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NOTES

Florida's "Guns-At-Work" Law: Why It Has Employers Up In Arms and What the Florida Legislature Should Do About It

ESTHER GLAZER-ESH*

I. INTRODUCTION:

Florida's *Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008*¹ (the "Guns-At-Work" law or the "Statute") has Florida employers up in arms. This so-called "Guns-At-Work" law² prohibits employers from banning employees from keeping lawfully owned guns locked in employee vehicles while parked in the employer's parking lot. House Bill 503—creating the "Guns-At-Work" law³—was signed by Florida Governor Charlie Crist on April 15, 2008,⁴ and a mere six days later a challenge to the law was filed⁵ in the United States District Court for the Northern District of Florida attempting to prevent the law from going into effect as scheduled on July 1, 2008.⁶ In *Florida Retail Federation, Inc., v. Attorney General of Florida* ("Florida Retail"), the court characterized the "Guns-At-Work" law as the "first limitation ever adopted in Florida on the right of a private property owner to prohibit a person who is not a law enforcement officer from possessing a gun on the property."⁷ The plaintiffs in the suit claimed that the law unconstitutionally interferes with private property rights and that it also conflicts with the standards mandated by the Gen-

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1. FLA. STAT. § 790.251 (2009).

2. *See, e.g., Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla.*, 576 F. Supp. 2d 1281, 1286 (N.D. Fla. 2008).

3. H.R.B. 503, 110th Reg. Sess. (Fla. 2008) (creating FLA. STAT. § 790.251).

4. Cathleen O. Schoultz, *Workplace Violence: New Right to Keep Guns in Cars at Work Becomes Key Issue for Florida Employers*, OCCUPATIONAL SAFETY & HEALTH REPORTER, May 22, 2008, at 402.

5. *See Fla. Retail*, 576 F. Supp. 2d 1281.

6. Schoultz, *supra* note 4.

7. 576 F. Supp. 2d at 1286.

eral Duty Clause⁸ of the Federal Occupational Safety and Health Act (the “OSH Act”).⁹ In enacting the “Guns-At-Work” law, the Florida Legislature’s stated purpose and intent was to

codify the long-standing legislative policy of the state that individual citizens have a constitutional right to keep and bear arms, that they have a constitutional right to possess and keep legally owned firearms within their motor vehicles for self-defense and other lawful purposes, and that these rights are not abrogated by virtue of becoming a customer, employee, or invitee of a business entity.¹⁰

When the “Guns-At-Work” law was passed, it also prohibited a business, which employs one or more employees who have a permit to carry a concealed gun, from banning a customer from storing a gun in his vehicle in the business’s parking lot, regardless of whether the customer possessed a permit to carry a concealed gun.¹¹ Due to the unusual drafting in the definition section of the Statute, the “Guns-At-Work” law would not apply to the customers of a business that does not employ an employee who possesses a permit for a concealed gun.¹² As a result of this peculiar distinction, the *Florida Retail* court enjoined the Attorney General of Florida from enforcing the portions of the “Guns-At-Work” law that applied to customers.¹³ The court found that the portions of the law pertaining to customers were unconstitutional because drawing a distinction between one business and another on the basis of at least one of the business’s *employees* possessing a permit to carry a concealed gun is arbitrary and “there is no rational basis for this disparate treatment of such businesses.”¹⁴ The court found the remainder of the law to be constitutional and denied the issuance of a permanent injunction enjoining the portions of the law pertaining to employees.¹⁵ No appeal has been filed with the Eleventh Circuit Court of Appeals.

This article discusses the constitutional challenges and strong opposition to the Florida “Guns-At-Work” law, and the consequences of its enactment. Although the portions of the Florida “Guns-At-Work” law relating to employees has withstood the constitutional challenges brought in the *Florida Retail* case, this article, nonetheless, advances the position that the constitutionality of such a law, in an as-applied challenge, remains suspect. This article discusses how the law severely hin-

8. 29 U.S.C. § 654(a)(1) (2006).

9. *Fla. Retail*, 576 F. Supp. 2d at 1284.

10. FLA. STAT. § 790.251(3) (2009).

11. *Fla. Retail*, 576 F. Supp. 2d at 1286–87.

12. *Id.* at 1287.

13. *Id.* at 1300.

14. *Id.*

15. *Id.*

ders an employer's ability to comply with the General Duty Clause of the OSH Act to prevent potential incidents of workplace violence, particularly within those industries that statistically face a higher risk for an occurrence of workplace violence. Furthermore, the "Guns-At-Work" law abrogates an employer's duty of care, which conflicts with the standards mandated under the General Duty Clause of the OSH Act. For these reasons, this article argues that in certain instances, the OSH Act will pre-empt the "Guns-At-Work" law—when the state law conflicts with the General Duty Clause, leaving an employer unable to simultaneously comply with both the federal law and the state law.

The "Guns-At-Work" law also infringes upon a fundamental aspect of the employer's property interests—the right to exclude. Given the historical evidence and the tremendous importance of property interests recognized by the Framers of the Constitution, the United States Supreme Court, and the State of Florida, such interests should have been given greater consideration by the Florida Legislature before enacting a law that forces employers to admit dangerous weapons onto their property. Finally, even if the law is able to withstand judicial scrutiny, the Statute is poorly drafted and shortsighted, leaving many important questions unanswered. The "Guns-At-Work" law is simply an unwise piece of legislation that potentially threatens the lives of employees across Florida, and leaves employers with little means of protecting their employees from workplace violence, which may result in countless lawsuits.

