, § 1289.7a(A).

²⁰⁷ Okla. Stat. tit. 21, § 1289.7a(C).

immunizes individuals required to permit firearms in vehicles from civil action for events arising from such firearms unless the individuals commit crimes involving the firearms.²⁰⁸

Another Oklahoma statute, entitled “Business Owner’s Rights,” provides that nothing in the Oklahoma Self-Defense Act restricts the rights of any person, property owner, tenant employer, or business entity to control possession of weapons on property, but no policy may be established that has the effect of prohibiting any person (except a convicted felon) from transporting and storing firearms in locked vehicles on property set aside for vehicles.²⁰⁹ This statute, and the preceding one, grant the right to transport and store firearms in locked vehicles on private property even when private property owners prefer otherwise.²¹⁰

B. Noteworthy Aspects of the State Laws²¹¹

As is evident from the above survey and from Appendix A to this article, there is much variation among these laws. Many of the laws do, however, share some commonalities. Two such commonalities are relevant for ultimately ascertaining whether there is a conflict with the OSH Act that necessitates preemption. Both characteristics suggest there is no conflict.

First, almost none of the guns-at-work laws target employees specifically.²¹² They are laws pursuant to state authority over general health, safety, and welfare that generally prevent

²⁰⁸ Okla. Stat. tit. 21, § 1289.7a(B). This subsection does not apply to claims under the Worker’s Compensation Act. *Id.*

²⁰⁹ *See* Okla. Stat. tit. 21, § 1290.22.

²¹⁰ *See* *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1286 (N.D. Okla. 2007). Both Sections 1289.7a and 1290.22 are criminal statutes that subject a violator to misdemeanor sanctions or punishment under Oklahoma law. *See* *Whirlpool Corp. v. Henry*, 110 P.3d 83, 84-86 (Okla. Crim. Appeals 2005).

Oklahoma has expressly declared the right to transport firearms in vehicles. *See* Okla. Stat. tit. 21, § 1289.7 (“Any person, except a convicted felon, may transport in a motor vehicle a rifle, shotgun or pistol, open and unloaded, *at any time.*” (emphasis added)).

²¹¹ To facilitate comparison, the guns-at-work laws with noteworthy aspects of each are provided in a chart in Appendix A. *See App. A infra.* The chart reveals relevant characteristics of many of the laws that prevent conflict with the OSH Act. *See App. A infra.*

²¹² *See App. A infra.*

prohibiting guns in vehicles.²¹³ Essentially, state legislatures have determined that individuals have the right to store guns in their vehicles while parked and conducting business—whether that business is grocery shopping or working.

As the Supreme Court has explained, however, the critical question is not necessarily a state’s intentions in enacting law but rather the state law’s effect on federal law.²¹⁴ The effect of guns-at-work laws on the OSH Act is therefore still important, and it is discussed further in Part IV.

Secondly, and more importantly, the majority of guns-at-work laws have exceptions for federal law. Approximately two-thirds of these laws will not force individuals to permit firearms if federal law prevents possessing firearms.²¹⁵ If the OSH Act prevents possessing firearms in workplace parking lots because it creates a safety hazard to employees, then these state statutes

²¹³ “Parking-lot laws” rather than “guns-at-work laws may therefore be more appropriate. *See generally* Stefanie L. Steines, *Parking-Lot Laws: An Assault on Private Property Rights & Workplace Safety*, 93 Iowa L. Rev. 1171 (Mar. 2008) (terming such laws “parking-lot laws”).

²¹⁴ *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 105-07 (1994) (“Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field. The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted under the [OSH] Act.”). The *Gade* Court did point out, however, that generally applicable laws that *do not* conflict are generally not preempted, *see id.* at 107, but this does not eliminate the need to determine whether there is a conflict. As Part IV of this article shows, there is none. *See Part IV infra*.

²¹⁵ *See* Alaska Stat. § 18.65.800(a), (b) (providing it only applies to individuals who may lawfully possess firearms under state or federal law and stating it does not limit a person’s rights or remedies under any other law); Fla. Stat. § 790.251(7)(g) (excepting property upon which firearm possession is prohibited pursuant to federal law); Ky. Rev. Stat. Ann. § 237.106(2) (permitting a person, including an employer, to prevent an individual from possessing a firearm on the property where that individual is prohibited by federal law from possessing a firearm); S.B. 51, 34th Reg. Sess., (La. 2008) (Full Text –Netscan) (to be codified at LA Rev. Stat. § 32:292.1(D)(1)) (providing the section shall not apply to any property where possession of firearms is prohibited by state or federal law); Miss. Code Ann. § 45-9-55(4) (stating this section does not authorize a person to store a firearm on any premises where the possession of firearms is prohibited by federal law). *But see supra* n. 142.

Georgia’s statute also has an exception for federal law, but it has a different effect than the other states’ exceptions. *See* O.C.G.A. § 16-11-135(d)(6) (providing exception where transport of firearms on employers’ premises is prohibited by state or federal law). This is because Georgia’s guns-at-work law does not directly prevent employers from prohibiting employees from storing guns in vehicles. *See* O.C.G.A. § 16-11-135(a), (b). It prevents vehicle searches and conditioning employment on agreements not to access firearms stored in vehicles, *see* O.C.G.A. § 16-11-135(a), (b). The statute’s exception is from taking these actions. *See* O.C.G.A. § 16-11-135(d). This exception thus permits federal law to trump state prohibition on the specific conduct outlined in Georgia’s guns-at-work law.

would not force employers to permit them.²¹⁶ For those guns-at-work laws that expressly yield to federal law, there can be no conflict with federal law.²¹⁷ In instances where the OSH Act prevents guns in vehicles, guns-at-work laws in approximately two-thirds of the states expressly yield, leaving only three states with laws potentially conflicting with the OSH Act.²¹⁸

C. Cases Analyzing OSH Act Preemption of State Guns-at-Work Laws

At this time of this writing, two federal district courts have analyzed the state guns-at-work laws of two of the states in the above survey, Oklahoma and Florida, to determine whether the OSH Act preempts these laws. In the first case, *ConocoPhillips v. Henry*, the Northern District of Oklahoma held the OSH Act preempts Oklahoma's laws.²¹⁹ In the second case, *Florida Retail Federation v. Attorney General*, the Northern District of Florida reached the opposite conclusion finding the OSH Act does not preempt Florida's law.²²⁰ As argued further in Part IV, the Florida court reached the correct conclusion.

1. Oklahoma: ConocoPhillips v. Henry

²¹⁶ One potential problem with this argument is the wording of some of the exceptions suggests that they apply when federal law prevents an individual from possessing a firearm at all, but this does not necessarily mean there is an exception for federal law that permits the individual to possess a firearm generally but only prevents her from storing the firearm in her vehicles while at work. *See, e.g.*, Ky. Rev. Stat. Ann. § 237.106(2) (“A person, including but not limited to an employer, who owns, leases, or otherwise occupies real property may prevent a person who is prohibited by state or federal law from possessing a firearm or ammunition from possessing a firearm or ammunition on the property.”); *see also supra* n. 142. One may argue that if the Kentucky legislature intended to provide exception where federal law only prohibited possession while on work property, it could have drafted the provision as follows: A person, including but not limited to an employer, who owns, leases, or otherwise occupies real property may prevent a person who is prohibited by state or federal law from possessing a firearm or ammunition *on the property* from possessing a firearm or ammunition on the property. This revised version is of course quite cumbersome, which may explain why it was not drafted this way. Further, the language of the statute as currently drafted is broad enough (federal law prohibiting possession) to encompass federal law prohibiting possession in certain circumstances (e.g., while at work).

²¹⁷ This of course does not eliminate a conflict with the states that do not have a federal-law exception in their guns-at-work laws: Kansas, Minnesota, and Oklahoma. *See* Kan. Stat. Ann. § 75-7c11; Minn. Stat. Ann. § 624.714; Okla. Stat. tit. 21 §§ 1289.7a, 1290.22.

²¹⁸ *See infra* App. A.

²¹⁹ *See ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1296, 1330, 1337-40 (N.D. Okla. 2007).

²²⁰ *See Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *15 (N.D. Fla. July 28, 2008).

