

July 2009

## Take Your Gun to Work and Leave It in the Parking Lot: Why the OHS Act Does Not Preempt State Guns-At-Work-Laws

Dayna B. Royal

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

*Dayna B. Royal\**

I. INTRODUCTION.....	476
II. PREEMPTION PRIMER .....	480
A. <i>Important Background Principles to Guide Preemption         Analysis</i> .....	480
1. Congressional Intent as Lodestar .....	480
2. Presumption Against Preemption .....	482
B. <i>Types of Preemption</i> .....	483
1. Express Preemption .....	483
2. Implied Preemption.....	483
a. Field Preemption.....	484
b. Conflict Preemption.....	485
i. Impossibility Conflict Preemption.....	485
ii. Obstacle Conflict Preemption.....	485
C. <i>Effect of Savings Clauses</i> .....	486
III. THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 .....	486
A. <i>Employer Obligations: Standards and the General         Duty Clause</i> .....	487
1. Promulgating Standards .....	488
2. The General Duty Clause .....	489
B. <i>Cooperative Federalism Under the OSH Act</i> .....	491
C. <i>The OSH Act's Savings Clauses</i> .....	493
1. Section 4(b)(4) .....	493
2. Section 18(a) .....	494
IV. GUNS-AT-WORK LAWS .....	495
A. <i>Guns-at-Work Laws</i> .....	496
1. Florida.....	496
2. Georgia .....	497
3. Oklahoma.....	499

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\* Visiting Assistant Professor, Cumberland School of Law, B.S. *cum laude* (Broadcast News Journalism) B.S. *cum laude* (Psychology) 2002, University of Florida; J.D. *summa cum laude* 2005, University of Michigan. My sincerest thanks to Cory Andrews, Brannon Denning, Scott Bauries, and Marcia McCormick for their insightful comments on earlier drafts and to Nancy Baumgarten for suggesting this topic. Also, thank you to Jeremy Royal who supports my every endeavor.

4. Other States.....	500
B. <i>Noteworthy Aspects of the Laws</i> .....	502
C. <i>Cases Analyzing OSH Act Preemption of State Guns-at-Work Laws</i> .....	503
1. Oklahoma: <i>ConocoPhillips v. Henry</i> .....	504
2. Florida: <i>Florida Retail Federation v. Attorney General</i> .....	505
V. THE OSH ACT DOES NOT PREEMPT STATE GUNS-AT-WORK LAWS .....	506
A. <i>Do the OSH Act Savings Clauses Save these Laws?</i> .....	506
1. Section 4(b)(4) Likely Does Not Save These Laws.....	507
2. Section 18(a) Should Save these Laws .....	507
a. The Express Intent of Congress Prevents Preemption .....	508
b. <i>Geier</i> Should Not Bar the Plain Meaning of § 18(a) .....	510
B. <i>No Express Preemption</i> .....	514
C. <i>No Implied Preemption</i> .....	514
1. No Field Preemption.....	514
2. No Conflict Preemption.....	515
a. No Impossibility Conflict Preemption .....	515
b. No Obstacle Conflict Preemption .....	516
i. Guns-at-Work Laws Do Not Conflict with the General Purpose of the OSH Act .....	517
ii. Guns-at-Work Laws Do Not Conflict with the Act's General Duty Clause .....	520
VI. GUNS AT WORK: PREEMPTION REQUIRES A STANDARD.....	523
A. <i>The General Duty Clause Does Not Permit Circumventing Standards</i> .....	524
B. <i>Standards Strike the Proper Balance of Cooperative Federalism</i> .....	524
VII. CONCLUSION.....	525

## I. INTRODUCTION

Two robbers entered an Alabama restaurant and forced customers and employees into a walk-in refrigerator at gunpoint.<sup>1</sup> Fortunately, one of the

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1. See J. Neil Schulman, Op-Ed., *A Massacre We Didn't Hear About: Firearms in the Hands of Private Citizens Should Play an Important Role in Protection of the Public Safety*, L.A. TIMES, Jan. 1, 1992, at B7.

customers, legally armed with his own pistol, shot the robbers before any hostage was injured.<sup>2</sup> In New York City, a fifty-six year-old woman in a wheelchair was attacked while leaving her apartment.<sup>3</sup> She shot her attacker, ending the attack, with a loaded gun she was carrying in violation of local gun-control laws.<sup>4</sup> In Texas, a man drove his pickup truck through the glass doors of a crowded Texas restaurant, pulled out two semi-automatic pistols, and opened fire.<sup>5</sup> He continued shooting for ten minutes, giving hostages ample time to return fire, especially since his pistol jammed many times.<sup>6</sup> But, Texas law forbade private citizens from carrying firearms out of their homes or businesses, and the restaurant forbade employees from carrying firearms at work. Twenty-three innocent people died.<sup>7</sup>

Gun proponents cite anecdotes like these when arguing for the safety benefits of firearms and the need for fewer firearm controls. But gun opponents have their own stories. In Henderson, Kentucky, a plastics plant worker shot and killed five co-workers before killing himself.<sup>8</sup> He became upset after his supervisor reprimanded him for using a cell phone and failing to wear safety goggles.<sup>9</sup> That supervisor lost his life.<sup>10</sup> In New York, a distraught executive summoned two employees to his office, shot them to death, and killed himself with a gun he kept nearby.<sup>11</sup>

Amid this debate, many states have enacted laws to protect individuals' rights to store guns in their vehicles while at work.<sup>12</sup> These laws<sup>13</sup> take

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2. *Id.* The protagonist sustained minor injuries from the fire exchange. *Id.*

3. John R. Lott, Jr., Op-Ed., *NY Gun Laws & the Granny*, N.Y. POST, Sept. 14, 2006, available at [http://swampman.nypost.com/seven/09142006/postopinion/opedcolumnists/ny\\_gun\\_laws\\_the\\_granny\\_opedcolumnists\\_john\\_r\\_lott\\_jr\\_.htm](http://swampman.nypost.com/seven/09142006/postopinion/opedcolumnists/ny_gun_laws_the_granny_opedcolumnists_john_r_lott_jr_.htm).

4. *Id.*

5. Schulman, *supra* note 1.

6. *Id.*

7. *Id.*

8. Bob Driehaus, *Worker Kills Five at Plant in Kentucky, Then Himself*, N.Y. TIMES, June 26, 2008, at A20.

9. *Id.*

10. *Id.*

11. *Insurance Executive Kills Co-Workers, Self*, AUGUSTA CHRON. (Georgia), Sept. 17, 2002, at A2. 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.*

12. *See infra* Part IV.

13. *See* CHRIS W. COX, NRA INST. FOR LEGIS. ACTION, WORKERS PROTECTION LAWS—2006 (2006), available at <http://www.nra.org/Issues/Articles/Read.aspx?id=181&issue=53> (noting dueling terminology for these laws); *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), *rev'd sub nom.* Ramsey Winch, Inc. v. Henry, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009). Proponents call these laws “Workers Protection” laws, while opponents name them “Forced Entry” 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 Fed'n,

various forms, but all limit an employer's ability to prevent employees from storing guns in their vehicles on employer property.<sup>14</sup>

These laws provide a litmus test for the gun debate. Supporters argue that such laws are necessary for employee self-defense since many licensed gun owners store their guns in their cars for protection as they commute through dangerous neighborhoods.<sup>15</sup> 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.”<sup>16</sup> Employees working the graveyard shift deserve a means of self-defense too.<sup>17</sup>

Opponents argue these laws instead decrease worker morale and safety by increasing the proximity to guns that can too easily turn a disagreement deadly.<sup>18</sup> If employees have immediate access to guns, they argue, supervisors will not feel comfortable disciplining employees for fear of violent retaliation.<sup>19</sup> Moreover, employees will work in fear that a loose cannon may “go postal.”<sup>20</sup>

At least two federal district courts have considered the legitimacy of state guns-at-work laws.<sup>21</sup> One found the state laws preempted by the Occupational Safety and Health Act of 1970 (OSH Act),<sup>22</sup> which Congress enacted to promote worker safety.<sup>23</sup> According to that court, the state laws create an obstacle to, and conflict with, the Act and therefore cannot

Inc. v. Att’y Gen., 576 F. Supp. 2d 1281, 1286 (N.D. Fla. 2008).

14. See *infra* Part IV.

15. See, e.g., Marion P. Hammer, Op-Ed., *Businesses May Not Usurp Constitutional Rights*, TALLAHASSEE DEMOCRAT, Apr. 1, 2008, at B3.

16. *Id.*

17. *Id.*

18. See, e.g., *ConocoPhillips*, 520 F. Supp. 2d at 1334–35; BRIAN J. SIEBEL, BRADY CTR. TO PREVENT GUN VIOLENCE, FORCED ENTRY: THE NATIONAL RIFLE ASSOCIATION’S CAMPAIGN TO FORCE BUSINESSES TO ACCEPT GUNS AT WORK 6–12 (2005), available at <http://www.bradycampaign.org/xshare/pdf/forced-entry-report.pdf>.

19. 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* text accompanying notes 8–10.

20. See SIEBEL, *supra* note 18, at 6–8, 11–12.

21. See Fla. Retail Fed’n, Inc. v. Att’y Gen., 576 F. Supp. 2d 1281, 1286 (N.D. Fla. 2008); *ConocoPhillips*, 520 F. Supp. 2d at 1286–87, 1296, 1330, 1340 (N.D. Okla. 2007), *rev’d sub nom.* Ramsey Winch, Inc. v. Henry, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009).

22. See *ConocoPhillips*, 520 F. Supp. 2d at 1286–87, 1296, 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), *rev’d sub nom.* Ramsey Winch, Inc. v. Henry, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009).

23. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2006)); see also 29 U.S.C. § 651.

stand.<sup>24</sup> Another court disagreed, finding an express provision in the Act permits states to regulate in this area.<sup>25</sup>

This Article discusses whether the OSH Act preempts such laws and concludes it does not.<sup>26</sup> Part II provides an overview of the law necessary

24. *ConocoPhillips*, 520 F. Supp. 2d at 1330–40.

25. *See Fla. Retail*, 576 F. Supp. 2d at 1298. The court did not discuss whether Florida’s law creates a conflict with the OSH Act. *See id.* Instead, the court found § 667(a) of the Act applied to expressly prevent preemption. *Id.*

The Supreme Court’s first Second Amendment case in nearly seventy years, *District of Columbia v. Heller*, adds more fuel to the debate. *See* Kenneth A. Klukowski, Note, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 170–71 (2008) (noting that, before *Heller*, the Supreme Court had only made one significant statement about the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939)). In *Heller*, the Supreme Court held that the Second Amendment embodies an individual’s right to keep and bear arms for self-defense. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799, 2801, 2817–18 (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.”). Laws violating this right—for instance, by completely banning handguns in homes—may not survive judicial scrutiny. *See id.* at 2817–18 (finding handgun ban is unconstitutional and invalid).

The scope of *Heller* is uncertain. Because *Heller* involved the District of Columbia, *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 id.* at 2812–13 & n.23; *see also* Klukowski, *supra*, at 189–90 (noting *Heller* did not consider whether the Second Amendment is incorporated to apply against the states). Of course, even if the Second Amendment ultimately applies to the states, it will not directly apply to private employers. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.6(a) (4th ed. 2007) (noting that the first ten amendments to the Bill of Rights directly apply only to the federal government).

Further, in *Heller*, the Court did not consider the precise issue of carrying a gun at all times. *Heller* is limited to guns in the home for self-defense. 128 S. Ct. at 2817–22. It is not yet clear whether the Second Amendment protects an individual’s right to store her gun in her car. Though *Heller* does not address guns in vehicles, it suggests the stakes in this debate are high if individuals’ constitutional rights potentially hang in the balance. *See generally* 128 S. Ct. at 2783. It is also not difficult to imagine that courts may quickly extend *Heller* to vehicles.