This article provides an overview of the "Guns-At-Work" law with an emphasis on the problematic aspects of the law and advocates for legislative reform. By pinpointing the problematic aspects of the law, and advancing possible solutions, the desired effect of this article is for the Florida Legislature to take heed that the law that it enacted is flawed and should be reconsidered. Additionally, this article critiques the *Florida Retail* court's decision and highlights the flaws in the court's reasoning and the weaknesses of the opinion that leave the law open to further challenges. The *Florida Retail* court's decision does not foreclose the possibility that the General Duty Clause is capable of preempting the "Guns-At-Work" law. Although the law was not enjoined when it was initially challenged on its face, such a challenge did not involve a fact specific case, and was not an as-applied challenge. The law, as currently written, is vulnerable to losing a constitutional challenge once the law is challenged by an individual employer. The challenge that this article envisions will occur involves an employer bringing suit after being cited by the Occupational Safety and Health Administration ("OSHA") for failure to prevent or abate a recognized hazard—workplace violence. It

is within this framework that a court will need to determine if, by following the “Guns-At-Work” law, the employer violated the General Duty Clause. Additionally, a similar challenge may arise if an employer fails to comply with the “Guns-At-Work” law and the Attorney General of Florida brings suit to enforce the law. In either scenario, a court could very well conclude that the state gun law is preempted if simultaneous compliance with both the state and federal law is impossible.

Organization of This Article:

Part II of this article discusses the legislative history and the details of Florida’s “Guns-At-Work” law. The article focuses on the portions of the law that relate to employees, and not to customers, because the portion of the law relating to customers has been struck down. This article also addresses why the law has been met with so much opposition. Part III discusses the court’s decision in *Florida Retail Federation, Inc. v. Attorney General of Florida*,¹⁶ which upheld the majority of the Florida “Guns-At-Work” law. This article critiques the court’s decision, particularly as it relates to the General Duty Clause. The court’s reasoning precludes any possibility of the General Duty Clause preempting *any* state law. This article disagrees with such a notion, and Part III thus concludes that the General Duty Clause does have preemptive abilities. Part IV analyzes the potential conflict between the “Guns-At-Work” law and an employer’s obligations under the General Duty Clause. This article concludes that the General Duty Clause is capable of pre-empting the “Guns-At-Work” law, and Part IV provides a likely scenario of when such pre-emption might occur. Part V addresses the argument advanced by the American Bar Association that property rights are fundamental and thus any law interfering with such rights should be subjected to the strict scrutiny standard. Under strict scrutiny, rather than the rational basis standard used in *Florida Retail*, the “Guns-At-Work” law likely would not withstand judicial scrutiny and would be struck down. Part V also discusses the potentially meritorious elements of such an argument, but ultimately this article concludes that such an argument is not viable given existing jurisprudence. Furthermore, the consequences of treating property rights as fundamental would have tremendous negative effects on important governmental objectives. Part VI details the various repercussions of the “Guns-At-Work” law and outlines the problematic aspects of the law. This Part also focuses on the many questions the poorly drafted Statute has left unanswered, and makes clear that even if the law is constitutional, it is unwise and ill conceived. Part VII contains recommendations for amendments to the law that will provide clarity as

16. 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

well as balance the interests of both sides of this controversy—gun owners and employers.

II. THE LEGISLATIVE HISTORY OF FLORIDA'S "GUNS-AT-WORK" LAW:

Timing is everything. The *Individual Personal Private Protection Act of 2007*,¹⁷ a law very similar to the enacted "Guns-At-Work" law, almost was enacted one year before the "Guns-At-Work" law and would have prohibited employers from banning employees from storing personal private property in their cars in a parking lot.¹⁸ According to Employment Attorney Ed McKenna, under the *Individual Personal Private Protection Act of 2007*, "[a]n employee could have a gun, pornography or white supremacy material in the back seat and even if the materials offend another employee, the employer would [be] prohibited from taking any action."¹⁹ Had it not been for the violent massacre that occurred on the campus of Virginia Tech on April 16, 2007, where thirty-two people lost their lives to gun violence,²⁰ it is likely that the *Individual Personal Private Protection Act of 2007* would have been enacted. The bill had passed in the Florida Senate on April 10, 2007, but was defeated in the Florida House on April 18, 2007, a mere two days after the violent Virginia Tech shooting rampage.²¹ After the 2007 bill was defeated, the spokesperson for the National Rifle Association ("NRA") announced to the media that "legislation will be reintroduced next year."²² A year later, the NRA was successful in its lobbying efforts,²³ and the *Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008* was passed in the Florida House and the Florida Senate and was signed into law by Governor Charlie Crist.²⁴

Under the "Guns-At-Work" law, employers may not: prohibit an employee from possessing a legally owned firearm locked inside his car in the employer's parking lot;²⁵ ask an employee whether he has a gun

17. H.R.B. 1417, 109th Leg., Reg. Sess. (Fla. 2007).

18. Julia Neyman, *House Backs Business Groups on Issue of Guns in Employee Cars*, S. FLA. BUS. J., Apr. 23, 2007, at 12.

19. *Id.*

20. Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1.

21. See Neyman, *supra* note 18.

22. *Id.*

23. See, e.g., Letter from Marion P. Hammer, USF Executive Dir., Unified Sportsmen of Fla., to USF & NRA Members and Friends (Feb. 28, 2008), available at <http://www.nraila.org/Legislation/Read.aspx?ID=3580>.