In *ConocoPhillips*, the Northern District of Oklahoma considered challenges to Oklahoma’s guns-at-work laws and held the statutes preempted as in conflict with the OSH Act’s overarching purposes in 29 U.S.C. § 651(b) and the general duty clause of Section 654(a)(1).²²¹ The court explained that Oklahoma’s statutes thwart the overall purposes of the Act to reduce occupational safety and health hazards and to stimulate programs for safe and healthy working conditions.²²² According to the court, OSHA has encouraged employers to enact policies to reduce workplace hazards, but Oklahoma’s guns-at-work laws prevent that.²²³ The court also found that the statutes “pose a material impediment to compliance with the [Act’s] general duty clause” by prohibiting employers’ *chosen* method of abatement of a potential hazard.²²⁴

The court thus held that Oklahoma’s guns-at-work laws conflict with the OSH Act and are preempted.²²⁵ It enjoined the statutes to the extent of this preemption.²²⁶ As demonstrated in

²²¹ *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1296, 1330, 1337-40 (N.D. Okla. 2007). The court also considered whether the statutes constitute an unconstitutional Taking of private property rights or an unconstitutional deprivation of a fundamental right and held they do not. *See ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1296 (N.D. Okla. 2007). For an analysis of this, see generally Stefanie L. Steines, *Parking-Lot Laws: An Assault on Private Property Rights & Workplace Safety*, 93 Iowa L. Rev. 1171 (Mar. 2008) (arguing parking-lot laws, like those at issue in *ConocoPhillips*, do not violate due process, but do constitute unconstitutional Takings and are bad policy).

²²² *See ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1338 (N.D. Okla. 2007).

²²³ *See id.* The court found Section 1289.7a(B) further thwarts the OSH Act’s purposes by immunizing employers from civil liability for any occurrences resulting from weapons in vehicles, and this shields employers from OSH Act liability for gun-related injuries, which undermines the OSH Act’s purposes. *See ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1338 (N.D. Okla. 2007). This proves too much. By enacting Section 1289.7a(B), the Oklahoma legislature presumably did not intend that the *federal government* is restricted by Oklahoma state law and may not hold someone liable under federal law. *Cf. Hancock v. Train*, 426 U.S. 167, 96 S. Ct. 2006, 2012-13 (1976) (noting seminal principle that federal constitution and laws control state constitution and laws and cannot be controlled by them, and explaining that state regulation of the federal government is permitted only where there is a clear congressional mandate); *United States v. New Mexico*, 455 U.S. 720, 733-35 (1982) (explaining that “the Court has never questioned the propriety of absolute federal immunity from state taxation” and noting that the principle purpose of immunity doctrine is to prevent clashing sovereigns by preventing states from laying demands directly on federal government). More likely, Section 1289.7a(B) is immunization individuals from *state* civil liability for complying with this state law.

²²⁴ *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1330, 1337 (N.D. Okla. 2007).

²²⁵ *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1340 (N.D. Okla. 2007).

²²⁶ *Id.*

Part IV, this decision was erroneous, and the Northern District of Florida reached a better result in *Florida Retail Federation v. Attorney General*.²²⁷

2. *Florida: Florida Retail Federation v. Attorney General*

In *Florida Retail Federation*, the United States District Court for the Northern District of Florida considered whether Florida's guns-at-work law violates the OSH Act.²²⁸ Reaching a conclusion contrary to the Northern District of Oklahoma, the Northern District of Florida held that the Act does not preempt Florida's law.²²⁹ It rested its decision on two independent bases.²³⁰

First, the court explained that because the Secretary has not promulgated any standards, Section 18(a) clearly applies, permits the states to regulate, and forecloses preemption.²³¹ Second, the court rejected the argument that the general duty clause requires preemption.²³² It reasoned that if the general duty clause were held to preempt state guns-at-work laws, it would have to be because the general duty clause requires banning guns from parking lots for safety, and employers would necessarily face liability if they did not ban guns.²³³ But, this is not the case: employers do not necessarily face liability under the general duty clause for failing to ban guns from parking lots; thus, the general duty clause does not require invalidating state guns-at-work laws that prevent employers from banning guns.²³⁴ For these reasons, the court rejected

²²⁷ No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *1 (N.D. Fla. July 28, 2008).

²²⁸ *See Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *1 (N.D. Fla. July 28, 2008). The court also considered whether the statute is unconstitutional because it compels property owners to make their property available for purposes that they do not support and because it draws irrational distinction between businesses that are and are not required to permit guns in parking lots. *Id.* at *1. The court decided the preemption issue on a motion for preliminary injunction, *see id.* at *1, but it converted this to a final judgment on the merits pursuant to the parties' agreement. *See Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 3286947, at **1-2 (Aug. 6, 2008).

²²⁹ *See Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *15 (N.D. Fla. July 28, 2008).

²³⁰ *See id.*

²³¹ *See id.*

²³² *See id.*

²³³ *See id.*

²³⁴ *See id.* Because the general duty clause likely does not require employers to ban guns from vehicles, it seems unlikely Fla. Stat. § 790.251(6) will enable employers to use the OSH Act to avoid complying with Florida's guns-

plaintiff's argument that the OSH Act preempts Florida's guns-at-work law.²³⁵ As argued in the next Part, the Northern District of Florida got it right.

IV. THE OSH ACT DOES NOT PREEMPT STATE GUNS-AT-WORK LAWS

This Part argues that the Northern District of Florida reached the correct conclusion: the OSH Act does not preempt state guns-at-work laws. It first examines whether either of the OSH Act savings clauses save these laws from preemption and argues that Section 18(a) should. It next maintains that even if neither savings clause saves these laws, they are still not preempted because neither express nor implied preemption is present. Courts therefore should not displace state guns-at-work laws.

A. Do the OSH Act Savings Clauses Save these Laws?

This section examines whether either of the OSH Act's two savings clauses save state guns-at-work laws from preemption. It concludes that Section 4(b)(4) does not, but it argues that Section 18(a) should save guns-at-work laws from OSH Act preemption.

1. Section 4(b)(4) likely does not Save these Laws

The plain language of Section 4(b)(4) suggests that it will not save guns-at-work laws.²³⁶ For discussion purposes, the first half of Section 4(b)(4) (everything before the "*or*")²³⁷ is referred to as the "workmen's compensation clause," and the remainder (everything following the "*or*") is simply known as "remainder clause."²³⁸

The workmen's compensation clause is limited to only workmen's compensation laws and is therefore easily eliminated as a vehicle to save state guns-at-work laws because they are

at-work law. *See supra* n. 159. If, however, it were found that the general duty clause required banning guns from parking lots, then the OSH Act could excuse compliance. *See supra* n. 159.

²³⁵ *See Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *16 (N.D. Fla. July 28, 2008).

²³⁶ *See supra* Part II(C)(1).

²³⁷ *See supra* Part II(C)(1).

²³⁸ *See* 29 U.S.C. § 653(4).

not workmen's compensation laws.²³⁹ The remainder clause is also inapplicable because it applies only to laws "with respect to injuries, diseases, or death of employees."²⁴⁰ Guns-at-work laws govern the storage of guns in vehicles,²⁴¹ and not injuries, diseases, or death of employees.²⁴²

2. Section 18(a) Should Save these Laws

Unlike Section 4(b)(4), Section 18(a) should save these laws. Section 18(a) expressly permits states to assert jurisdiction under state law over *any* occupational safety or health issue where no federal standard is in effect.²⁴³ This section unequivocally expresses Congress's intent not to preempt state law absent a standard.²⁴⁴ If there is no federal standard, states may govern.²⁴⁵ Here, there is no federal standard governing the prevention of workplace violence relevant to guns-at-work laws.²⁴⁶ OSHA claims it defers to state and local law enforcement to

²³⁹ See 29 U.S.C. § 653(b)(4).

²⁴⁰ See 29 U.S.C. § 653(b)(4).

²⁴¹ See *supra* Part III.

²⁴² One might of course counter that guns-at-work laws permit employees to have guns, and this may lead to injury or death of employees, and therefore such laws fall within the remainder clause. This stretches the language of the remainder clause too far, and no court appears to have accepted such an argument.

Further, though 4(b)(4) is broadly worded, it has been construed primarily to save only state tort laws and criminal laws. See *supra* Part II(C)(1). Only some of the state guns-at-work laws are part of the state's penal code. See *supra* Part III. Those laws would still have trouble under 4(b)(4) because they are not necessarily laws "with respect to injuries, diseases, or death," 29 U.S.C. § 653(b)(4). The same is true for those guns-at-work laws that may be classified as tort laws.

In addition to tort and criminal laws, Section 4(b)(4) has also been applied to save rights granted by statute. See *Startz v. Tom Martin Constr. Co.*, 823 F. Supp. 501, 506 (N.D. Ill. 1993). But, this statutory right directly involved injury or death and so is distinguishable from guns-at-work laws. See *Startz v. Tom Martin Constr. Co.*, 823 F. Supp. 501, 502-03, 506 (N.D. Ill. 1993) (finding plaintiff's personal injury claim under Illinois statute was saved and therefore not preempted); see also *Atlas Roofing Co. v. Occupational Safety Health Review Commission*, 430 U.S. 442, 444-45 (1977) (explaining that "existing state statutory and common-law remedies for actual injury and death remain unaffected" by the OSH Act). As mentioned, guns-at-work laws are not laws "with respect to injuries, diseases, or death," 29 U.S.C. § 653(b)(4).

²⁴³ See 29 U.S.C. § 667(a).