26. *See infra* Part V. As states are enacting these statutes, the Supreme Court’s preemption jurisprudence has perhaps signaled a trend of receptivity toward preemption. *See, e.g.*, *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2412 (2008) (finding that the National Labor Relations Act preempts California law where California law regulates within a zone protected and reserved for market freedom); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1002–07 (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 the Food and Drug Administration); *Rowe v. N.H. Motor Transp. Ass’n*, 128 S. Ct. 989, 998 (2008) (finding federal law preempts two provisions of Maine law, which regulate tobacco delivery); *Preston v. Ferrer*, 128 S. Ct. 978, 981 (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). Bucking this trend, the Supreme Court held on March 4, 2009, that FDA labeling requirements did not preempt state-law failure-to-warn claims in a products-liability case. *See Wyeth v. Levine*, No. 06-1249, 2009 WL 529172 (U.S. Mar. 4, 2009). It is difficult to extrapolate from these preemption cases that do not involve the OSH Act to the issue under consideration here because preemption analysis turns primarily on the statute at issue. *See* 2 RONALD D. ROTUNDA &

to navigate any preemption problem. Part III analyzes the OSH Act and its specific provisions. Part IV examines state guns-at-work laws, reveals characteristics that many of these laws share, and addresses lower court cases that have considered OSH Act preemption of these laws. Part V argues that these laws do not conflict with the OSH Act. Finally, Part VI contends that preemption requires promulgation of standards in accordance with the OSH Act, and absent standards, states remain free to regulate in this arena. This dispute over workers' safety and gun-owners' rights must be resolved by the executive branch in accordance with the OSH Act, rather than by the courts through the doctrine of preemption.<sup>27</sup>

## II. PREEMPTION PRIMER

Though states are independent sovereigns, the United States Constitution provides that federal law is supreme and contrary state law must yield.<sup>28</sup> This federal supremacy creates the backdrop for the doctrine of preemption.<sup>29</sup>

### A. *Important Background Principles to Guide Preemption Analysis*

Two important principles guide the analysis to determine whether preemption applies. 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.<sup>30</sup> This inquiry uses the federal law's objectives and policies for guidance.<sup>31</sup> Congress enacts federal law, and has the power, stemming from the Supremacy Clause of the Constitution,<sup>32</sup> to preempt

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JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 12.1 (4th ed. 2007).

27. 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).

28. *See* U.S. Const. art. VI, cl. 2.; ROTUNDA & NOWAK, *supra* note 26, §12.1.

29. *See* ROTUNDA & NOWAK, *supra* note 26, §12.1.

30. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion). Part II of *Gade* received only a plurality of the Court. *See Gade*, 505 U.S. at 91. Unless otherwise indicated, citation to *Gade* is to the majority portions of the opinion.

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

32. The Supremacy Clause reads:

state law.<sup>33</sup> Congressional intent is therefore the lodestar for determining whether state law is preempted.<sup>34</sup>

Courts discern this congressional intent from the statutory language and overall framework of the federal law.<sup>35</sup> “The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject.”<sup>36</sup> Courts analyze congressional intent against a backdrop presumption that Congress does not cavalierly preempt state law.<sup>37</sup>

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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.

U.S. CONST. art. VI, cl. 2.

33. “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 Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819)); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). Both federal statutes and regulations can preempt state law. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Even a compelling state interest cannot save a preempted state law. *Gade*, 505 U.S. at 108. “[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*, 22 U.S. (9 Wheat.) 1, 82 (1824)).

34. See *English*, 496 U.S. at 78–79. Congress’ purpose has been termed the “touchstone” of the preemption analysis. *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. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67–68 (2002); see also *Hillsborough County*, 471 U.S. at 721 (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.*, 529 U.S. 861, 884–85 (2000) (cautioning that no formal agency statement of preemptive intent is necessary before finding conflict preemption).

35. *Lohr*, 518 U.S. at 486.

36. *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941).

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



## 2. Presumption Against Preemption

Particularly in areas of law that states have traditionally controlled,<sup>38</sup> preemption analysis begins with an assumption that the historic police powers of the state<sup>39</sup> stand undisturbed absent evidence of a clear and manifest congressional purpose to supersede them.<sup>40</sup> This “presumption against pre-emption”<sup>41</sup> stems from notions of federalism and respect for state sovereignty.<sup>42</sup>

The Supreme Court has not always applied this presumption consistently.<sup>43</sup> Thus, though it clearly exists, it is unclear exactly how the presumption applies in practice.<sup>44</sup> At a minimum, this presumption should provide a moment of pause before a court holds that federal law preempts state law 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.<sup>45</sup> When adjudicating cases involving state-controlled arenas,<sup>46</sup>

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38. 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.”).

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

40. *Id.*; *see also* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

41. 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. *Fed. Energy Regulatory Comm’n*, 535 U.S. at 18. In this case, the question is simply whether Congress has conferred the power to preempt on the agency. *Id.* A federal agency acting within the scope of its congressionally delegated authority may preempt state law. *Locke*, 529 U.S. at 110.

42. *See* *Bates*, 544 U.S. at 449; *Lohr*, 518 U.S. at 485.

43. *Compare, e.g.,* *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 668 (1993) (purporting to apply presumption), *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (same), *with* *Norfolk S. RR v. Shanklin*, 529 U.S. 344 (2000) (failing to mention or apply presumption), *and* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (same). *See* Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 967 (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”).

44. *See* Ausness, *supra* note 43, at 972–73 (discussing the Supreme Court’s inconsistent treatment of the presumption against preemption).

45. *Id.* at 973 (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 the Univ. of Minn.*, 534 U.S. 533, 543 (2002) (explaining that when Congress intends to alter the balance between the states and federal government by

courts should not find for preemption of state law where Congress has not clearly communicated that federal law preempts.

### B. Types of Preemption

Preemption generally takes two forms: express and implied.<sup>47</sup> Implied preemption is further subdivided into field and conflict preemption.<sup>48</sup> These categories are not rigidly distinct.<sup>49</sup>

#### 1. Express Preemption

Express preemption is straightforward.<sup>50</sup> It exists where Congress has shown its intent to preempt state law through explicit statutory language.<sup>51</sup> An express preemption clause generally begins preemption analysis because it is the best indicator of Congress' intent.<sup>52</sup> When Congress has made its intent known through explicit statutory language, the preemption task simply gives effect to that language.<sup>53</sup>

#### 2. Implied Preemption

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.<sup>54</sup> In both cases, this preemption occurs through implied

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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" (citation omitted).

46. See *supra* notes 38–39.

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

48. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000) (stating that field preemption may fall into the implied-preemption category); *Geier*, 529 U.S. at 884 (noting that the Court typically treats conflict preemption as a species of implied preemption); *English*, 496 U.S. at 79 (explaining that field and conflict preemption apply in the absence of express statutory language).

49. *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' intent. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 104 n.2 (1992) (plurality opinion). Thus, that state law could be considered a species of field or conflict preemption. *Id.*

50. See *English*, 496 U.S. at 78.

51. *Id.* at 79; see also *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1002–07 (2008) (interpreting the express preemption provision in the Medical Device Act); *Lorillard Tobacco*, 533 U.S. at 541 (stating that express language in a congressional enactment may foreclose state action).

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

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

54. See *infra* note 248.

preemption.<sup>55</sup> Implied preemption may be either field or conflict preemption.<sup>56</sup>

#### a. Field Preemption

Congress may intend that federal law “occup[ies] the field” and governs the conduct exclusively,<sup>57</sup> an arrangement called “field preemption.”<sup>58</sup> Field preemption applies when there is a “‘field reserved for federal regulation’ and ‘Congress ha[s] left no room for state regulation of these matters.’”<sup>59</sup> It is inferred where the federal interest is so dominant that it is presumed to preclude state laws on the subject.<sup>60</sup> Field preemption stems from the depth and breadth of the congressional scheme that occupies the legislative field,<sup>61</sup> and it depends on the intent behind the federal scheme<sup>62</sup>

The Supreme Court has limited application of field preemption, especially where state law governs health and safety.<sup>63</sup> In arenas traditionally within the federal government’s purview, like foreign affairs, however, the Court is more likely to find field preemption.<sup>64</sup>

55. *Id.*

56. *See supra* note 48 and accompanying text.

57. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). “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.” *Id.*

58. *See Crosby*, 530 U.S. at 372–73; *English*, 496 U.S. at 79.

59. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) (quoting *Locke*, 529 U.S. at 111).

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

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

62. *See Hillsborough County*, 471 U.S. at 714.

63. *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*, 471 U.S. at 720 (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).

The Court is even more reluctant to infer preemption simply from the comprehensiveness of agency regulations. *See Hillsborough County*, 471 U.S. at 720. Instead, it has looked for a specific statement of preemptive intent. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000). This observation 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 pre-empt in its entirety a field related to health and safety.” *Hillsborough County*, 471 U.S. at 718 (explaining complex problems will often require intricate and complex congressional solutions without Congress intending to preempt the field).

64. *See Hillsborough County*, 471 U.S. at 719 (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))).

## b. Conflict Preemption

Preemption may also occur impliedly through conflict preemption.<sup>65</sup> 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.”<sup>66</sup> These types of preemption are “impossibility” preemption and “obstacle” preemption, respectively.<sup>67</sup>

### 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.<sup>68</sup> “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.”<sup>69</sup> The Supreme Court describes the impossibility as a “physical impossibility.”<sup>70</sup>

### ii. Obstacle Conflict Preemption

Obstacle conflict preemption is less straightforward, and it has created much debate.<sup>71</sup> 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.<sup>72</sup> “If the purpose of the act cannot otherwise be

65. See *Geier*, 529 U.S. at 884; *Oxygenated Fuels Ass’n, Inc. v. Pataki*, 158 F. Supp. 2d 248, 253 n.2 (N.D.N.Y. 2001).

66. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (citation omitted). Conflict preemption turns on an actual conflict rather than an express statement of congressional intent. *Geier*, 529 U.S. at 884. Though clear evidence of a conflict is required, no formal congressional or agency statement identifying a conflict is necessary. *Id.* at 884–85.

67. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000); Jeffrey A. Berger, Comment, *Phoenix Grounded: The Impact of the Supreme Court’s Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 NW. U. L. REV. 941, 951 (2003).

68. See *Crosby*, 530 U.S. at 372.

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

70. See *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (plurality opinion)). An example of where it would be impossible to comply with both federal and state law is if a federal law forbade avocados testing more than seven percent oil, but state law forbade any avocados testing less than eight percent oil. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

71. See, e.g., Nelson, *supra* note 67, at 265 (criticizing obstacle preemption as having no place as a constitutional law doctrine); Berger, *supra* note 67, at 951–52 (stating that academic battles have raged over obstacle preemption); Kathryn E. Picanso, Note, *Protecting Information Security Under a Uniform Data Breach Notification Law*, 75 FORDHAM L. REV. 355, 371 (2006) (noting that obstacle preemption has been criticized as a default doctrine used when congressional intent is unclear).

72. *Crosby*, 530 U.S. at 373.

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 its delegated power.”<sup>73</sup> Where this happens, state law creates an obstacle to, and conflicts with, federal law.<sup>74</sup> In the face of such conflict, federal law preempts state law.

### C. *Effect of Savings Clauses*

Congress seldom intends to preempt entire fields of state regulation.<sup>75</sup> Indeed, Congress commonly includes a “savings clause” in its legislation.<sup>76</sup> A savings clause is a provision that legitimizes concomitant state regulation.<sup>77</sup> If a savings clause exists and applies, it may save state law from federal preemption.<sup>78</sup>

The federal law is therefore the appropriate starting point to determine whether Congress has clearly communicated intent to preempt state law.<sup>79</sup> This Article therefore turns to the OSH Act.