24. FLA. STAT. § 790.251 (2009) (signed into law).

25. *Id.* § 790.251(4)(a).

inside his car in the parking lot;²⁶ search a car in the parking lot for a gun;²⁷ refuse to allow an employee to enter a parking lot because a gun is inside his car;²⁸ take any action against an employee based upon statements made by another party concerning possession of a gun inside an employee's car in the parking lot;²⁹ condition employment on an employee having or not having a concealed gun permit³⁰ or on the basis of an employee agreeing not to store a gun in his car in the parking lot;³¹ and an employer may not terminate an employee or discriminate against an employee for possessing a legally owned gun, so long as the gun is not revealed on company property other than for lawful defense purposes.³² Recognizing the potential danger that guns may pose in the workplace, and that injuries or death may occur as a result of this law, the Florida Legislature provided employers with immunity from civil suits that are "based on actions or inactions taken in compliance with [the "Guns-At-Work" law]."³³ Despite the grant of immunity, the "Guns-At-Work" law remains controversial and has been met with much opposition.

Opposition to Florida's "Guns-At-Work" Law:

Providing a safe work environment for employees is of primary importance to many employers. The "Guns-At-Work" law is viewed by many employers as a threat to maintaining a safe work environment.³⁴ Employers fear that the presence of firearms on company property could increase incidents of workplace violence. Although employers are still able to prohibit employees from bringing guns inside the workplace, the fear remains that even having a gun in the company parking lot is too close for comfort. It is far easier for workplace violence to occur at the hands of a disgruntled employee who only has to step outside and walk a short distance to retrieve his stored gun from his car than at the hands of the same disgruntled employee who has to go home to retrieve that same weapon. Banning guns from the company parking lot allows for a so-called "cooling off" period,³⁵ which provides a disgruntled employee

26. *Id.* § 790.251(4)(b).

27. *Id.*

28. *Id.* § 790.251(4)(d).

29. *Id.* § 790.251(4)(b).

30. *Id.* § 790.251(4)(c)(1).

31. *Id.* § 790.251(4)(c)(2).

32. *Id.* § 790.251(4)(e).

33. *Id.* § 790.251(5)(b).

34. *See, e.g.,* Schoultz, *supra* note 4 (quoting Attorney Allan H. Weitzman as saying: "People are going to get hurt.").

35. *See, e.g.,* Niel D. Perry, *Employer Firearm Policies: Parking Lots, State Laws, OSHA,*

with time to reflect on the situation, rather than act hastily and in the heat of the moment.

Recent statistics show that these concerns are well-founded. A 2005 study conducted by the Bureau of Labor Statistics indicates that 5.3% of all business establishments were confronted with an incident of workplace violence in the prior 12-month period.³⁶ This amounts to nearly 400,000 incidents of workplace violence.³⁷ Of the work-related homicides that occurred in 2003, the vast majority were due to gun violence.³⁸ The Brady Campaign to Prevent Gun Violence reports that in 2005, 60% of major employers experienced a disgruntled employee threatening a member of senior management with violence.³⁹ Additionally, guns are responsible for a staggering 77% of the homicides that take place in the workplace.⁴⁰ A recent study shows that a workplace that does not prohibit guns was almost seven times more likely to experience a homicide than a workplace that bans guns.⁴¹ Furthermore, workplace violence is more prevalent when downsizing or layoffs are occurring.⁴² During times of economic uncertainty, like the current downward economic situation this country is facing, employers have even more reason to implement policies banning guns entirely from all company property.

In light of these statistics, the "Guns-At-Work" law leaves employers more vulnerable and open to attack by disgruntled employees. This is true even if all employees have to go through a metal detector before entering the inside of the workplace because the new law prevents the employer from searching cars for guns or from asking employees if they have guns stored in their vehicles.⁴³ This increases the likelihood that guns in employee vehicles will go undetected. The Florida Legislature

and the Second Amendment, MONDAQ, July 23, 2008, <http://www.mondaq.com/article.asp?articleid=63822>.

36. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, SURVEY OF WORKPLACE VIOLENCE PREVENTION tbl. 1, (2005) available at <http://www.bls.gov/iif/oshwc/osnr0026.pdf>.

37. Five-and-three-tenths percent of the 7,361,560 total business establishments constitutes 390,162.68 incidents. *See id.*

38. "[Sixty-one percent] of female [workplace] homicide victims and 81% of male [workplace] homicide victims were killed by guns." Anne B. Hoskins, *Women Workers, Occupational Safety and Health: Occupational Injuries, Illnesses, and Fatalities Among Women*, MONTHLY LAB. REV., Oct. 2005, at 32, available at http://www.bls.gov/opub/mlr/2005/10/art4_full.pdf.

39. Brady Campaign To Prevent Gun Violence, *Guns At Work? An NRA Campaign Threatens Workplace Safety*, <http://www.bradiycampaign.org/action/workplace/> (last visited Nov. 14, 2009).