²⁴⁴ See 29 U.S.C. § 667(a) ("Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." (emphasis added)).

²⁴⁵ See 29 U.S.C. § 667(a).

²⁴⁶ See Occupational Safety & Health Administration, *Workplace Violence, OSHA Standards*, at <http://www.osha.gov/SLTC/workplaceviolence/standards.html> (last visited June 13, 2008) (stating that as of 7/20/07 no standards exist for workplace violence); Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at

regulate workplace violence.²⁴⁷ Thus, the OSH Act plainly permits states to regulate.²⁴⁸ As the Northern District of Florida agreed, Section 18(a) could not be clearer and prevents preemption of guns-at-work laws.²⁴⁹ To find otherwise ignores clear congressional intent.

a. The Express Intent of Congress Prevents Preemption

A rule applicable to express preemption is instructive here.²⁵⁰ That rule provides that when Congress has made its intent known through explicit statutory language, the task is simply to give effect to that language.²⁵¹ “Although this rule is ordinarily applied in situations where Congress has expressly declared that certain state laws are preempted, [there is] no reason why it does not apply with equal force when Congress clearly and unambiguously states that certain

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008) (recognizing that no standards exist); Occupational Safety & Health Administration, *Safety & Health Topics, Workplace Violence*, at <http://www.osha.gov/SLTC/workplaceviolence/index.html> (last visited June 13, 2008) (stating OSHA is not initiating rulemaking on workplace violence at this time); *see also* *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1339 (N.D. Okla. 2007) (noting there are no specific “standards” governing workplace violence).

The general duty clause is not a “standard.” *See, e.g.*, *Puffers Hardware, Inc. v. Donovan*, 742 F.2d 12, 15-17 (1st Cir. 1984) (finding no “standard” governed where employer was cited for violation of general duty clause); *Wilcox v. Niagara of Wis. Paper Corp.*, 965 F.2d 355, 365 n.* (7th Cir. 1992) (Cummings, J., concurring) (maintaining that the Seventh Circuit has never held the general duty clause is a “standard” that preempts state law and contending such a finding “would be extremely ill-advised” as it “would imperil numerous traditional areas of state general health and safety regulation and would seem to subvert 29 U.S.C. § 667(a)”); *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1332 (D.C. 1997) (stating general duty clause is not a “standard” promulgated by rule under Section 655, and the OSH Act preemption subsections only apply to federal standards promulgated by rule under that section); *see also* *P&Z Co., Inc. v. District of Columbia*, 408 A.2d 1249, 1250 (D.C. 1979) (explaining “standard” is a term of art, and the OSH Act preemption sections apply only to standards promulgated under Section 655).

It is important to distinguish between federal standards that fall within Section 18 and other federal regulations that may be relevant to issues of workplace violence. The former are limited to standards in effect per 29 U.S.C. § 655. *See* 29 U.S.C. § 667(a), (b). A federal regulation not promulgated under Section 655 may relate to guns on workplace property, *see, e.g.*, 39 C.F.R. § 232.1(l) (“[N]o person while on postal property may carry firearms . . . or store the same on postal property, except for official purposes.”), but it does not fall within Section 18(a). *See* 29 U.S.C. § 667(a), (b).

²⁴⁷ *See* Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008).

²⁴⁸ *See* 29 U.S.C. § 667(a).

²⁴⁹ *See* *Fla. Retail Federation, Inc. v. Attorney Gen.*, No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *15 (N.D. Fla. July 28, 2008).

²⁵⁰ *See* *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 841 (N. Dakota 2006).

²⁵¹ *See* *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 841 (N. Dakota 2006).

state laws are *not* preempted by the federal act.”²⁵² In both, “the intent of Congress is clear from the statutory language, and the court's ‘easy’ and solitary task is to enforce the statute according to its terms.”²⁵³

The same rationale applies here. Congress has included a clause expressly stating that nothing in the OSH Act prevents states from regulating where no federal standard is in place.²⁵⁴ No federal standard is in place.²⁵⁵ The express language of the Act prevents courts from finding guns-at-work laws preempted as in conflict with the general duty clause or any other part of the OSH Act.²⁵⁶

If the federal government wants exclusivity over the guns-in-vehicles-at-work issue, it must first promulgate standards. In the absence of standards, the express text of the Act provides that the states control.²⁵⁷

Despite these arguments, the Northern District of Oklahoma (while acknowledging Section 18(a)), held that the OSH Act impliedly preempts Oklahoma’s guns-at-work laws.²⁵⁸

²⁵² See *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 841 (N. Dakota 2006).

²⁵³ See *id.*

²⁵⁴ See 29 U.S.C. § 667(a).

²⁵⁵ See *supra* n. 246.

²⁵⁶ There is admittedly an issue with this argument. *Geier* seems to suggest that a court should only refrain from performing implied conflict preemption if the savings clause states something like “implied conflict preemption analysis is not permitted.” See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). The Court seems to be suggesting that Congress can save state law from *express* preemption through a savings clause, but it may not save state law from implied preemption unless the savings clause declares this expressly. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867-74 (2000); see also *Jeffers v. Wal-Mart Stores, Inc.*, 171 F. Supp. 2d 617, 620 (S.D. W. Va. 2001) (explaining that a savings clause merely limits the scope of express preemption but does not prevent conflict preemption and citing *Geier*).

One might therefore argue that because Section 18(a) contains no such language, state guns-at-work laws may be preempted as in conflict with the OSH Act. As discussed further in Part IV(A)(2)(b), applying such a broad reading of *Geier* should be rejected here in light of the clear language of Section 18(a) that can only mean states may govern in the absence of federal standards. Further, applying *Geier* that broadly is undesirable since it undermines the clear efforts of Congress, which may not realize its seemingly clear directive in Section 18(a) needs altering to prevent all preemption. See *Stone ex rel. Estate of Stone v. Frontier Airlines, Inc.*, 256 F. Supp. 2d 28, 32-33 (D. Mass. 2002) (“The sweep of the Supreme Court's implied preemption doctrine is of particular concern to Congress because Congress' focus is necessarily on the issue sought to be remedied by a pending bill, not on the unintended consequences for existing state and federal legislation. Indeed, even express Congressional disclaimers of preemptive effect have proven ineffective in light of this jurisprudence.”).

²⁵⁷ See 29 U.S.C. § 667(a).

The court found Oklahoma’s guns-at-work laws create an obstacle to the fulfillment of the OSH Act’s general purposes and its general duty clause.²⁵⁹ The court explained that Oklahoma’s laws prevent an employer from using one of its chosen methods to create a safe work environment, and they thus conflict with the OSH Act and are therefore preempted by it.²⁶⁰

Though the court addressed Section 18(a), its treatment of it leaves much to be desired. The court discussed the negative implications of Section 18(a), but it failed to grapple with the positive implications of Section 18(a), i.e. the effect of its express language.²⁶¹ Instead, the court erroneously reasoned that because the alleged conflict between the state law and the OSH Act is not with OSH Act “standards,” Section 18(a) does not even apply.²⁶² But, the court missed the point that Section 18(a) clearly permits states to regulate in the absence of standards, and so they should be free to regulate here.²⁶³

Preempting state law where Section 18(a) *expressly* saves state law because other portions of the OSH Act (such as the general duty clause or the general purposes provision, which do not even specifically address the issue) *impliedly* conflict with that state law makes little sense.²⁶⁴ In doing so, the express text of the statute—Section 18(a)—is completely ignored in favor of implied preemption.²⁶⁵

Though this ignores the plain meaning of Section 18(a), it is not wholly irrational in light of a non-OSH-Act case, *Geier v. American Honda*, in which the Supreme Court held that though

²⁵⁸ See *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1325-30 (N.D. Okla. 2007). The court relied in part on the Supreme Court precedent referenced above. See *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1327 (N.D. Okla. 2007) (citing *Sprietsma* in which the Supreme Court found an express preemption clause does not bar the ordinary workings of implied conflict preemption).

²⁵⁹ See *id.* at 1334-39.

²⁶⁰ See *id.* at 1336-38.

²⁶¹ See *id.* at 1325-27.

²⁶² See *id.* at 1326-27.

²⁶³ See *id.* at 1325-30.

²⁶⁴ See 29 U.S.C. §§ 654(a)(1), 651.

²⁶⁵ The *Gade* plurality found the state law created a conflict with the OSH Act and was preempted, but there, a federal standard was in place, and thus Section 18(a) did not apply. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 92-93, 100 (1992) (plurality). *Gade* does not apply here where no federal standard is in place.

a savings clause may save state law from express preemption, it may not save it from *implied* preemption.²⁶⁶ As shown in the next section, however, *Geier* should not override Section 18(a).

b. Geier Should not Bar the Plain Meaning of Section 18(a)

The Supreme Court has not yet addressed whether Section 18(a) prevents preemption here.²⁶⁷ But, the Supreme Court’s opinion in *Geier v. American Honda*, a case involving a different federal law, suggests that the Court may not agree that Section 18(a) unequivocally saves state guns-at-work laws.²⁶⁸ In *Geier*, the Court pronounced that a “saving clause (like [an]

²⁶⁶ See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

²⁶⁷ In *Gade v. National Solid Wastes Management Association*, the Court considered whether the OSH Act preempted state law and held it did. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108-09 (1992). *Gade* is distinguishable because there *were* federal standards on point, thus Section 18(a) did not apply. See *Gade v. Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 92-93, 98-100 (1992) (plurality); 29 U.S.C. § 667(a). Here there are no such standards. See *supra* n. 246.