## III. THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

The OSH Act brought the federal government into an area traditionally within the states’ purview.<sup>80</sup> Congress enacted the Act to assure “safe and healthful working conditions”<sup>81</sup> to every man and woman in the nation.<sup>82</sup>

73. *Id.* The Court places some weight on an agency’s opinion of whether the state law stands as an obstacle. *See* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 68 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

74. *See Crosby*, 530 U.S. at 373.

75. *See* ROTUNDA & NOWAK, *supra* note 26, § 12.1.

76. *Id.*

77. *Id.*

78. *See, e.g., United States v. Massachusetts*, 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*, 529 U.S. at 869 (concluding savings clause does not bar conflict preemption).

79. *See* *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 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.” (citations omitted)); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85 (1996).

80. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992) (plurality opinion).

81. The circuits define “working conditions” slightly differently. *Compare 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 environmental area in which employees customarily go about their daily tasks), *and Columbia Gas of Penn., Inc. v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980) (same), *and S. Ry. Co. v. Occupational Safety & Health Review Comm’n*, 539 F.2d 335, 339 (4th Cir. 1976) (same), *with S. Pac. Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976) (explaining that

The Act effectuates its purpose by imposing important obligations on employers.<sup>83</sup> Two relevant obligations are compliance with occupational health and safety standards promulgated under the Act, and compliance with the Act's general duty clause.<sup>84</sup> 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.<sup>85</sup>

#### 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 requires employers to comply with the occupational health and safety standards promulgated pursuant to the statute.<sup>86</sup> 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 hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>87</sup> This second obligation, known as the “general duty clause,”<sup>88</sup> creates an independent, mandatory

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“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., Am. Cyanamid*, 741 F.2d at 448 (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 Pac., Inc.*, 160 F.3d 1239, 1245 (9th Cir. 1998).

82. 29 U.S.C. § 651(b); *see also* *Am. Smelting & Refining Co. v. Occupational Safety & Health Review Comm'n*, 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.” (footnote omitted)).

83. 29 U.S.C. §§ 651(b)(3), 654(a).

84. *See* discussion *infra* Part III.A.

85. “[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 III.B.

86. 29 U.S.C. §§ 651(b)(3), 654(a)(2).

87. 29 U.S.C. § 654(a)(1). “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). Examples of the hazards contemplated are air pollutants, industrial poisons, combustibles, explosives, unsafe work practices, and inadequate training. *Id.*

88. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12–13 (1980) (characterizing § 654(a)(1) as

requirement for employers distinct from any specific health and safety standards.<sup>89</sup> Even if no specific standards exist, employers may still face liability for a general-duty-clause violation.<sup>90</sup>

### 1. Promulgating Standards

The OSH Act sets forth an intricate scheme for promulgating standards.<sup>91</sup> This process includes a 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.<sup>92</sup> Only after the procedures are satisfied may the Secretary of Labor issue a rule promulgating, modifying, or revoking a standard.<sup>93</sup> This produces informed decision-making by involving all interested parties 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 citation.<sup>94</sup> The spirit of the Act is to regulate employer conduct through this predictable system, rather than by ad hoc decision-making.<sup>95</sup> Though the

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the OSH Act's general duty clause).

89. *Marshall*, 445 U.S. at 12–13; *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 & Agric. Implement Workers of Am. v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (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.”).

90. *See* *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 n.9 (7th Cir. 1975); *see also* 29 U.S.C. § 666(a)–(c) (providing liability for violations of § 654, which encompasses the general duty clause, or for violations of any standard promulgated under § 655); *In re Establishment Inspection of the Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1167 (7th Cir. 1994). Civil penalties for “serious violation[s]” 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 id.* § 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.*

91. *See* 29 U.S.C. § 655(b).

92. *Id.* § 655(b)(1)–(3).

93. *Id.* § 655(b)(4).

94. *See* *Am. Smelting & Refining Co. v. Occupational Safety & Health Review Comm’n*, 501 F.2d 504, 512 (8th Cir. 1974).

95. *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*, 501 F.2d at 511–12 (noting a similar argument made in dissent by Chairman Moran of the Occupational Safety and Health Review Commission). The

OSH Act requires employers to comply with both specific standards and the general duty clause, the general duty clause cannot substitute for appropriate standards. No federal standards have been promulgated to address guns in vehicles at the workplace.<sup>96</sup>

## 2. The General Duty Clause

The general duty clause traditionally addresses hazards arising from some condition inherent in the workplace environment.<sup>97</sup> The standards for establishing a general-duty-clause violation are “exacting.”<sup>98</sup> The Secretary must prove that (1) the employer failed to render his workplace free of a hazard, which was recognized<sup>99</sup> as a hazard either by the employer<sup>100</sup> or generally within the industry;<sup>101</sup> (2) the hazard caused or was likely to cause death or serious bodily harm; and, (3) feasible<sup>102</sup> means existed to eliminate or materially reduce the hazard.<sup>103</sup>

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*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. *Id.* at 512.

96. See *infra* note 228 and accompanying text.

97. *Megawest Fin., Inc., Dec. & Orders Occ. Safety & Health Rev. Comm’n 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. *Teal v. E.I. DuPont de Nemours & Co.*, 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) (“This 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., Inc. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973) (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).

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

99. A “recognized” hazard is one that is known as a hazard within the particular industry. *Nat’l Realty & Constr.*, 489 F.2d at 1265 n.32. Unpreventable instances of hazardous conduct are not “recognized.” *Id.* at 1266.

100. 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).

101. See *Pratt & Whitney Aircraft v. Sec’y of Labor*, 649 F.2d 96, 100 (2d Cir. 1981).

102. “Feasible” means capable of being done, executed, or effected. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508–09 (1981).

103. See *Fabi Const. Co., Inc. v. Sec’y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007);



The general duty clause does not impose on employers an absolute duty to make the work environment safe.<sup>104</sup> Courts hold that employers do not face liability under the general duty clause unless abatement of the hazard was possible.<sup>105</sup> The government bears the burden of specifying the particular steps an employer must take to avoid a citation for violating the general duty clause.<sup>106</sup> The government must also demonstrate the feasibility and likely utility of alternative measures.<sup>107</sup>

Courts consistently hold that because the general duty clause is a tool of last resort, standards are the preferred enforcement mechanism.<sup>108</sup> If a specific hazard is a concern, a standard should address it, rather than relying on the general duty clause.<sup>109</sup>

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*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, 1017–18 & 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.*, 508 F.3d at 1081 (quoting *L.R. Willson & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 698 F.2d 507, 513 (D.C. Cir.1983)).

104. *Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 660 F.2d 439, 446–47 (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).

105. *See Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 n.7 (6th Cir. 1984); *Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 543–44 (9th Cir. 1978); *Brennan v. Occupational Safety & Health Review Comm'n*, 502 F.2d 946, 951 (3d Cir. 1974) (explaining that duty must be capable of achievement); *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).

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

107. *See id.*; *see also Nat'l Realty & Constr. Co.*, 489 F.2d at 1267–68.

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

109. *See 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 Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 17 (1st Cir. 1984) (finding that the Secretary did not abuse his 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. *R.L. Sanders*, 620 F.2d at 101. 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

### 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 wide latitude to establish national standards where necessary, the Act simultaneously encourages states to assume full responsibility for the administration and enforcement of their occupational health and safety laws.<sup>110</sup> In this respect, the OSH Act embodies cooperative federalism.<sup>111</sup>

The Act accomplishes this balance in § 667.<sup>112</sup> Section 667(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.<sup>113</sup> Therefore, where no federal standard is in place, states may freely regulate over any given occupational health or safety issue.<sup>114</sup>

Even where federal standards are in place, states are still not foreclosed from regulating.<sup>115</sup> Where federal standards exist, § 667(b) permits a state

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enforce the general duty clause. *See id.*

110. *See* 29 U.S.C. § 651(b)(11) (2006).

111. *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* 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); 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 (1993) (“OSHA’s preemption provisions uniquely establish a system 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 (1994) (explaining that through the OSH Act, Congress has contemplated “state participation in achieving the legislative goal of safe and healthy workplaces for employees”); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 188 (2005) (noting that the term “cooperative federalism” has been loosely applied to OSHA); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1383 (2006) (characterizing the OSH Act’s objective as “cooperative federalism”); Alan Van Gelder, Comment, *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). Where statutes embody cooperative federalism, the Supreme Court leaves a range of permissible choices to the states. *See* *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

112. *See* 29 U.S.C. § 667.

113. 29 U.S.C. § 667(a). The Secretary promulgates standards in accordance with § 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).

114. *See* 29 U.S.C. § 667(a).

115. *See id.* § 667(b).

to submit a plan for the development and enforcement of state standards, and if approved, *state* standards preempt *federal* law.<sup>116</sup> Absent a state plan, however, state law is entirely preempted in the face of federal standards.<sup>117</sup> States may not even supplement federal standards,<sup>118</sup> since the Supreme Court has rejected concurrent state and federal jurisdiction where federal standards exist.<sup>119</sup>

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116. *Id.* Section 667 sets forth conditions for approval of state plans. *See id.* § 667(c).

117. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 102 (1992) (plurality opinion) (“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.”); *see also id.* at 111–13 (Kennedy, J., concurring) (agreeing with the plurality, but contending that the preemption is express, rather than implied).

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 § 18(b) expressly preempts state law. *Compare Gade*, 505 U.S. at 98–99, 104 n.2 (plurality opinion), *with id.* at 111 (Kennedy, J., concurring). According to the plurality, § 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 id.* at 98–99 (plurality opinion). *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). Justice Kennedy believed the express terms of § 18(b) mandated preemption, thus the preemptive scope of the OSH Act is limited to the language of the statute. *See id.* at 111 (Kennedy, J., concurring).

The *Gade* plurality dismissed the disagreement as labeling, “implied” versus “express,” which is merely technical. *See Gade*, 505 U.S. at 104 n.2 (plurality opinion). 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 of § 18(b), but the plurality is willing to look beyond and find implied preemption. *Compare id.* at 111 (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 98–99, 104 n.2 (plurality opinion). Per Justice Kennedy’s rationale, OSH Act preemption is defined by § 18, and if it does not apply, state law is not preempted. *See id.* at 114 (Kennedy, J., concurring). Justice Kennedy would not look to implied preemption where an express preemption clause exists but does not govern. *See id.* at 109–11, 114 (Kennedy, J., concurring). Justice Kennedy’s view has lost. *See infra* note 250.

118. *See Gade*, 505 U.S. at 100 (plurality opinion). 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 113 (Kennedy, J., concurring).

119. *See id.* at 102 (plurality opinion); *id.* at 114 (Kennedy, J., concurring); *see also Pedraza v. Shell Oil Co.*, 942 F.2d 48, 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.” (citation and internal quotation marks omitted) (emphasis added)). 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*, 505 U.S. at 99 (plurality opinion). 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. *Id.* at 98–99; *see also Indus. Truck Ass’n, Inc. v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997) (“[U]nder the [OSH Act] . . . when OSHA promulgates a federal standard, that

### C. *The OSH Act's Savings Clauses*

The OSH Act contains two savings clauses: §§ 4(b)(4) and 18(a).<sup>120</sup> Both provisions are discussed here 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.”<sup>121</sup> 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.<sup>122</sup>

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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*, 505 U.S. at 107. 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*, 505 U.S. at 105.

This is true even if the state law serves several objectives. *See id.* at 106. “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.” *Id.* at 107. 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. *Id.* 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. *Id.* (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. *Id.* at 108.