40. *Id.*

41. Dana Loomis et al., *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, AM. J. PUB. HEALTH, May 2005, at 830.

42. Eilene Zimmerman, *Danger Signals at Work, and How To Handle Them*, N.Y. TIMES, Apr. 15, 2007, at 18.

43. FLA. STAT. § 790.251(4)(b) (2009).

intended for legally owned guns to go undetected so that lawful gun owners will not be retaliated against;⁴⁴ however, an illegally owned gun or any other dangerous weapon will now be more likely to go undetected as well. Therefore, as enacted, the law leaves employers with virtually no power to prevent a violent episode from taking place in the company parking lot, and at the same time increases the overall likelihood of a violent occurrence taking place inside the workplace.

Because of the potential for an occurrence of workplace violence, employers view the “Guns-At-Work” law as a hindrance to their obligations to maintain a safe workplace under the General Duty Clause of the OSH Act. The General Duty Clause requires that “[e]ach employer—shall 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.”⁴⁵ Given the well-known statistics on workplace violence, employers are, in essence, caught in a catch-22 situation—they recognize that workplace violence is a hazard likely to cause death or serious harm—and yet under the “Guns-At-Work” law they are prohibited from completely banning guns, which cause the vast majority of workplace homicides. The OSH Act is addressed in greater detail in Parts III and IV of this article.

The “Guns-At-Work” law has also sparked much opposition because employers view the law as an infringement of their property rights.⁴⁶ The law interferes with an employer’s right to exclude unwanted persons and objects from its property.⁴⁷ Ironically, the *Individual Personal Private Protection Act of 2007*, which failed in the Florida House a year before the “Guns-At-Work” law was enacted, was introduced as a means of protecting property rights.⁴⁸ Representative Dennis Baxley, who sponsored the 2007 bill, explained that he primarily sponsored the bill in order to put an end to the practice of employers searching employee vehicles because such a practice “goes over the line by crossing into *private property*.”⁴⁹ Representative Baxley’s remark demonstrates that even those who support “forced-entry” laws⁵⁰ recognize

44. See, e.g., *id.* § 790.251(4)(e).

45. 29 U.S.C. § 654(a)(1) (2006).

46. See, e.g., *Fla. Retail Fed’n, Inc. v. Attorney Gen. of Fla.*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

47. See e.g., *id.*

48. See Neyman, *supra* note 18.

49. *Id.* (emphasis added).

50. The American Bar Association explains that “[t]he legislation is characterized by some as ‘forced entry’ legislation because it seeks to override the traditional right of a private property owner to exclude whomever he or she chooses from his or her property and determine the terms on which others may enter on or use that property.” SPECIAL COMM. ON GUN VIOLENCE, AM. BAR

the importance of private property and seek to protect such interests.

Another reason for opposition to the "Guns-At-Work" law is that the law is in essence adding gun owners as a new class of protected employees.⁵¹ An employer may not condition employment upon an employee possessing a concealed gun license,⁵² or upon an employee agreeing not to store a gun in his car.⁵³ Additionally, the employer may not terminate the employee or discriminate on the basis of the employee "exercising his or her constitutional right to keep and bear arms or for exercising the right of self-defense."⁵⁴ Adding gun owners as a protected class trivializes the importance of the other protected classes of employees.⁵⁵ Furthermore, the "Guns-At-Work" law interferes with "at-will" employment in Florida. Because Florida is an "at-will" employment state, generally, an employer may fire an employee for virtually any reason or no reason at all.⁵⁶ However, the "Guns-At-Work" law strictly forbids an employer from terminating an employee because he keeps a lawfully owned gun in his car.⁵⁷

Not only are employers likely to have the added burden of consulting with legal counsel in order to understand the new law to make sure they do not violate it, but employers also potentially face costly litigation. An employer who violates these prohibitions is subject to the Attorney General of Florida bringing a civil or administrative action against him.⁵⁸ In such a case, the employer faces the possibility of paying damages and civil penalties.⁵⁹ Additionally, the "Guns-At-Work" law also provides the aggrieved employee with the right to bring a civil suit against the employer.⁶⁰ If the employee's lawsuit is successful, the employer has to pay the "reasonable personal costs and losses suffered by the aggrieved person as a result of the violation of rights under this act."⁶¹ Lastly, it is quite telling that the Florida Legislature specifically provides a civil remedy to an aggrieved gun owner, while it specifically

ASS'N, REPORT TO THE HOUSE OF DELEGATES 2 (2007), available at <http://www.abanet.org/yld/midyear07/docs/107.pdf>.

51. See, e.g., Schoultz, *supra* note 4.

52. FLA. STAT. § 790.251(4)(c)(1) (2009).

53. *Id.* § 790.251(4)(c)(2).

54. *Id.* § 790.251(4)(e).

55. See, e.g., Schoultz, *supra* note 4 (quoting Attorney Allan Weitzman as saying: "We're now equating people having guns with groups protected for their sex, race, or religion.>").

56. See, e.g., *Walton v. Health Care Dist. of Palm Beach County*, 862 So. 2d 852, 855 (Fla. Dist. Ct. App. 2003) ("Under Florida law, if [an employee] is indeed an 'at will' employee, then he can be terminated for any or no reason.>").

57. FLA. STAT. § 790.251(4)(c)(2)(e).

58. *Id.* § 790.251(6).

59. *Id.*

60. *Id.*

61. *Id.*

denies a remedy to an employee who is injured or killed due to the law, by providing the employer with immunity from civil suits. Perhaps, therefore, another reason for the opposition is that the “Guns-At-Work” law places a higher value on the “rights” of a gun owner than a human life.