²⁶⁸ See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-74 (2000) (explaining that pre-emption provision in federal statute does not, by itself, foreclose through negative implication conflict preemption, and holding savings clause does not either). According to *Geier*, a savings clause may support a narrow reading of an express preemption clause, but this does not affect implied preemption. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868-74 (2000). As the Court explained, neither the savings clause, express preemption clause, nor both together create a special burden against implied preemption. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870-74 (2000). A broad savings clause does mean, however, a court should not “hunt for a conflict” between state and federal law. See *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp.2d 669, 688-89 (N.D. Ohio 2005). A conflict must be “direct, clear and substantial.” *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp.2d 669, 689 (N.D. Ohio 2005) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 107 (1992)).

Prior to *Geier*, the Court reached a similar conclusion regarding federal law that contained an express preemption provision that did not preempt the state law at issue. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89 (1995) (rejecting argument that Court need not consider implied preemption because federal law contains express preemption clause that does not apply). In *Freightliner*, respondent and the Court of Appeals maintained that because the federal law contained an express preemption provision, the scope of preemption was limited to the scope of the express preemption clause, and implied conflict preemption could not exist because the federal law contained an express preemption provision. *Id.* at 287. The Court rejected this claim and explained that implied preemption is still possible despite an express preemption clause that does not apply. See *id.* at 287-89. *But see* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-17 (1992) (finding preemptive scope entirely governed by express preemption clause and implied preemption inapplicable). For a thorough discussion of the Court’s retreat from the position taken in *Cipollone*, see Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 K.Y. L.J. 913, 940-71(2003-2004) (tracing the Court’s post-*Cipollone* jurisprudence in which it has generally applied implied preemption despite an express preemption clause and arguing that the Court should return to its *Cipollone* position and decline to preempt state law on implied grounds where express preemption clause exists). The Court’s current position has been criticized as opening the door to preempting numerous cases not before considered appropriately preempted. See Martin A. Kotler, *The Myth of Individualism & the Appeal of Tort Reform*, 59 Rutgers L. Rev. 779, 828-29 (Summer 2007).

Despite such criticisms, the Court has continued to adhere to this position. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (“Congress’ inclusion of an express preemption clause does *not* bar the ordinary working of conflict pre-emption principles” (internal quotation marks and citation omitted) (emphasis in original)); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) (rejecting argument that Court should be reluctant to find conflict preemption because of express preemption provision and reiterating that neither express

express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.”²⁶⁹ The Supreme Court has found that Section 18(a) is a savings clause.²⁷⁰ One may therefore contend that even the plain text of Section 18(a) may not prevent conflict preemption.²⁷¹ But, *Geier* should not be extended to apply here.²⁷² It did not involve the OSH Act.²⁷³ It concerned a different law, the National Traffic and Motor Vehicle Safety Act of 1966 (“NTMVSA”),²⁷⁴ which does not contain the same clear, congressional directive embodied in Section 18(a).

preemption provision nor savings clause prevent implied preemption); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) (“the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.”).

Lower courts have recognized that this is the Supreme Court’s position where express preemption provisions and savings clauses are concerned. *See, e.g.*, *James v. Mazda Motor Corp.*, 222 F.3d 1323, 1326 (11th Cir. 2000) (explaining *Geier* made clear courts should apply normal, implied preemption principles despite savings clause); *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 678-79 (N.D. Ohio 2005) (“Thus, even when Congress states expressly what aspects of state law it means to pre-empt, courts must still infer pre-emption beyond the confines of Congress’s statements if state law actually conflicts with federal law.”); *Gonzalez v. Ideal Tile Importing Co.*, 877 A.2d 1247, 1250-53 (N.J. 2005) (per curiam) (acknowledging savings clause but finding OSHA preempts state tort action because of conflict). *But see Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 209-10 (3d Cir. 2007) (distinguishing *Geier* and finding it does not compel conclusion that savings clause cannot foreclose further preemption analysis).

²⁶⁹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

²⁷⁰ *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 100 (1992) (plurality).

²⁷¹ That this argument is even tenable reveals a major problem with the Court’s current conflict preemption jurisprudence: attempting to uncover Congress’s intent, the Court should be permitted to displace Congress’s express statements of intent for the implied intent the Court discovers.

²⁷² *See, e.g.*, *Levine v. Wyeth*, 944 A.2d 179, 193-94 (VT 2006) (explaining that *Geier* “simply stands for the proposition that Congress’s intent *not* to preempt a provision of state law cannot be inferred from either (1) an express preemption clause that does not include the state law in question in its scope, or (2) a clause that prevents regulated entities from using compliance with federal law as a defense in state common-law suits,” but it does not permit preemption of state laws that have been expressly saved by Congress), *cert granted* 128 S. Ct. 1118 (Jan. 18, 2008); *Ariz. Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1049-50 (D. Ariz. 2008) (rejecting argument that *Geier* helps establish universal rule that savings clauses must be minimized no matter the effect on or magnitude of the state police powers at issue).

At least one court has agreed that *Geier* does not apply to one of the OSH Act savings clauses, Section 4(b)(4), 29 U.S.C. § 653(b)(4). *See Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 209-10 (3d Cir. 2007) (distinguishing *Geier* and finding “[it] does not compel a conclusion that the savings clause in this case cannot foreclose further preemption analysis).

²⁷³ *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864 (2000).

²⁷⁴ *See id.* The NTMVSA contains two relevant provisions: a preemption provision and a savings clause. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867-68 (2000). The preemption provision provides that whenever a federal motor vehicle safety standard is in effect, no state may establish or continue a state standard that is not identical. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867 (2000) (quoting 15 U.S.C. § 1392(d) (1988)). The Court held that the preemption provision did not preempt the tort claims at issue. *Id.* at 867-68.

The NTMVSA savings clause states that compliance with a federal safety standard does not exempt any person from liability under common law.²⁷⁵ The Court held that the savings clause did not prevent conflict preemption of tort claims that conflict with the NTMVSA federal safety standards.²⁷⁶ The Court explained that nothing in the text of the savings clause evinces Congress’s intent to save state tort actions that conflict with federal regulations; rather, the savings clause merely bars a certain kind of defense in those actions: that compliance with a federal standard automatically exempts defendants from state law whether the federal standard was intended to be an absolute requirement or only a minimal one.²⁷⁷

The OSH Act savings clause is very different. It clearly states that nothing in the Act prevents states from regulating where no federal standard is in place.²⁷⁸ Unlike the NTMVSA savings clause, which does not unequivocally eliminate conflict preemption, Section 18(a) plainly does. The plain language of Section 18(a) necessarily means there can be no conflict where no federal standard is in place. Where no federal standard is in place, Congress has clearly ceded regulatory power to the states.

Applying *Geier* despite Section 18(a)’s clear directive suggests that the only way Congress may effectively “save” state law from all preemption—including implied conflict preemption—is to include an explicit directive that implied preemption shall not apply. But, this makes little sense. Section 18(a) unequivocally states that, in the absence of federal standards, nothing in the Act interferes with a state’s right to govern in the occupational health and safety arena.²⁷⁹ Through Section 18(a), Congress has expressed its position on the balance of state-

²⁷⁵ See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) (quoting 15 U.S.C. § 1397(k) (1988)).

²⁷⁶ See *id.* at 867-70 (2000).

²⁷⁷ See *id.* at 869 (2000).

²⁷⁸ See 29 U.S.C. § 667(a)

²⁷⁹ See 29 U.S.C. § 667(a).

federal sovereignty where there is no standard.²⁸⁰ Essentially, Congress has determined that where an issue does not merit a standard, state law controls worker health and safety.

Courts should not search for an “implied” conflict with the express text of the OSH Act.²⁸¹ If any conflict exists, it is with Section 18(a), not state law. Where an act’s savings clause expressly permits state action, there can be no conflict, *Geier* notwithstanding.²⁸²

B. No Express Preemption

No OSH Act provision expressly preempts guns-at-work laws.²⁸³ Indeed, as discussed in Part III, the majority of guns-at-work laws automatically yield to federal law according to their express terms.²⁸⁴ Express preemption is entirely absent. So too is implied preemption.