120. Occupational and Safety and Health Act of 1970, Pub. L. No. 91-596, §§ 4(b)(4), 18(a), 84 Stat. 1590, 1592–93, 1608 (codified as amended at 29 U.S.C. §§ 653(b)(4), 667(a) (2006)); *see also Gade*, 505 U.S. 96–97, 100 (plurality opinion) (explaining that Congress expressly “saved” some state law from federal preemption in §§ 4(b)(4) and 18(a) and referring to § 18(a) as a “saving clause”); *Pedraza*, 942 F.2d at 52–53 (terming § 4(b)(4) the Act’s “savings clause”); *Associated Indus. v. Snow*, 898 F.2d 274, 278 (1st Cir. 1990) (describing § 18 as a “savings clause”). The *Pedraza* court does not characterize § 18(a) as a “savings clause” but instead describes it as a general statement of preemptive intent. *See Pedraza*, 942 F.2d at 51–52.

121. 29 U.S.C. § 653.

122. *Id.* § 653(b)(4) (emphasis added).

Sparse legislative history exists for § 4(b)(4).<sup>123</sup> The First Circuit 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.”<sup>124</sup> The Third Circuit disagreed, arguing such an interpretation “defies traditional principles of statutory interpretation” by ignoring the plain language of § 4(b)(4), which is not limited only to workers’ compensation but which precludes other matters expressly identified in the statute.<sup>125</sup> The D.C. Circuit has also offered its own interpretation of § 4(b)(4).<sup>126</sup> According to that court, § 4(b)(4) bars workers from asserting a private cause of action against employers under OSHA<sup>127</sup> standards, and when a worker asserts a claim under state workmen’s compensation or other law, § 4(b)(4) bars the worker and her adversary from asserting that the OSH Act preempts any element of state law.<sup>128</sup>

## 2. Section 18(a)

The second savings clause, § 18(a) is straightforward. It expressly permits states to assert jurisdiction under state law over *any* occupational

123. 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, 1234 n.70 (D.C. Cir. 1980).

124. 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*).

125. *Ries*, 960 F.2d at 1161–62; see also *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.” (citation and internal quotation marks omitted)); *Pedraza*, 942 F.2d at 53 & n.6 (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”). Courts have also found that § 4(b)(4) saves criminal laws, see, e.g., *People v. Pymm*, 563 N.E.2d 1, 6 (N.Y. 1990) (finding § 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 also *Judy K. Broussard, Note, The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities?*, 45 CLEV. ST. L. REV. 135, 154–56 (1997) (contending that the most compelling argument against OSH Act preemption of state criminal laws is the language of § 4(b)(4) and citing cases finding no preemption of state criminal laws). 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).

126. See *Marshall*, 647 F.2d at 1235–36.

127. “OSHA is the organization within the Department of Labor that addresses hazards in the workplace, including workplace violence.” Letter from Richard E. Fairfax, Dir., Directorate of Enforcement Programs, Occupational Health and Safety Admin., to Morgan Melekos (Sept. 13, 2006), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=25504](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504) (recognizing in a Standard Interpretation letter that no standards exist).

128. See *Marshall*, 647 F.2d at 1235–36.

health or safety issue where no federal standard is in effect.<sup>129</sup> In such instances, resolving the preemption inquiry should be simple: federal law does not preempt state law. As revealed in Part V.A.2, however, this is not necessarily true.

#### IV. GUNS-AT-WORK LAWS

A number of states—including Florida, Georgia, and Oklahoma—have already enacted guns-at-work laws, and many more have legislation pending.<sup>130</sup> These laws are generally similar, but each has nuances. This Part highlights the laws in Florida, Georgia, and Oklahoma—important jurisdictions in the gun debate that provide examples of guns-at-work laws—and it discusses the guns-at-work laws of other states. It also identifies noteworthy commonalities of these laws that are relevant to the preemption inquiry.<sup>131</sup> Finally, it considers two recent federal district court

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129. 29 U.S.C. § 667(a) (2006).

130. The states with legislation pending include Alabama, Arizona, Indiana, Missouri, Pennsylvania, and Tennessee. *See* H.R. 362, 2009 Reg. Sess. (Ala. 2009) (providing no employer or other person may establish a policy that restricts the right of a person possessing a firearm stored in his or her motor vehicle from parking that vehicle in the parking facility while lawfully possessing the firearm; violation is a misdemeanor, and the violator may also be subject to civil liability); H.R. 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. 11, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009) (prohibiting a natural person, corporation, or governmental entity from enforcing a policy or rule that prohibits an individual from possessing a firearm locked in the individual's vehicle while the vehicle is in or on the person's property; and authorizing a civil damages action for violations); H.B. 170, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009) (providing that a business owner shall not restrict any person from lawfully possessing a firearm in a motor vehicle in possession of such person except a motor vehicle owned or leased by such business; providing for a civil cause of action); H.R. 1185, 190th Gen. Assem., 2007–08 Reg. Sess. (Pa. 2007) (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.R. 3063, 105th Gen. Assem., 2d Sess., §§ 1, 4 (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. 2928, 105th Gen. Assem., 2d Reg. Sess. (Tenn. 2007) (same). For an older Tennessee guns-at-work bill that never left committee, see S. 153, 105th Gen. Assem., 1st Reg. Sess. (Tenn. 2007).

131. 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* UTAH CODE ANN. § 53-5a-102(2) (West 2008). It states that unless

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*<sup>132</sup>

#### 1. Florida

Florida's guns-at-work law<sup>133</sup> prohibits employers from preventing customers, employees, or invitees from possessing legally owned firearms locked in vehicles in parking lots when lawfully in the area.<sup>134</sup> Employers may not stop these individuals from entering parking lots with firearms in their vehicles so long as the firearms are out of sight within the vehicle.<sup>135</sup> Employers may not inquire whether there are firearms in vehicles, nor may they conduct searches of vehicles.<sup>136</sup> Only on-duty law enforcement may conduct vehicle searches.<sup>137</sup>

Employers may not take any action against employees, customers, or invitees based on statements regarding firearms in vehicles.<sup>138</sup> Employers also may not condition employment on an agreement not to maintain such firearms.<sup>139</sup> 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).<sup>140</sup>

Florida's statute completely immunizes employers from civil liability for actions taken in compliance with the statute.<sup>141</sup> It also provides that the

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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. *Id.* § 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, Inc.*, 96 P.3d 950, 954–56 (Utah 2004) (analyzing UTAH CODE ANN. § 63-98-102, which was subsequently renumbered, effective May 5, 2008, UTAH CODE ANN. § 53-5a-102 (2008)).

132. Summaries of the guns-at-work laws with noteworthy aspects of each appear in a chart in Appendix A. *See infra* app. A. The chart reveals relevant characteristics of many of the laws that may prevent conflict with the OSH Act. *See id.*

133. Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008, 2008 Fla. Laws ch. 2008-7, 1–5 (codified as amended at FLA. STAT. ANN. § 790.251 (West 2008), *held unconstitutional on other grounds*, Fla. Retail Fed'n, Inc. v. Att'y Gen., 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008)).

134. FLA. STAT. § 790.251(4)(a).

135. *Id.* § 790.251(4)(d).

136. *Id.* § 790.251(4)(b).

137. *Id.*

138. *Id.*

139. *Id.* § 790.251(4)(c)(2).

140. *Id.* § 790.251(4)(e).

141. *See id.* § 790.251(5).

statute shall not be interpreted to expand any existing duty or create any additional duty for employers.<sup>142</sup>

The Florida legislature granted the Florida Attorney General authority to enforce the statute.<sup>143</sup> Nothing in the statute, however, prevents the aggrieved from suing for violations of rights protected by the statute.<sup>144</sup> “[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.”<sup>145</sup>

The statute contains numerous exceptions.<sup>146</sup> It does not apply to vehicles owned, leased, or rented by employers.<sup>147</sup> 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.<sup>148</sup>

## 2. Georgia

Georgia also enacted a guns-at-work law, but it differs from the others.<sup>149</sup> Although it does not expressly ban enacting policies prohibiting weapons in vehicles, it effectively accomplishes this result.<sup>150</sup>

Georgia’s law provides that employers shall not establish, maintain, or enforce any policy or rule that has the effect of allowing employers or their agents to search locked, privately owned vehicles of employees or invited

142. *Id.* § 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 id.* § 790.251(4).

143. *Id.* § 790.251(6). The Attorney General may commence a civil or administrative action to enforce the statute. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* § 790.251(7).

147. *Id.* § 790.251(7)(f).

148. *Id.* § 790.251(7)(g). 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 result follows 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 state-law exception would enable employers to prohibit guns. Thus, Florida’s guns-at-work law may be interpreted to avoid any OSH Act conflict entirely.

149. *See* Business Security & Employee Privacy Act, 2008 Ga. Laws 802 (codified at GA. CODE ANN. § 16-11-135 (West 2008)). This Act was approved May 14, 2008. *Id.* The law became effective July 1, 2008. *See* GA. CODE ANN. § 1-3-4(a)(1). Georgia also has a guns-at-work bill currently pending before its legislature. *See infra* note 164.

150. *See* GA. CODE ANN. § 16-11-135.



guests in employer parking lots.<sup>151</sup> Employers also may not condition employment on any agreement prohibiting prospective employees from entering parking lots when their vehicles contain firearms locked in trunks, glove boxes, or other enclosed compartments out of sight—provided the employee has a Georgia firearms license.<sup>152</sup>

Like other guns-at-work laws, Georgia's statute has many exceptions.<sup>153</sup> 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.<sup>154</sup> It does not apply to an employee who is restricted from possessing a firearm on the premises due to disciplinary action;<sup>155</sup> where state law, federal law, or regulation prohibits transport of a firearm on the premises;<sup>156</sup> and to any area used for parking on a temporary basis.<sup>157</sup> As do many other states, Georgia limits employer liability stemming from compliance.<sup>158</sup>

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.<sup>159</sup> Second, it contains a very broad provision that highlights the narrowness of the statute's restrictions.<sup>160</sup> 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.<sup>161</sup> Even for employers, private property rights govern.<sup>162</sup> Because many employers either own or lease the properties where their businesses

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151. *See id.* § 16-11-135(a).

152. *See id.* § 16-11-135(b).

153. *See id.* § 16-11-135(c)–(f), (h), (k).

154. *See id.* § 16-11-135(c)(1)–(4).

155. *See id.* § 16-11-135(d)(5).

156. *Id.* § 16-11-135(d)(6). This could be used to argue Georgia's statute does not conflict with the OSH Act. *See supra* note 148 and accompanying text, and *infra* notes 188–90 and accompanying text.

157. *See* GA. CODE ANN. § 16-11-135(d)(8).

158. *See id.* § 16-11-135(e).

159. *See id.* § 16-11-135(f). Perhaps even more so than with Florida's provision, this provision should eliminate any OSH Act conflict because OSH Act compliance should be a complete defense to liability under this statute. *See id.*; *see also supra* note 148 and accompanying text, and *infra* notes 188–90 and accompanying text.

160. *See* GA. CODE ANN. § 16-11-135(k).

161. *See id.*

162. *See id.*

operate, private property rights appear to completely negate the statute.<sup>163</sup>

The Georgia Assembly also has a bill pending that is more similar to the other states' guns-at-work laws.<sup>164</sup> 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.<sup>165</sup> It contains the usual exceptions, including if state or federal law prohibits the transport of a firearm on the premises.<sup>166</sup> The bill also contains a provision immunizing employers from liability for compliance.<sup>167</sup>

### 3. Oklahoma

Oklahoma has two guns-at-work laws. First, the Oklahoma Firearms Act of 1971 prohibits:

[Any] person, property owner, tenant, employer, or business entity [from] maintain[ing], establish[ing], or enforc[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.<sup>168</sup>

Civil action may be brought to enforce this section, and damages, attorney's fees, and court costs may be awarded to a prevailing plaintiff.<sup>169</sup> The statute 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.<sup>170</sup>

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163. 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 id.* § 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.

164. *See* S. 43, 149th Gen. Assem., Reg. Sess. (Ga. 2007–08).

165. *See id.* § 1(a).

166. *See id.* § 1(b) (excepting also 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).

167. *Id.* § 1(c).