III. FLORIDA RETAIL FEDERATION, INC. v. ATTORNEY GENERAL OF FLORIDA

A constitutional challenge was brought in the United States District Court for the Northern District of Florida seeking an injunction to prevent the “Guns-At-Work” law from becoming effective.⁶² The basis of the challenge was that the law unconstitutionally interferes with private property rights by violating the Takings Clause⁶³ and the Due Process Clause.⁶⁴ The plaintiffs also argued that the “Guns-At-Work” law conflicts with the standards mandated by the OSH Act.⁶⁵ Therefore, the plaintiffs argued that the law is pre-empted by the OSH Act’s General Duty Clause, since employers have a federal obligation to maintain a workplace free from recognized hazards,⁶⁶ and the “Guns-At-Work” law interferes with such obligation.⁶⁷ Ultimately, the court upheld the majority of the “Guns-At-Work” law.⁶⁸ The court found that the law as it relates to employees storing guns in cars in a business’s parking lot was constitutional.⁶⁹ The court, however, did issue an injunction against the portion of the law pertaining to customers keeping firearms in a business’s parking lot.⁷⁰ No appeal has been filed with the Eleventh Circuit Court of Appeals.

In addressing the plaintiffs’ argument that the “Guns-At-Work” law constituted an unconstitutional Taking, the court determined that the only alteration to the employer’s property rights that the “Guns-At-Work” law creates is if an employer provides parking for its employees, it may not ban legally owned guns from being stored in employee vehi-

62. Fla. Retail Fed’n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

63. *Id.* at 1289–90. This article will provide a basic overview of the district court’s analysis of the Takings Clause argument, and critique the court’s decision only from a policy perspective, and not from a constitutional standpoint. For an in depth constitutional analysis on how a similar gun law should be held unconstitutional under the Takings Clause, see Stefanie L. Steines, Note, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 IOWA L. REV. 1171 (2008).

64. Fla. Retail, 576 F. Supp. 2d at 1290.

65. *Id.* at 1297–98.

66. See 29 U.S.C. § 654(a)(1) (2006).

67. Fla. Retail, 576 F. Supp. 2d at 1298.

68. See *id.* at 1300.

69. *Id.*

70. *Id.*

cles.⁷¹ However, the law does not force employers to provide parking at all, and the employer can choose not to do so.⁷² The court, therefore, found that no Taking had occurred.⁷³ Although the *Florida Retail* court suggests that an employer may simply stop providing parking to its employees entirely to circumvent the "Guns-At-Work" law, such a response from employers is highly unlikely and impractical. This is especially true when considering that the law, as enacted, not only applied to guns in employee cars, but also to guns in customer cars. Not providing parking to employees may be a severe inconvenience; however, failing to provide parking for customers would very likely result in a disastrous financial impact on a business. Therefore, an employer does not realistically have the choice of simply terminating its practice of providing parking. The court, however, ultimately determined that the law does not constitute an unconstitutional Taking because the law "addresses . . . only the storage of guns by individuals who would be on the property anyway."⁷⁴

The court then addressed the issue of whether the "Guns-At-Work" law violates the substantive portion of the Due Process Clause because "without sufficient justification, the statute compels property owners to make their property available for purposes they do not support."⁷⁵ Conflicting evidence was presented to the court regarding the "real-world effect" of the law.⁷⁶ The plaintiffs contended that having a gun stored in a car in the parking lot would

invariably increase the risk of an unlawful or accidental shooting with no offsetting benefit, because . . . the gun will be available to an irate worker who may use it improperly but will never be available to an honest worker in time to be used defensively to successfully avert a crime.⁷⁷

The Attorney General of Florida argued the opposite, insisting that "a gun in the parking lot will have great benefits in averting crime and will never lead to the gun's improper use."⁷⁸ The court eloquently noted that "[c]ommon sense and human experience suggest the truth lies between

71. *Id.* at 1289.

72. *Id.*

73. *Id.* at 1290 ("The guns-at-work statute . . . seeks to make no change in the number of people using an owner's property, the portions of the property they may use, or their purposes or activities while there; the statute addresses, instead, only the storage of guns by individuals who would be on the property anyway.").

74. *Id.*

75. *Id.* at 1284.

76. *Id.* at 1290.

77. *Id.*

78. *Id.*

these extremes.”⁷⁹ Using the rational basis standard of judicial scrutiny, the court then found that a reasonable legislature could

conclude that allowing workers with concealed-carry permits to keep guns in business parking lots would have either a small net positive or small net negative effect on overall public safety. So a state legislature might reasonably choose to give such a worker a right to keep a gun in a vehicle in the parking lot.⁸⁰

Therefore, no violation of the substantive component of the Due Process Clause was found.⁸¹

Although common sense may dictate that it is far more likely for guns in the workplace to increase the risk of violence rather than decrease the risk to public safety by using such guns for self-defense, in applying the rational basis level of scrutiny, the safety argument advanced by the Attorney General of Florida is taken at face value,⁸² and thus constitutes a legitimate government purpose and satisfies the rational basis standard.⁸³ This article, therefore, agrees that the “Guns-At-Work” law does not violate the Due Process Clause.

Finally, the *Florida Retail* court also rejected the argument that the law conflicts with the General Duty Clause of the OSH Act,⁸⁴ and therefore found that the law was not pre-empted under the Supremacy Clause of the Constitution.⁸⁵ In rejecting the pre-emption claim, the court stated that it had two independent reasons for doing so.⁸⁶ First, the court found that OSHA has not promulgated any standards relating to guns in the employer’s parking lot; therefore, pursuant to section 667(a) of the OSH Act,⁸⁷ a state regulation in this area cannot be preempted by the OSH Act.⁸⁸ Second, the court determined that the General Duty Clause simply

79. *Id.*

80. *Id.* at 1291.