C. No Implied Preemption

Courts are generally reluctant to infer pre-emption,²⁸⁵ and this reluctance may be even stronger with the OSH Act.²⁸⁶ The Act’s language, history, and interpretational ambiguity suggest that “[it] should be interpreted in a manner that prevents the interference with states’

²⁸⁰ See 29 U.S.C. § 667(a).

²⁸¹ See *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 840-41 (N. Dakota 2006).

²⁸² See *id.* (distinguishing *Geier* and its progeny because they do not involve express provisions explicitly providing that nothing in the federal statute shall preempt state law, and holding that where Congress has included an express provision granting states power to enact laws, it cannot frustrate the purposes of Congress when states act pursuant to that grant); cf. *Jeffers v. Wal-Mart Stores, Inc.*, 171 F. Supp. 2d 617, 623 (S.D. W. Va. 2001) (analyzing *Geier* and explaining that though the limited express preemption provision at issue does not foreclose conflict preemption, it cannot be ignored, and finding conflict preemption does not apply because the goals and purposes of the federal act in combination with the express preemption provision suggest Congress did not intend to preempt more). In reaching this conclusion, the *Jeffers* court highlights that the federal law contemplates a partnership in which the states retain their traditional powers, and it points to a statutory provision expressly permitting states to regulate. See *Jeffers v. Wal-Mart Stores, Inc.*, 171 F. Supp. 2d 617, 624-25 (S.D. W. Va. 2001). OSH Act Section 18(a) similarly provides a partnership permitting states to regulate. See 29 U.S.C. § 667(a).

²⁸³ See generally 29 U.S.C. §§ 651-700.

²⁸⁴ See *supra* Part III(B).

²⁸⁵ See *Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 132 (1978); see also Eileen Silverstein, *Against Preemption in Labor Law*, 24 Conn. L. Rev. 1, 40 (1991) (analyzing OSH Act and maintaining “the growing body of case law shows little tolerance for elaborate arguments in favor of broad federal preemption”).

²⁸⁶ See *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 54 n.6 (1st Cir. 1991) (“We would be very reluctant to infer preemptive intent absent some indication the state law could have a significant adverse regulatory impact on OSHA’s mission in the workplace.”); see also *Wilcox v. Niagara of Wis. Paper Corp.*, 965 F.2d 355, 365 n.* (7th Cir. 1992) (Cummings, J., concurring) (explaining that the Seventh Circuit has not held that the general duty clause is a standard that preempts state law, and such a decision “would be extremely ill-advised” as it “would imperil numerous traditional areas of state general health and safety regulation and would seem to subvert 29 U.S.C. § 667(a)”).

exercise of police powers to protect their citizens.”²⁸⁷ Guns-at-work laws are exercises of police power that should not be disturbed absent a clear conflict with federal law. None exists.

I. No Field Preemption

Section 18²⁸⁸ confirms that Congress did not intend for the federal government exclusively to regulate the entire field of worker-safety regulation.²⁸⁹ It expressly permits states to regulate where no federal standard exists.²⁹⁰ Because the OSH Act permits states to regulate in the field of worker health and safety, field preemption is absent.²⁹¹ Field preemption occurs only where the field is reserved for federal regulation, and Congress has left no room for state regulation.²⁹² This is clearly not the case with the OSH Act,²⁹³ which embodies a system of cooperative federalism.²⁹⁴

²⁸⁷ *Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 208 (3d Cir. 2007).

²⁸⁸ *See* 29 U.S.C. § 667.

²⁸⁹ *See* 29 U.S.C. § 667(a), (b); *Puffers Hardware, Inc. v. Donovan*, 742 F.2d 12, 16 (1st Cir. 1984). At least one court has interpreted Section 18 to mean that “preemption under OSHA arises *only where* a state law or regulation concerns an occupational safety and health matter governed by a specific federal standard and *only where* an approved state plan is not in effect.” *Lepore v. Nat’l Tool & Mfg. Co.*, 540 A.2d 1296, 1306 (N.J. Super Ct. App. Div. 1988) (emphasis added), *aff’d* 557 A.2d 1371 (N.J. 1989).

²⁹⁰ *See* 29 U.S.C. § 667(a) (permitting states to regulate in the absence of federal standards); *see also* *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 474 (8th Cir. 1990) (noting OSH Act expressly permits state regulation in occupational safety field of law).

Where a federal standard *is* in place for a specific issue, that standard preempts the field for that issue unless the state has a pre-approved plan. *See* 29 U.S.C. § 667(b); *Indus. Truck Ass’n v. Henry*, 125 F.3d 1305, 1310-11 (9th Cir. 1997) (“[W]hen OSHA promulgates a federal standard, that standard totally occupies the field within the ‘issue’ of that regulation and preempts all state occupational safety and health laws relating to that issue, conflicting or not, unless they are included in the state plan.”); *see also* *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 104, n. 2 (1992) (plurality) (“Although we have chosen to use the term ‘conflict’ pre-emption, we could as easily have stated that the promulgation of a federal safety and health standard ‘pre-empts the field’ for any nonapproved state law regulating the same safety and health issue.”).

²⁹¹ *See* *Puffers Hardware, Inc. v. Donovan*, 742 F.2d 12, 16 (1st Cir. 1984); *see also* *ConcoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1302 (N.D. Okla. 2007) (finding field preemption absent); *Gonzalez v. Ideal Tile Importing Co.*, 877 A.2d 1247, 1251 (N.J. 2005) (same). Congress has also made clear it does not intend to preempt the field where firearms are concerned. *See* 18 U.S.C. § 927.

²⁹² *See* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002). “[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.” *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

²⁹³ *See* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992) (plurality) (“Federal regulation of the workplace was not intended to be all encompassing, however.”); *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 474 (8th Cir. 1990) (noting that OSH Act expressly permits state regulation in the occupational safety field of law); *Puffers Hardware, Inc. v. Donovan*, 742 F.2d 12, 16 (1st Cir. 1984) (“The express language of the Occupational Safety and Health Act clearly indicates that in the absence of an applicable standard Congress did not intend that

2. *No Conflict Preemption*

Even absent field preemption, the OSH Act may impliedly preempt state guns-at-work laws if they conflict with the OSH Act.²⁹⁵ But, no conflict exists.²⁹⁶

a. No Impossibility Conflict Preemption

Impossibility conflict preemption occurs where the federal and state statutes are in “irreconcilable conflict,” imposing directly conflicting duties with impossibility of dual compliance—“as they would, for example, if the federal law said, ‘you must sell insurance,’ while the state law said, ‘you may not.’”²⁹⁷ The OSH Act does not expressly require something that guns-at-work laws prohibit or vice versa, nor is it physically impossible to comply with both.²⁹⁸ The OSH Act merely mandates that employers provide a work environment free from recognized hazards,²⁹⁹ while guns-at-work laws require that individuals not be prohibited from storing guns in vehicles.³⁰⁰ The OSH Act does not expressly prevent locking guns in vehicles, nor has it (or OSHA) clarified that storing guns in vehicles is a recognized hazard that necessarily threatens employee health and safety. Employers can still provide a safe

OSHA occupy an entire field of regulation, thereby ousting any state regulation.” (internal quotation marks and citation omitted)); *see also* Berardi v. Getty Refining & Marketing, Co., 435 N.Y.S.2d 212, 217 (N.Y. Sup. Ct. 1980); Eileen Silverstein, *Against Preemption in Labor Law*, 24 Conn. L. Rev. 1, 39 (1991).

²⁹⁴ *See supra* Part II(B).

²⁹⁵ *See* ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1330-40 (N.D. Okla. 2007) (finding Oklahoma’s guns-at-work laws impliedly preempted as in conflict with the OSH Act).

²⁹⁶ Because there are no federal standards in place, *Gade* does not require finding preemption. *See supra* pp. 19-20, 39 & nn. 124-26, 246; *see* ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1326-27 (N.D. Okla. 2007) (finding *Gade* conflict preemption lacking).

²⁹⁷ *See* Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); *see also* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963). An example of this is if a federal law forbade avocados testing more than 7% oil, but state law forbade any avocados testing less than 8% oil. *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963).

²⁹⁸ *See* ConocoPhillips Co. v. Henry, 520 F. Supp.2d 1282, 1328-29 (N.D. Okla. 2007).

²⁹⁹ *See* 29 U.S.C. § 654(a)(1).

³⁰⁰ *See supra* Part III.

environment while permitting employees to store their guns in their vehicles.³⁰¹ Impossibility conflict preemption is lacking.³⁰²

b. No Obstacle Conflict Preemption

State guns-at-work laws are therefore only preempted if they frustrate the purposes of the federal law³⁰³ and are so inconsistent that they must yield.³⁰⁴ The test is whether the state law creates an obstacle to accomplishing Congress's full purposes and objectives.³⁰⁵ The state law must be a "material impediment" to the federal action or thwart the federal policy in a material way.³⁰⁶ No rigid formula exists: evaluation is case-by-case³⁰⁷ and considers the relationship between the state and federal laws as written, interpreted, and applied.³⁰⁸

There is no basis to conclude that guns-at-work laws create an obstacle to and conflict with the OSH Act. The Northern District of Oklahoma found a conflict with the Act's purposes and general duty clause, but this was based on the assumption that guns-at-work laws *decrease* employee safety.³⁰⁹ As shown by the data, which points in both directions, this is not necessarily true.