168. *See* OKLA. STAT. ANN. tit. 21, § 1289.7a(A) (West 2008).

169. *Id.* § 1289.7a(C).

170. *Id.* § 1289.7a(B). This subsection does not apply to claims under the Worker's Compensation Act. *Id.*

A second Oklahoma statute, entitled “Business owner’s rights,” grants the right to transport and store firearms in locked vehicles on private property even when private property owners prefer otherwise.<sup>171</sup>

#### 4. Other States

Numerous other states have also enacted guns-at-work laws. Many of these statutes specifically include employers in the class of persons to whom the laws apply. For example, Kansas’s concealed weapons law permits employers to restrict the carrying of concealed weapons while on business premises, but it prevents employers from prohibiting possession of firearms in private vehicles while parked on employer premises.<sup>172</sup> Kentucky has a similar law, which declares that any employer who punishes an employee for exercising a right guaranteed by Kentucky’s statute will face civil liability.<sup>173</sup> Louisiana has a similar law.<sup>174</sup> Like many of the other states, it contains a clause immunizing those to whom the statute applies from damages arising from compliance.<sup>175</sup> It also contains an exception common to many of these statutes: it does not apply where

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171. See OKLA. STAT. ANN. Tit. 21, § 1290.22 (West 2008); see also *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1286 (N.D. Okla. 2007), *rev’d sub nom. Ramsey Winch, Inc. v. Henry*, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009). Both §§ 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. ANN. 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)).

172. See KAN. STAT. ANN. § 75-7c11(a)(1) (2008). 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.*

173. KY. REV. STAT. ANN. § 237.106(1), (4). Kentucky’s Penal Code also contains a guns-at-work provision. See *id.* § 527.020. It prevents persons or organizations from prohibiting individuals licensed to carry concealed deadly weapons from possessing them in their vehicle. *Id.* § 527.020(4), (8). Any attempt to do so may result in damages or other appropriate relief. *Id.* Yet another provision of Kentucky law addresses guns in vehicles. See *id.* § 237.110(17) (preventing private employers from prohibiting persons holding weapons licenses from carrying weapons in vehicles).

174. See S.B. 51, 34th Reg. Sess. (La. 2008) (codified at LA REV. STAT. ANN. § 32:292.1 (2008)).

175. *Id.* § 32:292.1(B).

state or federal law prohibits the possession of firearms.<sup>176</sup>

Other state guns-at-work statutes do not specifically reference employers, but are sufficiently broad to apply to employers. For example, Alaska's guns-at-work law forbids any person from prohibiting individuals from lawfully possessing firearms in vehicles.<sup>177</sup> The statute immunizes individuals from liability for any injury or damage resulting from compliance with the statute.<sup>178</sup> Importantly, the statute does not limit rights or remedies under other law,<sup>179</sup> nor does it apply to individuals who may not legally possess a firearm under state or federal law.<sup>180</sup>

Minnesota's guns-at-work law is also broadly worded.<sup>181</sup> Part of the criminal statutes, it provides that "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."<sup>182</sup>

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176. *See id.* § 32:292.1(D)(1)–(3). This language suggests no OSH-Act conflict. *See supra* note 148. Mississippi's guns-at-work statute is similar to Louisiana's. *See* MISS. CODE ANN. § 45-9-55 (West 2008). 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." *Id.* § 45-9-55(5). The statute does not authorize transportation or storage of firearms on any premises where possession is prohibited by state or federal law. *Id.* § 45-9-55(4).

177. ALASKA STAT. § 18.65.800(a) (2008).

178. *Id.* § 18.65.800(c).

179. *Id.* § 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.*

180. *Id.* § 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 id.* This necessarily means it does not apply to individuals possessing firearms unlawfully under state or federal law. *See id.* If it were unlawful under federal OSH Act to possess firearms in vehicles while at work, this exception arguably would apply. In that case, employers would 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, an employer 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, § 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.

181. *See* MINN. STAT. ANN. § 624.714(17)(c) (West 2008), *held unconstitutional as applied to church parking lots in Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 206–10, 213 (Minn. Ct. 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).

182. MINN. STAT. ANN. § 624.714(17)(c) (West 2008), *held unconstitutional as applied to church parking lots in Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 206–10, 213 (Minn. Ct. 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). Minnesota's law contains another provision that addresses employers specifically. MINN. STAT. ANN. § 624.714(18). It provides that employers and public postsecondary institutions may establish policies restricting

### B. Noteworthy Aspects of the Laws

Although these laws vary, they often have many commonalities. Two commonalities are relevant here, and both suggest no conflict with the OSH Act.

First, almost none of the guns-at-work laws target *employees* specifically.<sup>183</sup> Though the laws apply to employers, very few of the laws protect only employees.<sup>184</sup> The majority apply generally to protect the public while on property, including business property.<sup>185</sup> These are laws pursuant to state authority over health, safety, and welfare that generally prevent prohibiting guns in vehicles.<sup>186</sup> Essentially, state legislatures have granted individuals 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 for preemption is not necessarily a state's intentions in enacting law but rather the state law's effect on federal law.<sup>187</sup> The effect of guns-at-work laws on the OSH Act is therefore still important, and is discussed further in Part V.

Second, 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 prohibits possessing firearms.<sup>188</sup> If the OSH Act prevents possessing firearms in workplace

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carrying firearms, but neither may prohibit lawful carrying or possession in parking facilities or parking areas. MINN. STAT. ANN. § 624.714(18).

183. *See infra* app A.

184. *See infra* app A.

185. *See infra* app A.

186. "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 and Workplace Safety*, 93 IOWA L. REV. 1171 (2008) (terming such laws "parking-lot laws").

187. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992) ("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 107–08, but this does not eliminate the need to determine whether there is a conflict. As Part V of this Article shows, there is none. *See infra* Part V.

188. *See infra* app. A. *See* ALASKA STAT. § 18.65.800(a)–(b) (2008) (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. ANN. § 790.251(7)(g) (West 2008), *held unconstitutional on other grounds*, Fla. Retail Fed'n, Inc. v. Att'y Gen., 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008) (excepting property upon which firearm possession is prohibited pursuant to federal law); KY. REV. STAT. ANN. § 237.106(2) (West 2008) (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); LA. REV. STAT. ANN. § 32:292.1(D)(1) (2008) (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) (West 2008) (stating

parking lots because it creates a safety hazard to employees, then these state statutes would not force employers to permit them.<sup>189</sup> For those guns-at-work laws that expressly yield to federal law, there can be no conflict with federal law.<sup>190</sup> In instances where the OSH Act prevents guns in vehicles, guns-at-work laws in approximately two-thirds of the states appear expressly to yield, leaving only three states with laws potentially conflicting with the OSH Act.<sup>191</sup>

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

Florida and Oklahoma federal district courts have analyzed the state guns-at-work laws of those states to determine whether the OSH Act preempts them. In *ConocoPhillips Co. v. Henry*, the Northern District of Oklahoma held the OSH Act preempts Oklahoma's laws.<sup>192</sup> In *Florida*

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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* note 180; *infra* note 189.

Georgia's statute also has an exception for federal law, but it has a different effect than the other states' exceptions. *See* GA. CODE ANN. § 16-11-135(d)(6) (West 2008) (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 id.* It prevents vehicle searches and conditioning employment on agreements not to access firearms stored in vehicles. *See id.* The statute's exception is from taking these actions. *See id.* § 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.

189. One potential problem with this argument is that the wording of some of the exceptions suggests that they apply when federal law prevents an individual from possessing a firearm completely, not when federal law permits an individual to possess a firearm generally but prevents her from possessing the firearm in some contexts, such as in her vehicle 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* note 180. 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 the legislature did not draft it 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).

190. This observation 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 (2008); MINN. STAT. ANN. § 624.714 (West 2008), *held unconstitutional as applied to church parking lots*, Edina Cmty. Lutheran Church v. State, 745 N.W.2d 194, 206–10, 213 (Minn. Ct. App. 2008); OKLA. STAT. ANN. tit. 21 §§ 1289.7a, 1290.22 (West 2008).

191. *See supra* notes 188, 190. *See also supra* note 148; *infra* app. A.

192. *See* *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1296, 1330, 1337-40 (N.D. Okla. 2007), *rev'd sub nom.* *Ramsey Winch, Inc. v. Henry*, No. 07-5166, 2009 WL 388050 (10th

*Retail Federation, Inc. v. Attorney General*, the Northern District of Florida reached the opposite conclusion, finding the OSH Act does not preempt Florida's law.<sup>193</sup> The Florida court reached the correct conclusion.<sup>194</sup>

### 1. Oklahoma: *ConocoPhillips v. Henry*

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, codified in 29 U.S.C. § 651(b) and the general duty clause, codified in 29 U.S.C. § 654(a)(1).<sup>195</sup> 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.<sup>196</sup> According to the court, OSHA has encouraged employers to enact policies to reduce workplace hazards, but Oklahoma's guns-at-work laws prevent that.<sup>197</sup> 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 workplace hazard.<sup>198</sup> The court thus held that Oklahoma's guns-at-work laws conflict with the OSH Act and are preempted.<sup>199</sup> It enjoined the

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Cir. Feb. 18, 2009).

193. See Fla. Retail Fed'n, Inc. v. Att'y Gen., 576 F. Supp. 2d 1281, 1298 (N.D. Fla. 2008).

194. See *infra* Part V.

195. *ConocoPhillips*, 520 F. Supp. 2d at 1296, 1330, 1337–40. 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 *id.* at 1296. For an analysis of this, see generally Steines, *supra* note 186, for an argument that parking-lot laws, like those at issue in *ConocoPhillips*, do not violate due process, but do constitute unconstitutional takings and are bad policy.

196. See *ConocoPhillips*, 520 F. Supp. 2d at 1338.

197. See *id.* The court found § 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 *id.* This proves too much. By enacting § 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. *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); *Hancock v. Train*, 426 U.S. 167, 178 (1976) (noting the seminal principle that the federal Constitution and federal 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). More likely, § 1289.7a(B) is intending to immunize individuals from *state* civil liability for complying with this state law.

198. *ConocoPhillips*, 520 F. Supp. 2d at 1330, 1337.

199. *Id.* at 1340.

statutes to the extent of this preemption.<sup>200</sup>

The Tenth Circuit recently held that the Northern District of Oklahoma reached the wrong result in finding preemption.<sup>201</sup> In reversing the district court, the Tenth Circuit first noted the absence of any specific OSHA standard on workplace violence.<sup>202</sup> It explained that gun-related workplace violence is therefore not a “recognized hazard” for which an employer may be liable under the general duty clause.<sup>203</sup> According to the Tenth Circuit, “OSHA is aware of the controversy surrounding firearms in the workplace and has consciously decided *not* to adopt a standard.”<sup>204</sup> Thus, the court found no conflict preemption between the general duty clause of the OSH Act and Oklahoma’s guns-at-work laws.<sup>205</sup>

It also found no conflict between Oklahoma’s guns-at-work laws and the general purposes of the OSH Act.<sup>206</sup> The court explained that the OSH Act is not a “general charter for courts to protect worker safety,”<sup>207</sup> thus burdening employers to anticipate civic disorder by employees is beyond the scope of the OSH Act’s general purpose.<sup>208</sup> Where, as here, state laws do not conflict with an OSH Act standard, the court found them not preempted.<sup>209</sup>

## 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.<sup>210</sup> Reaching a conclusion contrary to the

200. *Id.* This decision conflicts with a decision of the Northern District of Florida in *Florida Retail Federation v. Attorney General*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008). This Article argues that the *Florida Retail Federation* decision is correct while the *ConocoPhillips* decision is incorrect. *See infra* Part V.

201. *See Ramsey Winch Inc. v. Henry*, No. 07-5166, 2009 WL 388050, at \*1, 5 (10th Cir. Feb. 18, 2009). The Ramsey court cited *Florida Retail Federation* in its decision. *See id.*

202. *Id.* at \*3.