81. *Id.*

82. *See, e.g.,* *Haves v. City of Miami*, 52 F.3d 918, 923–24 (11th Cir. 1995) (recognizing the leniency of the rational basis standard, in favor of the state).

83. *See, e.g.,* *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1320 (N.D. Okla. 2007), *rev’d sub nom. Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) (“[T]here is no question that promoting public safety, deterring crime, and protecting the community are legitimate government purposes.”).

84. *Fla. Retail*, 576 F. Supp. 2d at 1298.

85. U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.”).

86. *Fla. Retail*, 576 F. Supp. 2d at 1298.

87. 29 U.S.C. § 667(a) (2006) (“Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.”).

88. *Fla. Retail*, 576 F. Supp. 2d at 1298 (“Because no standard is in effect . . . on guns in parking lots, [OSHA] does not prevent [the Florida Legislature] from ‘asserting jurisdiction under

does not require that an employer *must* ban guns from the workplace.⁸⁹ As discussed in the forthcoming analysis, the court's reasoning is flawed.

A. *An Analysis of the Florida Retail Court's First Reason as to Why the "Guns-At-Work" Law Is Not Preempted by the General Duty Clause:*

The *Florida Retail* court first emphasized that OSHA has not promulgated a standard on the specific issue of banning guns in the workplace, and therefore, the OSH Act "does not prevent a state agency (this includes the Florida Legislature and the Attorney General) from 'asserting jurisdiction under State law over any occupational safety or health issue' relating to guns in parking lots."⁹⁰ In so holding, the court relied on section 667(a) of the OSH Act which reads: "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title."⁹¹ In essence, the court interpreted section 667(a) as indicating that the General Duty Clause can never be preemptive. This is because the General Duty Clause does not constitute a promulgated standard,⁹² but rather, it is a catch-all provision, and therefore, according to the court's interpretation, in the absence of a promulgated standard, a state occupational safety and health law can *never* be preempted by the OSH Act. The court read section 667(a) of the OSH Act as a "clear statement by Congress that the OSH Act does not preempt state regulation in this area [workplace violence]."⁹³ Interestingly, the court did not expressly say that the General Duty Clause can never preempt a state regulation; however, in actuality, this is the implication of the court's holding. However, the court's reasoning is overbroad and flawed. The court failed to con-

State law over any occupational safety or health issue' relating to guns in parking lots. This is a clear statement by Congress that the OSH Act does not preempt state regulation in this area." (quoting 29 U.S.C. § 667(a) (2006)).

89. *Id.* at 1298–99 ("The OSH Act is not a general charter for courts to protect worker safety. The Act instead sets forth explicit standards that courts must enforce. One of those is the general duty clause The plaintiffs say this means a business *must* ban guns from vehicles in the parking lot. The contention proves way too much. 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 By enacting the general duty clause, Congress did not weigh in on this issue." (emphasis added)).

90. *Id.* at 1298 (citing 29 U.S.C. § 667(a)).

91. 29 U.S.C. § 667(a).

92. In addition to the General Duty Clause, the OSH Act also requires that an employer "comply with occupational safety and health standards promulgated under [the OSH Act]." 29 U.S.C. § 654(a)(2).

93. *Fla. Retail*, 576 F. Supp. 2d at 1298.

sider the purpose of the General Duty Clause and failed to use relevant case law on this subject as guidance in its analysis.

1. THE PURPOSE OF THE GENERAL DUTY CLAUSE

The General Duty Clause is distinct from the promulgated standards in the OSH Act. Using the *Florida Retail* court's reasoning, not only would the General Duty Clause not preempt state regulation in the area of workplace violence, but under such reasoning, the General Duty Clause could also never preempt any area of state regulation in which a specific federal standard has not been promulgated. The implications of this holding are far reaching and go well beyond the scope of the court's inquiry.

As a way of background, the obligations of the General Duty Clause are entirely separate from those standards specifically promulgated in the OSH Act. The General Duty Clause is an independent mandate that employers must comply with, *in addition to* any formal standards promulgated in the OSH Act.⁹⁴ Furthermore, the purpose of the General Duty Clause is no less important than the purposes behind the promulgated standards. Therefore, it would make little sense that promulgated standards would have such strong preemptive effects,⁹⁵ whereas the General Duty Clause would not have any preemptive power at all. As evidence of the importance of the General Duty Clause, the Senate Report on the OSH Act specifically explains that the General Duty Clause was enacted because:

The Committee recognizes that precise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which could result in such a misfortune. Therefore, to cover such circumstances the committee has included a requirement to the effect that employers are to furnish employment and places of employment which are free from recognized hazards to the health and safety of their employees.⁹⁶

The Senate Report makes clear that the General Duty Clause was enacted to protect employees from being "killed or seriously injured on

94. See *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1324 (N.D. Okla. 2007), *rev'd sub nom. Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) ("The 'general duty' clause is a stand-alone obligation with which employers must comply. It is in addition to the 'specific duty' clause in § 654(a)(2), which requires compliance with the numerous OSH Act regulations promulgated to prevent specific workplace hazards.").

