

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D C 20210



JAN 16 2009

The Honorable Jerry Ellis
Oklahoma State Senate
State Capitol Room 513A
Oklahoma City, Oklahoma 73105

Dear Senator Ellis:

This is in response to your request for the Occupational Safety and Health Administration's (OSHA) position on the applicability of the Occupational Safety and Health Act (OSH Act) to state legislation in Oklahoma generally allowing employees to have firearms in their vehicles in their employers' parking lots. As explained more fully in this response, we do not believe that, as a general matter, the general duty clause of the OSH Act preempts your state's law.

In 2004 and 2005, Oklahoma enacted laws that generally prohibit an employer from banning firearms stored in an employee's locked car on the employer's premises. Florida enacted a similar provision in July 2008, and other states have adopted or are considering such legislation. Several employers with policies that do not comply with the state legislation challenged the Oklahoma law on a variety of grounds, including that the statute is preempted by the federal OSH Act's general duty clause, which requires employers to maintain their workplaces free of "recognized hazards."¹ A U.S. district court agreed, finding that the Oklahoma law materially impeded employers' ability to comply with the general duty clause and posed a conflict with the OSH Act's purpose of encouraging voluntary workplace safety and health measures. A U.S. district court in Florida, however, rejected the same argument, raised in a motion for a preliminary injunction, that the OSH Act preempts Florida's version of the law.²

Generally, a federal statute preempts a state statute if the federal statute expressly provides for preemption or if the federal statute conflicts with the state provision. For states, such as Oklahoma, that do not have an approved OSHA state plan, the OSH Act preempts all state law whenever a federal standard governing the same issue is in effect. Section 18 of the OSH Act specifically preserves the states' authority to regulate "occupational safety and health issues" with respect to which no OSHA standard is in

¹ *Conoco-Phillips v Henry*, 520 F.Supp 2d 1282 (N. D. Okla. 2007), appeal docketed, No. 07-5166 (10th Cir. November, 2007).

² *Florida Retail Federation, Inc v Attorney General of Florida*, 576 F. Supp 2d 1281 (N D Fla 2008).

effect.³ Since no OSHA standard specifically governs the issue of the presence of firearms in vehicles in company parking lots, states generally retain broad authority regarding individual rights under the Second Amendment to the U.S. Constitution, or state equivalent constitutional provisions, as they affect employers within federal OSHA's jurisdiction. It is important to note that Section 18 cannot be read so broadly as to tolerate state laws that would directly conflict with the OSH Act by preventing employers from taking feasible actions necessary to abate "recognized" hazards.⁴

Under ordinary conflict preemption principles, state law can be preempted to the extent it is a "material impediment" to the general duty clause or the purpose of the Act.⁵ The Oklahoma and Florida laws do not on their face pose a conflict with the general duty clause or purpose of the OSH Act. Gun-related violence is not a recognized occupational hazard in industry as a whole, under normal working conditions. Therefore, state laws protecting an employee's right to transport and store firearms in a locked car on employer premises would not on their face impede the employer's ability to comply with the general duty clause. Employers are not required to implement policies, including restrictions on firearms in locked cars, to protect against random, unforeseeable acts of violence. There may, however, be special circumstances in which an employer policy restricting firearms in parked cars may be needed to deal with a particular threat of armed violence. In such circumstances, preemption under the general duty clause could arise as a defense for employer actions reasonably calculated to address the threat but that also violate state law. This would be on a case-by-case basis where a heightened risk of violence exists. In such a case, preemption would be limited to the specific circumstances at issue, and the applicability of the state law in other situations would be unaffected.

This position is consistent with OSHA's longstanding policy as set forth in an interpretive memorandum dated December 10, 1992:

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

³ The presence of a savings clause, i.e., a clause that removes from the scope of federal preemption certain types of state activity, indicates that Congress has not occupied the entire field to the exclusion of all state regulation. Such a clause does not, by itself, bar the application of ordinary conflict preemption principles, under which state law is preempted to the extent that it frustrates the accomplishment of a specific federal statutory or regulatory objective. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869-74 (2000). See also *Wyoming v. U.S.*, 279 F.3d 1214, 1232-36 (10th Cir. 2002) (savings provision in federal wildlife statute stating "[n]othing in this act shall be construed as affecting the authority . . . of the several States to manage, control or regulate fish and wildlife under State law" did not permit state wildlife regulations incompatible with the federal statute's purpose). As the Court explained in *Geier*, interpreting a savings provision to foreclose the operation of ordinary conflict preemption principles is wholly anomalous since "it permits that law to defeat its own objectives, or potentially . . . to destroy itself" 592 U.S. at 872.