203. *Id.*

204. *See id.* at \*3.

205. *See id.* at \*3–5.

206. *Id.* at \*5.

207. *Id.* (citing *Fla. Retail Fed’n, Inc. v. Attorney Gen.*, 576 F. Supp. 2d 1281, 1298 (N.D. Fla. 2008)).

208. *See id.*

209. *See id.* This conclusion is correct. *See infra* Part V.

210. *See Fla. Retail*, 576 F. Supp. 2d at 1284. 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.* The court decided the preemption issue on a motion for preliminary injunction, *see id.*, but it converted this to a final judgment on the merits pursuant to the parties’ agreement, *see Fla. Retail Fed’n, Inc. v. Att’y Gen. (Fla. Retail II)*, 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008).



Northern District of Oklahoma, Chief Judge Robert L. Hinkle held that the Act does not preempt Florida's law.<sup>211</sup> The court rested its decision on two independent bases.<sup>212</sup>

First, the court explained that because the Secretary of Labor has not promulgated any standards, § 18(a) clearly applies to permit the states to regulate, and it therefore forecloses preemption.<sup>213</sup> Second, the court rejected the argument that the general duty clause requires preemption.<sup>214</sup> It reasoned that to find that the general duty clause preempts state guns-at-work laws requires finding that the general duty clause mandates banning guns from parking lots for safety and that employers would necessarily face liability if they did not ban guns.<sup>215</sup> 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.<sup>216</sup> For these reasons, the court rejected plaintiff's argument that the OSH Act preempts Florida's guns-at-work law.<sup>217</sup>

#### V. 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 § 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 exists. 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 saves state guns-at-work laws from preemption. It concludes that while § 4(b)(4) does not, § 18(a) should be read to save guns-at-work laws from OSH Act preemption.

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211. *Fla. Retail*, 576 F. Supp. 2d at 1298–99.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *See id.* Because the general duty clause likely does not require employers to ban guns from vehicles, it seems unlikely Florida Statute § 790.251(7)(g), which creates an exception where firearm possession is prohibited pursuant to federal law, will enable employers to use the OSH Act to avoid complying with Florida's guns-at-work law. *See supra* note 148. If, however, the general duty clause required banning guns from parking lots, then the OSH Act might excuse compliance. *See supra* note 148. Either scenario prevents a conflict with the OSH Act.

217. *See Fla. Retail*, 576 F. Supp. 2d at 1299–1300.

### 1. Section 4(b)(4) Likely Does Not Save These Laws

The plain language of § 4(b)(4) suggests that it will not save guns-at-work laws.<sup>218</sup> The first half of § 4(b)(4) (everything before the “or”)<sup>219</sup> is referred to here as the “workmen’s compensation clause,” and the remainder is simply known as “remainder clause.”<sup>220</sup>

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, which are not workmen’s compensation laws.<sup>221</sup> The remainder clause is also inapplicable because it applies only to laws “with respect to injuries, diseases, or death of employees.”<sup>222</sup> Guns-at-work laws govern the storage of guns in vehicles,<sup>223</sup> and not injuries, diseases, or death of employees.<sup>224</sup>

### 2. Section 18(a) Should Save These Laws

Unlike § 4(b)(4), § 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.<sup>225</sup> This section unequivocally expresses Congress’ intent not to preempt state law absent a standard.<sup>226</sup> Without a federal standard, states may govern.<sup>227</sup>

218. *See supra* Part III.C.1.

219. *See supra* Part III.C.1.

220. *See* 29 U.S.C. § 653(b)(4) (2006).

221. *See id.*

222. *See id.*

223. *See supra* Part IV.

224. Of course, one might counter that guns-at-work laws permit employees to have guns, and this fact 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. Moreover, although § 4(b)(4) is broadly worded, it has been construed primarily to save only state tort laws and criminal laws. *See supra* Part III.C.1. Only some of the state guns-at-work laws are part of the states’ penal codes. *See infra* app. A. 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 guns-at-work laws that may be classified as tort laws.

In addition to tort and criminal laws, § 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 id.* at 502–03, 506 (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 Comm’n*, 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.” *See* 29 U.S.C. § 653(b)(4).

225. *See* 29 U.S.C. § 667(a).

226. *See id.* (“Nothing in this Act 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].”).

Here, there is no federal standard governing the prevention of workplace violence relevant to guns-at-work laws.<sup>228</sup> OSHA generally defers to state and local law enforcement to regulate workplace violence.<sup>229</sup> Thus, the OSH Act plainly permits states to regulate.<sup>230</sup> As the Northern District of Florida stated, § 18(a) could not be clearer and prevents preemption of guns-at-work laws.<sup>231</sup> To find otherwise ignores clear congressional intent.

#### a. The Express Intent of Congress Prevents Preemption

The rule applicable to express preemption is instructive here.<sup>232</sup> When Congress has made its intent known through explicit statutory language, the court's task is simply to give effect to that language.<sup>233</sup> "Although this

227. *See id.*

228. *See* Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127 (recognizing in a Standard Interpretation letter that no standards exist); U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., *Workplace Violence, OSHA Standards*, <http://www.osha.gov/SLTC/workplaceviolence/standards.html> (last visited Feb. 28, 2009) (stating that as of February 28, 2009, no standards exist for workplace violence); U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., *Safety & Health Topics, Workplace Violence*, <http://www.osha.gov/SLTC/workplaceviolence/index.html> (last visited Apr. 19, 2009) (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), *rev'd sub nom.* Ramsey Winch, Inc. v. Henry, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009).

Moreover, the general duty clause is not a "standard." *See, e.g.,* Wilcox v. Niagara of Wis. Paper Corp., 965 F.2d 355, 366 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)"); Puffer's 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); 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 § 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 § 655).

It is important to distinguish between federal standards that fall within § 18 and other federal regulations that may be relevant to issues of workplace violence. The former are limited to standards in effect per § 655 of Title 29 of the United States Code. *See* 29 U.S.C. § 667(a)-(b). A federal regulation not promulgated under § 655 may relate to guns on workplace property, *see, e.g.,* 39 C.F.R. § 232.1(l) (2009) ("[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 § 18(a), *see* 29 U.S.C. § 667(a)-(b).

229. *See* Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127.

230. *See* 29 U.S.C. § 667(a).

231. *See* Fla. Retail Fed'n, Inc. v. Att'y Gen., 576 F. Supp. 2d 1281, 1298 (N.D. Fla. 2008).

232. *See* State *ex rel.* Stenehjem v. FreeEats.com, Inc., 712 N.W.2d 828, 841 (N.D. 2006) (citing English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990)).

233. *Id.*

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 state laws are *not* preempted by the federal act.”<sup>234</sup> 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.”<sup>235</sup>

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.<sup>236</sup> Indeed, no federal standard is in place.<sup>237</sup> The express language of the Act prevents courts from finding guns-at-work laws preempted in conflict with the general duty clause or any other part of the OSH Act.<sup>238</sup>

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 states control.<sup>239</sup>

Despite these arguments, the Northern District of Oklahoma (despite acknowledging § 18(a)) held that the OSH Act impliedly preempts Oklahoma’s guns-at-work laws.<sup>240</sup> The court found Oklahoma’s guns-at-

234. *Id.*

235. *Id.*

236. *See* 29 U.S.C. § 667(a).

237. *See supra* note 228 and accompanying text.

238. 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 id.* at 867–74; *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 § 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 V.A.2.b, applying such a broad reading of *Geier* should be rejected here in light of the clear language of § 18(a) that can only mean states may govern in the absence of federal standards. Further, applying *Geier* that broadly is undesirable since doing so undermines the clear efforts of Congress, which may not realize its seemingly clear directive in § 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 (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.”).

239. *See* 29 U.S.C. § 667(a).

240. *See ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1325–30 (N.D. Okla. 2007), *rev’d sub nom. Ramsey Winch, Inc. v. Henry*, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18,

work laws create an obstacle to the fulfillment of the OSH Act's general purposes and its general duty clause.<sup>241</sup> The court explained that Oklahoma's laws prevent an employer from using one of its chosen methods to create a safe work environment, and thus conflict with the OSH Act and are therefore preempted by it.<sup>242</sup>

Though the Oklahoma court addressed § 18(a), its treatment leaves much to be desired. The court discussed the negative implications of § 18(a), but it failed to grapple with the positive implications of § 18(a), i.e. the effect of its express language.<sup>243</sup> Instead, the court erroneously reasoned that because the alleged conflict between the state law and the OSH Act does not concern OSH Act "standards," § 18(a) does not even apply.<sup>244</sup> The court missed the point that § 18(a) clearly permits states to regulate in the absence of standards, and so they should be free to regulate here.<sup>245</sup>

Preempting state law where § 18(a) *expressly* saves state law because other portions of the OSH Act (such as the general duty clause or the general purposes provision) *impliedly* conflict with that state law makes little sense. In doing so, the express text of the statute—§ 18(a)—is completely ignored in favor of implied preemption.

Though this reading ignores the plain meaning of § 18(a), it is not wholly irrational in light of a non-OSH Act case, *Geier v. American Honda Motor Co.*, in which the Supreme Court held that though a savings clause may save state law from express preemption, it may not save it from *implied* preemption.<sup>246</sup> As shown in the next Section, however, *Geier* should not override § 18(a).

#### b. *Geier* Should Not Bar the Plain Meaning of § 18(a)

The Supreme Court has not yet addressed whether § 18(a) prevents preemption here.<sup>247</sup> But the Supreme Court's opinion in *Geier v. American*

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2009). The court relied in part on *Geier's* progeny in which the Supreme Court noted that an express preemption clause does not bar the ordinary workings of implied conflict preemption. *See id.* at 1327 (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000))).

241. *ConocoPhillips*, 520 F. Supp. 2d at 1337–38.

242. *Id.*

243. *See id.* at 1325–27.

244. *See id.* at 1326–27.

245. *See id.* at 1325–30.

246. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)).

247. In *Gade v. National Solid Wastes Management Association*, the Court considered whether the OSH Act preempted state law and held it impliedly did. *Gade*, 505 U.S. at 108–09. *Gade* is distinguishable because there *were* federal standards on point, thus § 18(a) did not apply. *See* 29 U.S.C. 667(a) (2006); *Gade*, 505 U.S. at 92–93, 98–100. Here there are no such standards.

*Honda Motor Co.*, a case involving a different federal law, suggests that the Court may not agree that § 18(a) unequivocally saves state guns-at-work laws.<sup>248</sup> In *Geier*, the Court held that a “saving clause (like [an]

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*See supra* note 228 and accompanying text.

248. *See Geier*, 529 U.S. at 869–74 (explaining that preemption 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 id.* at 868–74. As the Court explained, neither the savings clause, express preemption clause, nor both together create a special burden against implied preemption. *Id.* at 870–74. 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.” *Id.* at 689 (quoting *Gade*, 505 U.S. at 107).

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*, 514 U.S. at 287–89 (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 Ausness, *supra* note 43, at 940–71, which traces 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 and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779, 828–29 (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 pre-emption clause ‘does not bar the ordinary working of conflict pre-emption principles’ . . . .” (citing *Geier*, 529 U.S. at 869)); *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 preemption provision nor savings clause prevent implied preemption); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 387–88 (2000) (“[T]he 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*, 364 F. Supp. 2d at 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).

express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.<sup>249</sup> The Supreme Court has found that § 18(a) is a savings clause.<sup>250</sup> Therefore, even the plain text of § 18(a) may not prevent conflict preemption.<sup>251</sup> But *Geier* should not be extended to apply here.<sup>252</sup> It did not involve the OSH Act.<sup>253</sup> It concerned a different law, the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA),<sup>254</sup> which does not contain the same clear, congressional directive embodied in § 18(a).<sup>255</sup>

The NTMVSA savings clause states that compliance with a federal safety standard does not exempt any person from liability under common law.<sup>256</sup> The Court held that the savings clause did not prevent conflict preemption of tort claims that conflict with the NTMVSA federal safety standards.<sup>257</sup> The Court explained that nothing in the text of that savings clause evinced Congress intent to save state tort actions that conflict with

249. *Geier*, 529 U.S. at 869.