95. See generally *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (holding that any state occupational safety law that is regulating in an area in which a federal standard has been promulgated in the OSH Act is automatically pre-empted).

96. S. REP. No. 91-1282, at 5185-86 (1970).

the job” just as the specific standards are intended to provide such protection.⁹⁷ The only difference is that the standards reflect specific situations that Congress perceived as potentially harmful, whereas, in enacting the General Duty Clause no specific situation was contemplated by Congress. Nonetheless, Congress explicitly stated its intention to provide the same protection for employees in those situations where a “recognized hazard”⁹⁸ exists in the workplace.⁹⁹ Although a state may be free to regulate in areas in which no standard has been promulgated,¹⁰⁰ it is a stretch for the court to assume that this indicates that preemption of such state regulations is never possible.

Furthermore, under the reasoning of the *Florida Retail* court, the General Duty Clause could never preempt any state law because there can never be a clear expression from Congress of its intention to preempt a state law as Congress admittedly did not have any particular situation in mind.¹⁰¹ However, the court failed to understand that this is precisely the point of the General Duty Clause—to cover all potential recognized hazards not specifically contemplated by Congress.¹⁰² The General Duty Clause is an important element of the OSH Act and was intended to be a catch-all provision for those areas in which a specific standard had not been promulgated, not because it is any less important, but simply because it is impossible for Congress to contemplate an exhaustive list of every regulation in the realm of occupational safety and health.

2. SECTION 667(A)'S PRESERVATION OF STATE JURISDICTION

There is also no precedent for the notion that the General Duty Clause is not capable of preempting a state law. The Supreme Court has never specifically ruled on the preemptive effects of the General Duty Clause. In *Gade v. National Solid Wastes Management Association*,¹⁰³ in a plurality decision, the Supreme Court determined that where a specific federal standard has been promulgated, the OSH Act impliedly preempts any state regulation in the area of occupational health and safety even if the state regulation is not conflicting with the standard and even if the state regulation is stricter and provides additional protection

97. *Id.* at 5185.

98. 29 U.S.C. § 654(a).

99. *See* S. REP. No. 91-1282, at 5185–86.

100. 29 U.S.C. § 667(a).

101. *See* S. REP. No. 91-1282, at 5185 (“The Committee recognizes that precise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which could result in such a misfortune.”).

102. *See id.* at 5185–86.

103. 505 U.S. 88 (1992).

to workers.¹⁰⁴ The controversy in *Gade* involved two licensing acts enacted in Illinois, in which the stated purposes were to “‘promote job safety’” and “‘to protect life, limb and property,’” respectively.¹⁰⁵ The licensing acts constituted “dual impact” statutes, in which the laws were intended to “protect both workers and the general public.”¹⁰⁶ OSHA had already promulgated standards for the “protection of employees engaged in hazardous waste operations,” which was the same area in which the Illinois licensing acts had set regulations.¹⁰⁷ The issue presented in *Gade* was whether the Illinois “dual impact” statutes were preempted by the OSH Act because OSHA had already promulgated standards in the area of hazardous waste operations.¹⁰⁸

The *Gade* Court found that state occupational safety laws that attempt to regulate in an area in which a federal standard has been promulgated are impliedly preempted because such laws conflict with the “full purposes and objectives” of the OSH Act.¹⁰⁹ Only if a state plan has been submitted to and approved by OSHA, pursuant to section 667(b) of the Act, would a state be able to regulate in an area in which a standard has been promulgated by OSHA.¹¹⁰ If no such plan has been approved, then such a regulation is automatically preempted, and no further inquiry is necessary.¹¹¹ Such is true even for “dual impact” regulations—laws which are not exclusively for the purpose of regulating occupational health and safety, but rather those laws that serve other purposes as well.¹¹² The *Gade* Court reasoned that section 667(a)’s “preservation of state authority in the absence of a federal standard presupposes a background preemption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect.”¹¹³ However, the *Gade* Court in no way indicated that its analysis of section 667(a) expressly meant that the General Duty Clause can never pre-empt a state regulation. There is simply no discussion, nor

104. *See id.* at 98–99, 102–03 (opinion of O’Connor, J.).

105. *Id.* at 91 (citing Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, 225 ILL. COMP. STAT. 220/1 to /17 (1989); Hazardous Waste Laborers Licensing Act, 225 ILL. COMP. STAT. 221/1 to /15 (1989)).

106. *Id.*

107. *Id.* at 92.

108. *Id.* at 91.

109. *Id.* at 98–99 (opinion of O’Connor, J.).

110. *Id.* at 102 (“[T]he 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 [section 667(b)].” (emphasis added)).

111. *See id.*

112. *Id.* at 106 (majority opinion) (“Our precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one.”).