³⁰¹ See *infra* pp. 49-51.

³⁰² See *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1389 (N.D. Okla. 2007) (finding Oklahoma's guns-at-work laws did not create impossibility conflict preemption with the OSH Act); *cf. In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 457 F. Supp. 2d . 324, 335 (S.D.N.Y. 2006) (finding no impossibility conflict preemption because not physically impossible to comply with both state and federal law).

³⁰³ See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 78-79 (1987) (explaining that absent express preemption, preemption occurs only where compliance with both laws is a physical impossibility or where compliance with state law frustrates the purposes of the federal law, and finding because it is possible to comply with both, preemption only exists if state law frustrates federal purposes).

³⁰⁴ See *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

³⁰⁵ See *id.*; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Mgmt. Ass'n v. United States*, 467 F. Supp. 2d 596, 603-04 (E.D. Va. 2006) ("In other words, in obstacle preemption cases federal law does not completely occupy a field of law, nor does state law require an act that federal law forbids (or vice-versa), but state law instead impedes some policy or purpose of a federal statute or regulation.").

³⁰⁶ See *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir. 1998).

³⁰⁷ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

³⁰⁸ *Jones v. Rath Packing Co.*, 420 U.S. 519, 526, 540- (1977) (finding state law stands as an obstacle to accomplishing the full objectives of Congress in enacting federal act where congressional goal is to facilitate value comparisons among similar products, and state law would effectively prevent any meaningful comparison) .

³⁰⁹ See *ConocoPhillips Co. v. Henry*, 520 F. Supp.2d 1282, 1334-40 (N.D. Okla. 2007). It was also based on the court's assumption that because guns-at-work laws prevent employers' "chosen" method of enhancing safety

i. Guns-at-Work Laws do not Conflict with the General Purpose of the OSH Act

The general purposes of the OSH Act are to enhance worker safety.³¹⁰ Guns-at-work laws do not necessarily threaten this objective. This is because “workplace homicides are not the result of disgruntled workers who take out their frustrations on coworkers or supervisors . . . rather, they are mostly robbery-related crimes.”³¹¹

According to the National Institute for Occupational Safety and Health (“NIOSH”), the federal agency responsible for recommending ways to prevent work-related injuries,³¹² the “vast majority of workplace homicides” involve perpetrators with no legitimate relationship to the business.³¹³ Employer policies prohibiting employees from locking weapons in cars do not even apply to these individuals.

Unlike random criminals, employees are obviously more likely to follow employer anti-weapon policies, but worker-on-worker fatalities (where the perpetrator is a present or past employee) account for a very small percentage of workplace homicides—only 7%.³¹⁴ The

(preventing guns in vehicles), they necessarily impede the objectives and duties of the OSH Act to enhance safety. *See id.* at 1336-39. Employers can still comply with the general duty clause and general purposes though their “chosen” method may be eliminated by state law. That an employer’s choices are restricted is no basis to displace state law.

³¹⁰ *See* 29 U.S.C. § 651(b).

³¹¹ *See* National Institute for Occupational Safety and Health, *Violence in the Workplace, Homicide in the Workplace*, at <http://www.cdc.gov/niosh/violhomi.html> (last visited July 14, 2008). Data on homicides is used because it is the most readily accessible. Indeed, when OSHA has considered the issue of guns at work and workplace violence, it too has focused on workplace homicides. *See* Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008). Further, though there are undoubtedly cases of workplace violence that did not result in death, when eliminating all cases not involving guns and focusing only on gun cases (the only cases relevant here), it is doubtful that the rationale applying to homicides does not apply to these cases simply because the gun that was used did not result in death.

³¹² National Institute for Occupational Safety and Health, *About NIOSH* at <http://www.cdc.gov/niosh/about.html> (last visited July 14, 2008).

³¹³ National Institute for Occupational Safety and Health, *Workplace Violence Prevention Strategies & Research Needs*, at <http://www.cdc.gov/niosh/docs/2006-144> (last visited July 14, 2008). These crimes may include robbery, shoplifting, trespass, and terrorism. *Id.*

³¹⁴ National Institute for Occupational Safety and Health, *Workplace Violence Prevention Strategies & Research Needs*, at <http://www.cdc.gov/niosh/docs/2006-144> (last visited July 14, 2008).

portion of these homicides committed by past employees is unaffected by employer policies (prohibiting or permitting guns in vehicles) because past employees are no longer bound by such policies. Current employees are of course bound, but they also can be required to attend employer-sponsored training, which is critical to prevent worker-on-worker violence.³¹⁵

Moreover, murders are generally committed by sociopaths with extensive criminal records rather than ordinary people with access to weapons.³¹⁶ Sociopaths undeterred by moral obligation or criminal laws are hardly likely to heed employer policies preventing them from storing guns vehicles. Because those most likely to threaten worker safety with guns are least likely to follow policies prohibiting guns in vehicles, eliminating the policies will not necessarily decrease safety.

Further, there is evidence to suggest that gun ownership is actually correlated with decreased crime and *increased* safety.³¹⁷ One commentator maintains that this is because public gun access is a deterrent to crime.³¹⁸ Criminals who know that potential victims have access to

³¹⁵ National Institute for Occupational Safety and Health, *Workplace Violence Prevention Strategies & Research Needs, Chapter 3.4.2*, at <http://www.cdc.gov/niosh/docs/2006-144> (last visited July 14, 2008).

³¹⁶ Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?: A Review of International and Some Domestic Evidence*, 30 Harv. J.L. & Pub. Pol’y 665-70 (Spring 2007).

³¹⁷ See Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?: A Review of International and Some Domestic Evidence*, 30 Harv. J.L. & Pub. Pol’y 649, 673, 653 (Spring 2007) (“[T]he available international data cannot be squared with the mantra that more guns equal more death and fewer guns equal less death. Rather, if firearms availability does matter, the data consistently show that the way it matters is that more guns equal *less* violent crime.”). According to Kates and Mauser, “adoption of state laws permitting millions of qualified citizens to carry guns has not resulted in more murder or violent crime in these states. Rather, adoption of these statutes has been followed by *very significant* reductions in murder and violence in these states.” Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?: A Review of International and Some Domestic Evidence*, 30 Harv. J.L. & Pub. Pol’y 649, 659 (Spring 2007) (emphasis added); see also John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 358-61 (Spring 1997) (conducting research and finding that permitting citizens to carry concealed weapons creates deterrent effect for criminals, reducing murders by 8%, rapes by 5%, aggravated assaults by 7%, and robbery by 3%).

³¹⁸ See John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 359-60 (Spring 1997).

weapons are less likely to commit crimes that would bring them in contact with potentially armed victims.³¹⁹ Even individuals without guns benefit from this deterrence effect.³²⁰

Of course, this is correlation not causation, but it undermines the argument that accessibility to guns necessarily decreases safety. Guns-at-work laws arguably protect workers by enabling them to keep their firearms nearby for self defense and by deterring criminals who recognize that workers may have easily accessible means of protection.

There is of course another side to this debate, which highlights many instances where guns have escalated dangerous situations into deadly tragedies.³²¹ This valid position must not be ignored. In arguing in opposition, this article does not maintain guns-at-work laws are a good idea or even that they necessarily increase safety by arming the “proper” parties. It merely shows that the OSH Act’s general purpose of worker safety cannot be used to defeat guns-at-work laws because such laws do not necessarily obstruct that purpose and indeed may actually further it. In other words, the evidence is not determinative in either direction. A court therefore should not find that guns-at-work laws necessarily conflict with the general purposes of the OSH Act.

Finding a conflict between guns-at-work laws and the OSH Act’s general purposes is based on unfounded speculation, and this is impermissible. As the Supreme Court has emphasized, a hypothetical or speculative conflict is insufficient for preemption: conflict should not be created where none actually exists.³²² There must be an actual conflict.³²³

³¹⁹ John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 359-60 (Spring 1997).

³²⁰ John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 Valparaiso U. L. Rev. 355, 359-60 (Spring 1997).

³²¹ See *supra* pp. 2, 4.