250. *See Gade*, 505 U.S. at 100.

251. That this argument is even tenable reveals a major problem with the Court's current conflict preemption jurisprudence: attempting to uncover Congress' intent, the Court permits displacing Congress's express statements of intent for the implied intent the Court discovers.

252. *See, e.g., 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); *Levine v. Wyeth*, 944 A.2d 179, 193–94 (Vt. 2006) (explaining that *Geier* “simply stands for the proposition that Congress' 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), *aff'd*, No. 06-1249, 2009 WL 529172 (U.S. Mar. 4, 2009).

At least one court has agreed that *Geier* does not apply to one of the OSH Act savings clauses, § 4(b)(4), 29 U.S.C. § 653(b)(4). *See Lindsey*, 480 F.3d at 210 (distinguishing *Geier* and finding “[it] does not compel a conclusion that the savings clause in this case cannot foreclose further preemption analysis”).

253. *See Geier*, 529 U.S. at 864.

254. *Id.* The NTMVSA contains two relevant provisions: a preemption provision and a savings clause. *See id.* at 867–68. 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. *Id.* at 867 (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 868.

255. Courts routinely struggle with the question of the preemptive effect of Congressional statutes. *See, e.g., E. Farish Percy, Applying the Common Fund Doctrine to an ERISA-Governed Benefit Plan's Claim for Subrogation or Reimbursement*, 61 FLA. L. REV. 55, 60 (2009) (noting varying decisions on whether ERISA preempts state-law actions for reimbursement or subrogation, or state common fund doctrines); Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 194 n.41 (2006) (discussing preemption by the Federal Arbitration Act).

256. *Geier*, 529 U.S. at 868 (quoting 15 U.S.C. § 1397(k) (1988)).

257. *See id.* at 867–70.

federal regulations.<sup>258</sup> Rather, the court found that 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 Congress intended the federal standard to be an absolute requirement or only a minimal one.<sup>259</sup>

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.<sup>260</sup> Unlike the NTMVSA savings clause, which does not unequivocally eliminate conflict preemption, § 18(a) plainly does. The plain language of § 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 § 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 conclusion makes little sense. Through § 18(a), Congress has expressed its position on the balance of state-federal sovereignty:<sup>261</sup> in the absence of 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.<sup>262</sup> If any conflict exists, it is with § 18(a), not state law. Where an act's savings clause expressly permits state action, there can be no conflict, *Geier* notwithstanding.<sup>263</sup>

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258. *See id.* at 869.

259. *See id.*

260. 29 U.S.C. § 667(a) (2006).

261. *See id.*

262. *See State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 840–41 (N.D. 2006).

263. *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 id.* at 624–25. OSH Act § 18(a) similarly provides a partnership permitting states to regulate. *See* 29 U.S.C. § 667(a).



### B. *No Express Preemption*

No OSH Act provision expressly preempts guns-at-work laws.<sup>264</sup> Indeed, as discussed in Part IV, the majority of guns-at-work laws automatically yield to federal law according to their express terms. Express preemption is entirely absent. So too is implied preemption.

### C. *No Implied Preemption*

Courts are generally reluctant to infer preemption,<sup>265</sup> and this reluctance may be even stronger with the OSH Act.<sup>266</sup> The Act's language and history suggest that "[it] should be interpreted in a manner that prevents the interference with states' exercise of police powers to protect their citizens."<sup>267</sup> Guns-at-work laws are exercises of police power that should not be disturbed absent a clear conflict with federal law. No such conflict exists.

#### 1. No Field Preemption

Section 18 confirms that Congress did not intend the federal government exclusively regulate the entire field of worker-safety regulation.<sup>268</sup> It expressly permits states to regulate where no federal standard exists.<sup>269</sup> Because the OSH Act permits states to regulate in the

264. *See generally* 29 U.S.C. §§ 651–700.

265. *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").

266. *See Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53 n.6 (1st Cir. 1991) ("We would be very reluctant to infer preemptive intent absent some indication that 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, 366 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)").

267. *Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 208 (3d Cir. 2007) (quoting Fernandez, *supra* note 111, at 114).

268. *See* 29 U.S.C. § 667(a)–(b); *Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 16 (1st Cir. 1984). At least one court has interpreted § 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), *aff'd* 557 A.2d 1371 (N.J. 1989) (emphasis added).

269. *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.*

field of worker health and safety, field preemption is absent.<sup>270</sup> Field preemption occurs only where the field is reserved for federal regulation, and Congress has left no room for state regulation.<sup>271</sup> This is clearly not the case with the OSH Act,<sup>272</sup> which embodies a system of cooperative federalism.<sup>273</sup>

## 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.<sup>274</sup> But no conflict exists.<sup>275</sup>

### 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

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 opinion) (“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.”).

270. *See Puffer’s*, 742 F.2d at 16; *see also* *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1302 (N.D. Okla. 2007) (finding field preemption absent), *rev’d sub nom.* *Ramsey Winch, Inc. v. Henry*, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009); *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.

271. *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).

272. *See Gade*, 505 U.S. at 96 (“Federal regulation of the workplace was not intended to be all encompassing, however.”); *Schweiss*, 922 F.2d at 474 (noting that OSH Act expressly permits state regulation in the occupational safety field of law); *Puffer’s*, 742 F.2d at 16 (“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 OSHA occupy an entire field of regulation, thereby ousting any state regulation.” (internal quotation marks and citation omitted)); *see also* *Berardi v. Getty Ref. & Mktg., Co.*, 435 N.Y.S.2d 212, 217 (N.Y. Sup. Ct. 1980); *Silverstein*, *supra* note 267, at 39.

273. *See supra* Part III.B.

274. *See supra* Part II.B.2. *See also* *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), *rev’d sub nom.* *Ramsey Winch, Inc. v. Henry*, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009).

275. Because there are no federal standards in place, *Gade* does not require finding preemption. *See supra* note 247; *see also supra* notes 117–19 and accompanying text; *ConocoPhillips*, 520 F. Supp. 2d at 1326–27 (finding *Gade* conflict preemption lacking).

may not.”<sup>276</sup> 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.<sup>277</sup> The OSH Act merely mandates that employers provide a work environment free from recognized hazards,<sup>278</sup> while guns-at-work laws require that employers may not prohibit individuals from storing guns in vehicles.<sup>279</sup> The OSH Act does not expressly prevent locking guns in vehicles, nor has OSHA clarified that storing guns in vehicles is a recognized hazard that necessarily threatens employee health and safety.<sup>280</sup> Employers can still provide a safe environment while permitting employees to store their guns in their vehicles.<sup>281</sup> Impossibility conflict preemption does not exist.<sup>282</sup>

### b. No Obstacle Conflict Preemption

State guns-at-work laws are therefore only preempted if they frustrate the purposes of the federal law<sup>283</sup> and are so inconsistent that they must yield.<sup>284</sup> The test is whether the state law creates an obstacle to accomplishing Congress’s full purposes and objectives.<sup>285</sup> The state law must be a “material impediment to the federal action, or ‘thwart[] the federal policy in a material way.’”<sup>286</sup> No rigid formula exists: evaluation is

276. See *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996); see also *Fla. Lime & Avocado Growers*, 373 U.S. at 143.

277. See *ConocoPhillips*, 520 F. Supp. 2d at 1329.

278. See 29 U.S.C. § 654(a)(1) (2006).

279. See *supra* Part IV.

280. See *supra* note 228 and accompanying text. Indeed, OSHA has suggested the contrary. See *infra* notes 324–31 and accompanying text.

281. See *infra* Part V.C.2.b.i.

282. See *ConocoPhillips*, 520 F. Supp. 2d at 1329 (finding Oklahoma’s guns-at-work laws do 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 it was not physically impossible to comply with both state and federal law).

283. See *CTS Corp. v. Dynamics Corp. of Am.*, 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).

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

285. *Id.*; see also *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Mgmt. Ass’n for Private Photogrammetric Surveyors 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.” (footnotes omitted)).

286. See *Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir. 1998) (citation omitted) (quoting *Blue Circle Cement v. Bd. of County Comm’rs*, 27 F.3d 1499, 1509 (10th Cir. 1994)).

case-by-case<sup>287</sup> and considers the relationship between the state and federal laws as written, interpreted, and applied.<sup>288</sup>

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 the court based this on the assumption that guns-at-work laws *decrease* employee safety.<sup>289</sup> As shown by the data, this assumption is not necessarily true.<sup>290</sup>

#### i. Guns-at-Work Laws Do Not Conflict with the General Purpose of the OSH Act

The general purpose of the OSH Act is to enhance worker safety.<sup>291</sup> Guns-at-work laws do not 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.”<sup>292</sup>

According to the National Institute for Occupational Safety and Health, the federal agency responsible for recommending ways to prevent work-related injuries,<sup>293</sup> the “vast majority of workplace homicides” involve

287. *See Hines*, 312 U.S. at 67.

288. *Jones*, 420 U.S. at 526 (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).

289. *See ConocoPhillips Co. v. Henry*, 520 F. Supp.2d 1282, 1334–40 (N.D. Okla. 2007), *rev'd sub nom. Ramsey Winch, Inc. v. Henry*, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009). It was also based on the court's assumption that because guns-at-work laws prevent employers' “chosen” method of enhancing safety (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.

290. *See infra* Part V.C.2.b.i.

291. *See* 29 U.S.C. § 651(b) (2006).

292. *See* NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEP'T OF HEALTH & HUMAN SERVS., *Violence in the Workplace, Homicide in the Workplace*, <http://www.cdc.gov/niosh/violhomi.html> (last visited Apr. 19, 2009). 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* Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127. 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 to this Article), 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.

293. NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEP'T OF HEALTH & HUMAN SERVS., FACT SHEET 1, <http://www.cdc.gov/niosh/pdfs/2003-116.pdf>.

perpetrators with no legitimate relationship to the business.<sup>294</sup> Employer policies prohibiting employees from locking weapons in cars do not even apply to these individuals.

Unlike random criminals, employees are 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 small percentage of workplace homicides—only 7%.<sup>295</sup> Employer policies prohibiting or permitting guns in vehicles would not affect the portion of these homicides committed by past employees 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.<sup>296</sup>

Moreover, individuals with extensive criminal records generally commit more murders than ordinary people with access to weapons.<sup>297</sup> Individuals undeterred by moral obligation or criminal laws are hardly likely to heed employer policies preventing them from storing guns in 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 actually correlates with *increased* safety.<sup>298</sup> One commentator maintains that public gun access is a deterrent to crime.<sup>299</sup> Criminals who know potential victims have access to weapons are less likely to commit crimes that bring them in

294. NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEP'T OF HEALTH & HUMAN SERVS., WORKPLACE VIOLENCE PREVENTION STRATEGIES AND RESEARCH NEEDS 4, <http://www.cdc.gov/niosh/docs/2006-144/pdfs/2006-144.pdf>. The crimes involved may include robbery, shoplifting, trespass, and terrorism. *Id.*

295. *Id.*

296. *Id.* at 17–18.

297. 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, 665–70 (2007).

298. *See id.* at 653, 673 (“[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.” *Id.* at 659 (emphasis added); *see also* John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 VAL. U. L. REV. 355, 358–61 (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%).

299. *See* Lott, Jr., *supra* note 298, at 359–60.

contact with potentially armed victims.<sup>300</sup> Even individuals without guns benefit from this deterrence effect.<sup>301</sup>

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.