⁴ See, e.g., *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir. 1998)

⁵ *Mount Olivet Cemetery, Ibid*

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.⁶

The position recognizes that the risk of workplace violence could be sufficient, in some circumstances, to trigger a legal duty to abate the risk. However, the mere possibility that random antisocial acts uncharacteristic of employment could occur is not sufficient to establish a duty. Only if there are specific facts relevant to an individual workplace that demonstrate a workplace hazard could there be a need for employer action to restrict firearms in locked vehicles on company property.

In the context of voluntary guidelines, OSHA has identified access to firearms as a risk factor in two fields -- health care and social services, and late-night retail establishments. In neither case is the risk factor relevant to the issue considered here. In the health care and social services field, where criminal suspects, acutely disturbed violent individuals, and/or the mentally ill are often present, the presence of handguns and other weapons among patients, their families, or friends poses an obvious risk of violent assaults. See *Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers*, OSHA publication 3148 (1996) at 1. Employees storing their own firearms in locked vehicles in the company parking lot is a completely different matter and is not addressed in any way by the health care and social service guidelines. OSHA has also noted that there is an increased risk of criminal activity at late-night retail establishments, such as convenience stores, liquor stores and gas stations, which can be targets of armed violence.⁷ The risk, however, in the late-night retail industry stems not from the presence of employees bringing firearms to the workplace in their vehicles, but from third parties who purposely commit criminal acts, such as robbery and mugging. OSHA's health care and late-night retail guidelines address a variety of conditions characteristic of employment in these specific industries and provide guidance to protect employees; they are not designed for or intended to be applicable to workplaces and employment generally. Moreover, while the guidelines convey recommendations to safeguard employees, they do not prescribe specific obligations for employers under the general duty clause.

OSHA also believes that state firearms right-to-possess laws do not, as a general matter, frustrate the OSH Act's purpose in Section 2(b) of encouraging employers voluntarily to adopt protective measures. As we have discussed, OSHA has addressed the issue of voluntary firearms restrictions in only a few narrow fields of industry, and has not

⁶ OSHA interpretive letter dated December 10, 1992 from Rodger A. Clark, Director, Directorate of Enforcement Programs, to Mr. John R. Schuller. See also OSHA interpretive letter dated September 13, 2006 from Richard E. Fairfax, Director, Directorate of Enforcement Programs to Mr. Morgan Melekos.

⁷ *Guidelines for Workplace Violence Prevention Programs for Late-Night Retail Establishments*, OSHA publication 3153 (1998)

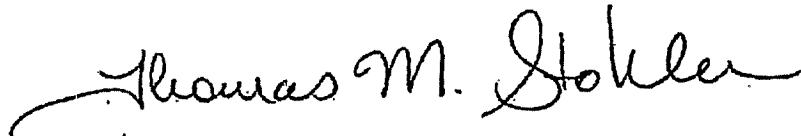
addressed the specific issue of firearms in locked vehicles on company property. Accordingly, under these circumstances, in the absence of a recognized hazard, the OSH Act's general purpose of encouraging employers to provide and promote safety and health also does not preempt these types of state laws.

This statement of position does not reflect any change in OSHA's approach to the problem of workplace violence. The agency remains committed to developing voluntary guidelines for high-risk industries and workplaces and disseminating useful information by other organizations and agencies about workplace violence and possible solutions. OSHA will continue to study all of the risk factors for workplace violence. OSHA also remains committed to enforcement of the general duty clause in situations in which the hazard of violence in a workplace is significant enough to be a recognized hazard and feasible measures are available to address the hazard.

This statement of agency position is solely for purposes of analyzing whether the Occupational Safety and Health Act has preemptive affect with regard to the specific type of statutes in question. OSHA takes no position on other arguments regarding the legality or constitutionality of these types of statutes or the policy merits of the state legislatures in enacting the statutes in question.

We hope this letter responds to your question and appreciate your interest in occupational safety and health.

Sincerely,

A handwritten signature in cursive script that reads "Thomas M. Stohler". The signature is written in dark ink and is positioned above the typed name.

Thomas Stohler
Acting Assistant Secretary