³²² See *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (rejecting argument that actions *will* occur that *will* create conflict as too speculative for preemption); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) (finding argument that county ordinance is an obstacle to federal goal is “too speculative to support pre-emption”); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130-31 (1978); *Schweiss v. Chrysler Motors Corp.*, 922

In determining whether an actual conflict exists, courts look for ““special features warranting pre-emption””³²⁴ These include the dominance of the federal interest in the area (such as in foreign affairs), which militates in favor of preemption.³²⁵ Areas such as health and safety, which states have traditionally regulated, disfavor preemption.³²⁶

Because guns-at-work laws regulate health and safety, courts must pause before displacing these state laws. During this pause, courts should notice that neither the OSH Act nor OSHA has decreed that storing guns in vehicles threatens worker safety,³²⁷ and there is evidence suggesting that it may actually increase safety. Courts should refrain from straining to find an actual conflict between state guns-at-work laws and the OSH Act’s general purposes.

ii. Guns-at-Work Laws do not Conflict with the Act’s General Duty Clause

The general duty clause requires employers to furnish employees a place of employment free from recognized hazards.³²⁸ These hazards are traditionally those arising from some condition inherent in the workplace environment.³²⁹ Though there may be circumstances where

F.2d 473, 475-76 (8th Cir. 1990) (rejecting argument that state law frustrates congressional purpose and is preempted because lack of evidence renders argument speculative).

³²³ *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)). Even if there is an actual conflict, state law is displaced only to the extent it actually conflicts with federal law. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996).

³²⁴ *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990).

³²⁵ *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). For instance, where a federal law governing foreign relations invests the President with a plentitude of authority, and state law would impose different pressure, the state law creates a conflict compromising the President’s ability to speak with one voice in foreign affairs. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375-77, 380-82, 388 (2000). Similarly, where Congress clearly intended to limit economic pressure on a foreign country, yet state law penalizes conduct Congress explicitly exempted, there is a conflict. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377-80 (2000). *Crosby* highlighted additional evidence supporting its conclusion that a conflict existed, including that in response to the passage of the state act, a number of United States allies filed formal protests; the European Union and Japan filed formal complaints against the U.S. with the World Trade Organization; and, the Executive consistently represented that the state act has complicated its dealing with foreign sovereigns. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 382-84 (2000). Though the Court does not blindly defer to such opinions, it is competent and direct evidence of the state act’s frustration of congressional objectives. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 385-86 (2000).

³²⁶ *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985).

³²⁷ *See supra* p. 39 & n. 246.

³²⁸ 29 U.S.C. § 654(a)(1).

³²⁹ *See Midwest Fin., Inc.*, OSHRC Docket No. 93-2879, 1995 OSAHRC LEXIS 80, *24 (May 8, 1995).

failing to protect employees from violence could be a general-duty-clause violation, the OSH Act is not typically enforced this way.³³⁰

It is unlikely that employers would face general-duty-clause liability for random acts of violence that are not recognized as part of the nature of the specific business but rather are “random antisocial acts which may occur anywhere.”³³¹ Surely the general duty clause would not hold an employer liable when an employee inexplicably shoots a coworker for no apparent reason or where a minor argument that should normally lead to nothing more than hurt feelings turns deadly.

Intentional, violent acts of employees are not conduct employers can prevent.³³² If an employee wants to commit a crime, he will likely find a way to do it. “A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime,” but this is not within the purview of the employer’s general duty requirement.³³³ Employers are not necessarily responsible for the aberrant behavior of employees.³³⁴

This makes sense because the OSH Act is concerned with increasing workplace safety, but random acts of violence are not workplace specific. They occur anywhere and everywhere, affecting society as a whole. Thus, society and its safety arm, the police, appropriately bear the burden of eliminating general violence, which is beyond the scope of the OSH Act.

³³⁰ 23 O.S.H. Rep. (BNA) 334 (Aug. 25, 1993).

³³¹ 23 O.S.H. Rep. (BNA) 334 (Aug. 25, 1993).

³³² An employer may, however, be held responsible for a negligent employee’s conduct if such conduct could have been prevented through feasible precautions such as proper training. *See* Baroid Div. of NL Indus., Inc., 660 F.2d 439, 445-46 (10th Cir. 1981). But, the general duty clause is not intended to impose absolute liability nor hold an employer liable on a respondeat superior basis for employee negligence. *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976).

³³³ *See Nat’l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973); *see also* Midwest Fin., Inc., OSHRC Docket No. 93-2879, 1995 OSAHRC LEXIS 80, *26 (May 8, 1995).

³³⁴ *Nat’l Realty & Constr., Co. v. OSHRC*, 489 F.2d 1257, 1265-66 & n. 35 (D.C. Cir. 1973). As the Fifth Circuit explained, the general duty clause is not intended to impose absolute liability nor hold an employer liable on a respondeat superior basis for an employee’s negligence. *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976).

Despite this, OSHA advised in a letter of interpretation that the general duty clause *may* require an employer to take action to abate a risk of workplace violence.³³⁵ The Northern District of Oklahoma seized on this letter to support its conclusion that guns-at-work laws necessarily conflict with the general duty clause.³³⁶ In that letter, OSHA stated:

In a workplace where the risk of violence and serious personal injury are significant enough to be “recognized hazards,” the general duty clause would require the employer to take *feasible* steps to minimize those risks. Failure of an employer to implement *feasible* means of abatement of these hazards could result in the finding of an OSH Act violation.

On the other hand, the occurrence of acts of violence which are not “recognized” *as characteristic of employment and represent random antisocial acts which may occur anywhere* would not subject the employer to a citation for a violation of the OSH Act.³³⁷

As OSHA also explained, whether an employer faces liability turns on the specific facts and circumstances of the case.³³⁸ In specific workforces where the risk of violence is a “recognized hazard” in that industry, the general duty clause may require an employer to take feasible steps to minimize the risk; however, this is industry specific, and there is no evidence

³³⁵ See Occupational Safety & Health Administration, 12/10/1992 – OSHA Policy Regarding Violent Employee Behavior, *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008).

³³⁶ See *ConocoPhillips Co. v. Henry*, 520 F. Supp.2d 1282, 1331-32 (N.D. Okla. 2007).

³³⁷ Occupational Safety & Health Administration, 12/10/1992 – OSHA Policy Regarding Violent Employee Behavior, *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008) (all emphasis added).

³³⁸ Occupational Safety & Health Administration, 12/10/1992 – OSHA Policy Regarding Violent Employee Behavior, *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008) (all emphasis added).

that minimizing risks necessarily requires completely banning guns from all parking lots in all workplaces everywhere.³³⁹

Further, the letter suggests employers will not be liable for complying with state guns-at-work laws. This is because “*the feasibility* of the means of abatement [of the hazard is a] critical factor[] to be considered” for liability.³⁴⁰ Where state law prevents employers from banning guns from vehicles, banning guns is not feasible, but other alternatives are feasible to eliminate the hazard. For instance, employers could install metal detectors at office entrances or sponsor gun awareness programs to educate employees on the dangers of improper handgun usage.³⁴¹

Given the presence of other viable options, it seems unlikely that OSHA would hold employers liable because they decided to pursue alternative precautions of arguably equal efficacy rather than banning guns in parking lots. And, because there are alternatives of arguably equivalent efficacy, state laws that prohibit guns in vehicles should not create an obstacle to fulfilling the general-duty-clause obligation to enhance worker safety. Guns-at-work laws may eliminate one possible means to enhance safety. But, where other feasible means exist, eliminating one means should not obstruct accomplishing the ultimate goal.

³³⁹ See Occupational Safety & Health Administration, 12/10/1992 – OSHA Policy Regarding Violent Employee Behavior, *at*

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008); Occupational Safety & Health Administration, 09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence, *at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008).

³⁴⁰ Occupational Safety & Health Administration, 12/10/1992 – OSHA Policy Regarding Violent Employee Behavior, *at*

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008) (emphasis added); *see also* Getty Oil Co. v. OSHRC, 530 F.2d 1143, 1145 (5th Cir. 1976) (noting general duty clause requires employers to discover and exclude from workplace feasibly preventable hazards).

³⁴¹ *See, e.g.*, Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975) (“An employer must take reasonable precautionary steps to protect its employees from reasonably foreseeable recognized dangers that are causing or are likely to cause death or serious physical injury. And precautionary steps, of course, include the employer's providing an adequate safety and training program.”).

The general duty clause does not require banning guns from vehicles as the only means of ensuring worker safety.³⁴² Employers may simultaneously ensure worker safety and permit guns in vehicles. Indeed, permitting guns in vehicles may actually assist employers in enhancing worker safety. Simply because guns-at-work laws prevent employers from pursuing one possible avenue, which may or may not enhance worker safety, does not mean that these laws obstruct the general duty clause. State guns-at-work laws do not conflict with the general duty clause and thus should not be preempted by it.