The other side to this debate highlights many instances where guns have escalated dangerous situations into deadly tragedies.<sup>302</sup> This valid position must not be ignored. This Article does not maintain that 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. At best, the evidence is indeterminate and points in either direction. A court therefore should not find that guns-at-work laws 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 speculation, and such reasoning 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.<sup>303</sup>

To determine whether an actual conflict exists, courts look for “special features warranting pre-emption.”<sup>304</sup> These include the dominance of the federal interest in the area, such as in foreign affairs, which militates in favor of preemption.<sup>305</sup> Areas such as health and safety, which states have

300. *Id.* at 360.

301. *Id.*

302. *See supra* text accompanying notes 8–11.

303. *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, 720 (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) (finding the existence of potential conflicts too speculative to warrant preemption); *see also Schweiss v. Chrysler Motors Corp.*, 922 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). 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).

304. *English*, 496 U.S. at 87 (quoting *Hillsborough County*, 471 U.S. at 719).

305. *See Hillsborough County*, 471 U.S. at 719. 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,

traditionally regulated, disfavor preemption.<sup>306</sup>

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, nor the Secretary of Labor has decreed that storing guns in vehicles threatens worker safety—quite the contrary<sup>307</sup>—and there is evidence suggesting that guns may actually increase safety.

#### 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.<sup>308</sup> These hazards traditionally arise from some condition inherent in the workplace environment.<sup>309</sup> Though there may be circumstances where failing to protect employees from violence could be a general-duty-clause violation, the OSH Act is not typically enforced this way.<sup>310</sup>

It is unlikely that employers would face general-duty-clause liability for random acts of violence that courts do not recognize as part of the nature of the specific business but rather as “random antisocial acts which may occur anywhere.”<sup>311</sup> 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.

Employers cannot prevent intentional, violent acts of employees.<sup>312</sup> If

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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 id.* at 377–80. *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. *Id.* at 382–84. 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. *Id.* at 385–86.

306. *See Hillsborough County*, 471 U.S. at 719.

307. *See supra* note 228 and accompanying text, and *infra* notes 324–31 and accompanying text.

308. 29 U.S.C. § 654(a)(1) (2006).

309. *See Megawest Fin., Inc., Dec. & Orders Occ. Safety & Health Rev. Comm’n No. 93-2879*, 1995 OSAHRC LEXIS 80, at \*24 (May 8, 1995).

310. *Efforts to Prevent Workplace Violence Slow in Coming from Federal OSHA Program*, 23 O.S.H. Rep. (BNA) 334 (Aug. 25, 1993).

311. *Id.*

312. 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*

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.<sup>313</sup> Employers are not necessarily responsible for the aberrant behavior of employees.<sup>314</sup>

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, bear the burden of eliminating general violence, not employers.

Nonetheless, 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.<sup>315</sup> 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.<sup>316</sup> 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.<sup>317</sup>

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Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm’n, 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. Occupational Safety & Health Comm’n*, 530 F.2d 1143, 1145 (5th Cir. 1976).

313. See *Nat’l Realty & Constr. Co., Inc. v. Occupational Safety & Health Comm’n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973); see also *Megawest*, 1995 OSAHRC LEXIS 80, at \*26.

314. *Nat’l Realty*, 489 F.2d at 1265–66 & n.35. 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*, 530 F.2d at 1145.

315. See Letter from Roger A. Clark, Dir., Directorate of Enforcement Programs, Occupational Safety and Health Admin., to John R. Schuller (Dec. 10, 1992), [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=20951](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951).

316. See *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1331–32 (N.D. Okla. 2007), *rev’d sub nom. Ramsey Winch, Inc. v. Henry*, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009).

317. Letter from Roger A. Clark to John R. Schuller, *supra* note 315 (emphasis added).



As OSHA also explained, whether an employer faces liability turns on the specific circumstances of the case.<sup>318</sup> In 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 requirement is industry-specific, and there is no evidence that minimizing risks requires banning guns from all parking lots in all workplaces everywhere.<sup>319</sup>

Further, the letter suggests employers will not be liable for complying with state guns-at-work laws.<sup>320</sup> This is because “the feasibility of the means of abatement [of the hazard is a] critical factor[] to be considered” for liability.<sup>321</sup> Where state law prevents employers from banning guns from vehicles, employers may find other feasible alternatives to eliminate the hazard of guns in the workplace. 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.<sup>322</sup>

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

The general duty clause does not require banning guns from vehicles as the only means of ensuring worker safety.<sup>323</sup> Employers may simultaneously ensure worker safety and permit guns in vehicles. Indeed, permitting guns in vehicles may actually assist employers in enhancing worker safety. Thus, state guns-at-work laws do not conflict with the

318. *Id.*

319. *See id.*; *see also* Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127.

320. Letter from Roger A. Clark to John R. Schuller, *supra* note 315.

321. *Id.*; *see also* Getty Oil Co. v. Occupational Safety & Health Review Comm’n, 530 F.2d 1143, 1145 (5th Cir. 1976) (noting general duty clause requires employers to discover and exclude from workplace feasibly preventable hazards).

322. *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.”).

323. *See* Fla. Retail Fed’n, Inc. v. Att’y Gen., 576 F. Supp. 2d 1281, 1299 (N.D. Fla. 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.”).

general duty clause and thus should not be preempted by it.

The Acting Assistant Secretary of Labor for OSHA, Thomas Stohler, recently bolstered this position in a letter to then-state Representative Jerry Ellis, who principally authored Oklahoma's guns-at-work laws.<sup>324</sup> That letter states that OSHA does not believe that the OSH Act preempts Oklahoma's law.<sup>325</sup> According to Stohler, since no OSHA standard governs guns in vehicles, states retain broad authority in this arena.<sup>326</sup> This further bolsters the conclusion that the OSH Act does not preempt state guns-at-work laws.<sup>327</sup>

## VI. GUNS AT WORK: PREEMPTION REQUIRES A STANDARD

Despite the OSH Act's preference for occupational health and safety standards,<sup>328</sup> OSHA has not adopted standards governing workplace violence<sup>329</sup> even after specifically considering the issue—including a direct request to ban guns from the workplace—on multiple occasions.<sup>330</sup> OSHA has strongly suggested that this silence is deliberate because a standard is not warranted.<sup>331</sup>

Rather than adopt binding standards, OSHA has issued *non-binding* guidelines<sup>332</sup> and letters of interpretation.<sup>333</sup> To override state guns-at-work

324. See 28(j) Notice of Supplemental Authority Doc. 01017579209, Letter from Thomas M. Stohler, Acting Assistant Secretary of Labor, Occupational Safety and Health Administration, to Hon. Jerry Ellis (Jan. 16, 2009), Ramsey Winch, Inc. v. Henry, No. 07-5166, 2009 WL 388050 (10th Cir. Feb. 18, 2009); see also Marie Price, *OSHA: Federal act does not pre-empt Oklahoma gun law*, THE JOURNAL RECORD, Jan. 21, 2009, at News.

325. See Letter from Thomas M. Stohler to Jerry Ellis, *supra* note 324.

326. See *id.*

327. Whether the federal agency that enforces the federal law believes preemption exists is important. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67–68 (2002); see also *Hillsborough County*, 471 U.S. at 721 (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*, 529 U.S. at 884–85 (cautioning that no formal agency statement of preemptive intent is necessary before finding conflict preemption).

328. See *supra* Part III.A and notes 108–09 and accompanying text.

329. See *supra* note 228 and accompanying text.

330. See Letter from Roger A. Clark to John R. Schuller, *supra* note 315; see also Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127.

331. See Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127. OSHA recently bolstered this conclusion. See *supra* notes 324–26 and accompanying text.

332. See Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127; see also U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., *Workplace Violence, Possible Solutions*, <http://www.osha.gov/SLTC/workplaceviolence/solutions.html> (last visited Apr. 19, 2009); U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., ALL ABOUT OSHA 13 (2006), [http://www.osha.gov/Publications/all\\_about\\_OSHA.pdf](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.”).

333. See Letter from Roger A. Clark to John R. Schuller, *supra* note 315; Letter from Richard E. Fairfax to Morgan Melekos, *supra* note 127.

laws without satisfying the process for promulgating standards undermines the OSH Act—and violates the express dictates of § 18(a). It also upsets the delicate balance of sovereignty the OSH Act provides for in this traditionally state-controlled arena. Preemption of guns-at-work laws therefore first requires the promulgation of standards.

*A. The General Duty Clause Does Not Permit Circumventing Standards*

The general duty clause is intended to fill the gap for unrecognized hazards, not to circumvent standards.<sup>334</sup> 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.<sup>335</sup> This procedure enables interested parties to share information about a proposed rule's potential effect and about whether the rule is likely to accomplish its objectives.<sup>336</sup> This process and the resulting standards are preferred to the general duty clause because standards provide notice to parties who must follow the rules.<sup>337</sup> This arrangement enables parties to govern their conduct on the front end, rather than face liability on the back end after unknowingly violating the amorphous general duty clause.

*B. Standards Strike the Proper Balance of Cooperative Federalism*

Standards strike the proper balance of cooperative federalism embodied in the OSH Act. They do so by providing states with prior notice that applying state law to the workplace could violate the OSH Act in certain circumstances. For guns-at-work laws with exceptions for federal law,<sup>338</sup> standards make clear that these exceptions apply and the general laws should not be enforced against employers. For states without these exceptions,<sup>339</sup> standards may signal a need to enact them. Many states have already enacted positive law that yields to federal supremacy.<sup>340</sup>

The state statutory exceptions for federal law apply when federal law “prohibits” firearm possession.<sup>341</sup> Absent a standard, the OSH Act does not

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334. *See supra* notes 108–09 and accompanying text.

335. *See* 29 U.S.C. § 655.

336. *See id.* § 655(b).

337. *See id.*

338. *See supra* Part IV.B; *infra* app. A.

339. *See supra* note 190; *infra* app. A.

340. *See supra* Parts IV.A., B.; *infra* app. A.

341. *See* FLA. STAT. ANN. § 790.251(7)(g) (West 2008) (excepting property upon which firearm possession is “prohibited” pursuant to federal law); GA. CODE ANN. § 16-11-135(d)(6) (West 2008) (providing exception where transport of firearms on employers' premises is “prohibited” by state or federal law); KY. REV. STAT. ANN. § 237.106(2) (West 2008) (permitting a

appear to prohibit firearm possession in vehicles parked on employer property. OSHA has had multiple opportunities to promulgate a standard governing workplace safety.<sup>342</sup> A continued failure to do so must be interpreted as an affirmative decision that regulation of guns in vehicles should be left to the states, even when those vehicles are at work.<sup>343</sup>

## VII. CONCLUSION

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. Courts should not lightly cast aside state laws absent a standard decreeing guns in vehicles create a recognized hazard to 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.

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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); LA. REV. STAT. ANN. § 32:292.1(D)(1) (2008) (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) (West 2008) (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).

342. *See supra* notes 228, 324–31 and accompanying text.

343. OSHA has recently recognized this correct conclusion. *See supra* notes 324–26 and accompanying text.

## APPENDIX A

<b>State</b>	<b>Relief/ Punishment</b>	<b>Federal Law Exception</b>	<b>Immunizes from Liability</b>	<b>Protects Employees Only</b>
Alaska	None provided in the provision.	Yes <sup>344</sup>	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

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344. *But see supra* note 180.

State	Relief/ Punishment	Federal Law Exception	Immunizes from Liability	Protects Employees Only
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. <sup>345</sup>	Yes	Yes	No
Minnesota	None provided in the provision, but statute is part of criminal code.	No	No	<i>No:</i> Minn. Stat. Ann § 624.714 (17)(c)  <i>Yes:</i> Minn. Stat. Ann § 624.714(18)
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

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345. Louisiana's statute does not provide this expressly, but it necessarily stems from sections B and C. *See* LA. REV. STAT. ANN. § 32:292.1(B)–(C).