V. GUNS AT WORK: A PROPOSED STANDARD

Despite the OSH Act's preference for occupational health and safety standards,³⁴³ OSHA has not adopted standards governing workplace violence,³⁴⁴ even after specifically considering the issue (including a direct request to ban guns from the workplace) on multiple occasions.³⁴⁵ OSHA has strongly suggested that this silence is deliberate because a standard is not warranted.³⁴⁶ As OSHA has highlighted, workplace homicides have declined nearly 50% over the last decade.³⁴⁷ The majority of deaths that occur are at the hands of non-employees, such as

³⁴² See Fla. Retail Federation, Inc. v. Attorney Gen., No. 4:08cv179-RH/WCS, 2008 WL 2908003, at *15 (N.D. Fla. July, 28, 2008) (“If the failure to ban guns were indeed a violation of the general duty clause, then all businesses would have a duty to ban guns. One doubts that even the plaintiffs really assert this is the law; they at least have not done so explicitly in this case. This record makes clear that some businesses believe guns in parking lots are a danger and wish to ban them. But surely some businesses do not. By enacting the general duty clause, Congress did not weigh in on this issue.”).

³⁴³ See *supra* Part II(A)(1), p. 17 & n. 115.

³⁴⁴ See *supra* p. 39 & n. 246.

³⁴⁵ See Occupational Safety & Health Administration, 12/10/1992 – OSHA Policy Regarding Violent Employee Behavior, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008); Occupational Safety & Health Administration, 09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008).

³⁴⁶ See Occupational Safety & Health Administration, 09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008).

³⁴⁷ Occupational Safety & Health Administration, 09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence, at

armed robbers,³⁴⁸ and violent employee behavior may best be handled through companies' employee relations activities.³⁴⁹

Rather than adopt binding standards, OSHA has issued *non-binding* guidelines³⁵⁰ and non-binding letters of interpretation.³⁵¹ As mentioned, in one letter, OSHA advised that the general duty clause may require employers take action to abate risks of workplace violence.³⁵² The general duty clause may not, however, displace the OSH Act's intricate process for promulgating standards, which provides informed decision-making and notice to those whom

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008).

³⁴⁸ Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008).

³⁴⁹ Occupational Safety & Health Administration, *12/10/1992 – OSHA Policy Regarding Violent Employee Behavior*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008) (all emphasis added).

³⁵⁰ See Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008); see also Occupational Safety & Health Administration, *Workplace Violence, Possible Solutions*, at <http://www.osha.gov/SLTC/workplaceviolence/solutions.html> (last visited June 13, 2008);

Occupational Safety & Health Administration, *All About OSHA*, at 13 (2006),

http://www.osha.gov/Publications/all_about_OSHA.pdf (“Failure to implement a guideline is not itself a violation of the OSH Act’s general duty clause.”).

³⁵¹ See Occupational Safety & Health Administration, *12/10/1992 – OSHA Policy Regarding Violent Employee Behavior*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008); Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008). Neither of these letters specifically addresses guns in vehicles, state guns-at-work laws, or preemption. See Occupational Safety & Health Administration, *12/10/1992 – OSHA Policy Regarding Violent Employee Behavior*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008); Occupational Safety & Health Administration, *09/13/2006 – Request for OSHA National Policy Banning Guns from the Workplace & OSHA Policy Regarding Workplace Violence*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504 (last visited June 13, 2008).

³⁵² See Occupational Safety & Health Administration, *12/10/1992 – OSHA Policy Regarding Violent Employee Behavior*, at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951 (last visited June 13, 2008).

occupational health and safety rules affect.³⁵³ To override state guns-at-work laws without satisfying this process undermines the OSH Act, and it violates the express dictates of Section 18(a). It also upsets the delicate balance of sovereignty the OSH Act clearly provides in this traditionally state-controlled arena. Preemption of guns-at-work laws therefore first requires the promulgation of standards.³⁵⁴

A. The General Duty Clause does not Permit Circumventing Standards

The general duty clause is not a crutch for OSHA to use to refrain from taking a definitive stance on workplace violence. It is intended to fill the gap for unrecognized hazards, not to circumvent standards.³⁵⁵ Permitting the general duty clause to circumvent standards subverts the OSH Act's intricate procedure for promulgating standards, which provides informed decision-making and notice.³⁵⁶ This procedure enables those most interested to share information about the potential effect of a proposed rule on the industry and whether it is likely to accomplish its objectives.³⁵⁷ The process and the resulting formally promulgated standards are preferred to the general duty clause because they provide notice to parties who must follow the rules. This enables them to govern their conduct accordingly on the front end rather than face liability on the back end after unknowingly violating the amorphous general duty clause. The general duty clause may not be used to circumvent this statutorily prescribed process.

B. Standards Strike the Proper Balance of Cooperative Federalism

Standards strike the proper balance of cooperative federalism embodied in the OSH Act. They accomplish this by providing states with prior notice that applying state law to the workplace could violate the OSH Act in a given circumstance. For guns-at-work laws with

³⁵³ See 29 U.S.C. § 655(b).

³⁵⁴ Promulgation of standards is necessary for preemption of state guns-at-work laws. It remains to be determined whether it is also sufficient.

³⁵⁵ See *supra* pp. 17 & n. 115.

³⁵⁶ See 29 U.S.C. § 655.

³⁵⁷ See 29 U.S.C. § 655(b).

exceptions for federal law,³⁵⁸ standards make clear that these exceptions apply and the general laws should not be enforced against employers. For those states without these exceptions,³⁵⁹ standards may signal a need to enact them. Many states have already enacted positive law expressing their willingness to yield to federal supremacy,³⁶⁰ but they need to know exactly what that supremacy dictates.

The statutory exceptions for federal law apply when federal law “prohibits” firearm possession.³⁶¹ It is currently unclear whether federal law prohibits firearm possession in vehicles parked on employer property. OSHA has had multiple opportunities to resolve this with a standard.³⁶² A continued failure to do so can only be interpreted as an affirmative decision that guns in vehicles should be left to the states to regulate even when those vehicles are at work.

Standards should be promulgated so that it is clear whether employers must ban guns from vehicles in workplace parking lots and whether states may prevent employers from doing so. This strikes the harmonious balance of cooperative-federalism embodied in the OSH Act. State laws governing general health, safety, and welfare survive, and they yield of their own accord as supremacy requires. The states have performed their part of the bargain. Now it is the federal government’s turn.

CONCLUSION

³⁵⁸ See *supra* Part III(B). See *infra* App. A.

³⁵⁹ See *supra* p. 34 n. 217. See *infra* App. A.

³⁶⁰ See *supra* Part III(B). See *infra* App. A.

³⁶¹ See Fla. Stat. § 790.251(7)(g) (excepting property upon which firearm possession is “prohibited” pursuant to federal law); O.C.G.A. § 16-11-135(d)(6) (providing exception where transport of firearms on employers’ premises is “prohibited” by state or federal law); Ky. Rev. Stat. Ann. § 237.106(2) (permitting a person, including an employer, to prevent an individual from possessing a firearm on the property where that individual is “prohibited” by federal law from possessing a firearm); S.B. 51, 34th Reg. Sess., (La. 2008) (Full Text –Netscan) (to be codified at LA Rev. Stat. § 32:292.1(D)(1)) (providing the section shall not apply to any property where possession of firearms is “prohibited” by state or federal law); Miss. Code Ann. § 45-9-55(4) (stating this section does not authorize a person to store a firearm on any premises where the possession of firearms is “prohibited” by federal law).

³⁶² See *supra* pp. 57-58.

This article has argued that the Occupational Safety and Health Act of 1970 does not preempt state guns-at-work laws. Intense debate continues to rage over guns in America with the individual right to bear arms recently gaining constitutional moorings. OSHA may not sit on the sidelines. Courts should not lightly cast aside state laws unless and until OSHA is willing to decree guns in vehicles create a recognized hazard to all workplaces. Absent this, states must be able to continue enacting laws governing the health, welfare, and safety of their citizens. The Occupational Safety and Health Act requires nothing less.

APPENDIX A

State	Relief/Punishment	Federal Law Exception?	Immunizes from Liability?	Protects Employees Only?
Alaska	None provided in the provision.	Yes ³⁶³	Yes	No
Florida	Damages, injunctive relief, civil penalties, “other relief as may be appropriate,” “all reasonable personal costs and losses suffered,” court costs and attorney’s fees to prevailing party. Part of criminal code.	Yes	Yes	No
Georgia	Action by Attorney General. Part of criminal code.	Yes	Yes	No
Kansas	None provided in the provision.	No	No	No
Kentucky	Civil liability, injunction, “appropriate relief.” Ky. Rev. Stat. Ann. § 527.020 is part of criminal code.	Yes	No	No

Louisiana	Civil action for damages. ³⁶⁴	Yes	Yes	No
Minnesota	None provided in the provision, but statute is part of criminal code.	No	No	Minn. Stat. Ann § 624.714(17)(c) -No Minn. Stat. Ann § 624.714(18) -Yes
Mississippi	None provided in the provision.	Yes	Yes	No
Oklahoma	Damages, injunction, court costs, attorneys' fees, misdemeanor sanctions, punishment under Oklahoma law. Both Oklahoma statutes are part of criminal code.	No	Yes (Not from Workers' Comp.)	No