113. *Id.* at 100 (opinion of O’Connor, J.).

even mention, of the General Duty Clause in the *Gade* opinion. The opinion written by Justice O'Connor did seem to acknowledge that section 667(a) does "save" a state law in an area in which a federal standard is not in effect from *automatic* preemption.¹¹⁴ This is in contrast to those areas in which a federal standard has been promulgated, which results in the automatic preemption of any state regulation in that area, even in the absence of any actual conflict between the federal and state laws.¹¹⁵

Although section 667(a) allows for states to regulate where no federal standard is in effect, it is quite a leap to interpret this as precluding any possibility of preemption of such a state regulation. Ordinary principles of preemption should still apply if there is an actual conflict between federal and state law, where compliance with both is impossible.¹¹⁶ This very principle is precisely what the Supreme Court discussed in *Sprietsma v. Mercury Marine*.¹¹⁷ *Sprietsma* involved a suit against Mercury Marine, which had manufactured the motor of the propeller that had killed the petitioner's spouse in a boating accident.¹¹⁸ The petitioner contended that the motor was "unreasonably dangerous."¹¹⁹ The lower courts had found that the suit was preempted by the Federal Boat Safety Act, and therefore, dismissed the complaint.¹²⁰ The Supreme Court, however, reversed and found that the Federal Boat Safety Act did not preempt the state common-law tort suit brought by the petitioner.¹²¹ Despite the fact that the Federal Boat Safety Act contained an express preemption clause, preempting state law in the same area, the Supreme Court nonetheless concluded that state common-law tort causes of action were not expressly preempted.¹²² Significantly, however, the Supreme Court acknowledged that "Congress' inclusion of an express pre-emption clause 'does *not* bar the ordinary working of conflict pre-emption principles,' that find implied pre-emption 'where it

114. *See id.*

115. *See id.* at 103 ("We cannot accept petitioner's argument that the OSH Act does not preempt nonconflicting state laws.").

116. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 507 (1996) (J. Breyer, concurring) ("Ordinary principles of 'conflict' and 'field' pre-emption. . . . make clear that a federal requirement pre-empts a state requirement if (1) the state requirement actually conflicts with the federal requirement—either because compliance with both is impossible, or because the state requirement 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' or (2) the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" (citations omitted)).

117. *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

118. *Id.* at 54–55.

119. *Id.* at 55.

120. *Id.*

121. *Id.* at 70.

122. *Id.* at 62–64.

is impossible for a private party to comply with both state and federal requirements.’”¹²³ District courts have interpreted this statement from the Supreme Court as indicating that “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. And this inference is appropriate even ‘in light of the presumption against pre-emption of state police power regulations.’”¹²⁴ The significance of *Sprietsma* for the purposes of this article is that section 667(a)’s express preservation of state jurisdiction should not undermine the regular workings of the principles of preemption, and therefore, implied preemption should still remain viable in the case of a conflict between state and federal law.

Further support for the proposition that the General Duty Clause is capable of preempting a state law is demonstrated by the First Circuit’s decision in *Puffer’s Hardware, Inc. v. Donovan*.¹²⁵ In *Puffer’s*, an employer was cited by OSHA under the General Duty Clause after an employee’s death was caused by the employer’s elevator, which was found to be a “recognized hazard.”¹²⁶ The First Circuit rejected the employer’s contention that because it had complied with the applicable state law, it could not be found to have violated the General Duty Clause.¹²⁷ The First Circuit explained that although the state statute “exempts certain elevators from complying with state regulations, there is no reason why an employer whose elevator falls within the state exemption should not comply with the requirements of federal law [the General Duty Clause].”¹²⁸ The court reasoned that

[t]here is nothing in either the language of the [OSH] Act or its history that indicates that Congress intended compliance with the minimum standards of applicable state law to create an exemption from the general duty clause. Absent such evidence, the inescapable conclusion is that Congress did not intend state law to create such an exemption [from the General Duty Clause].¹²⁹

Another district court facing a similar challenge as the one before the *Florida Retail* court, has described the *Puffer’s* case as “addressing whether a state law was preempted by the OSH Act’s general duty

123. *Id.* at 65 (citations omitted).

124. *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 678–79 (N.D. Ohio 2005) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)).

125. *Puffer’s Hardware, Inc. v. Donovan*, 742 F.2d 12 (1st Cir. 1984).

126. *See id.* at 13–14.

127. *Id.* at 16–17.

128. *Id.* at 16.

129. *Id.* at 16–17.

clause."¹³⁰ That district court further explained that the *Puffer's* court "first analyzed whether the language of [section] 667(a) functioned to preempt the state law and then proceeded to analyze whether the state law 'actually conflicted' with the general duty clause or the overall federal objectives of the OSH Act."¹³¹

The *Puffer's* court had initially explained the ways in which a state law can be preempted, writing that:

If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent that it actually conflicts with federal law, that is when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.¹³²

Applying this concept to section 667(a), although Congress has not "entirely displaced state regulation"¹³³ and has provided the states with the power to regulate when a federal standard is not in effect; nonetheless, ordinary preemption principles should apply, and a state law that is in actual conflict with the General Duty Clause should still be subject to preemption.

Significantly, the First Circuit understood that "[t]here is nothing in either the language of [the OSH] Act or its history that indicates that Congress intended compliance with the minimum standards of applicable state law to create an exemption from the general duty clause."¹³⁴ Although the *Puffer's* court ultimately found that the state regulation in question was not preempted because it did not actually conflict with the OSH Act;¹³⁵ nevertheless, the case demonstrates that the General Duty Clause could have preempted a state law if the two laws were in actual conflict. In fact, the administrative law judge whose decision had been appealed, had found that the General Duty Clause did preempt the state regulation.¹³⁶

Consistent with this article's interpretation, the First Circuit understood section 667(a) as preserving state jurisdiction where no federal standard exists; however, the court nonetheless concluded that:

[T]here is no question that [section 667(a)] was not intended to create an exemption from the general duty clause for compliance with mini-

130. *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1327 (N.D. Okla. 2007), *rev'd sub nom. Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

131. *Id.* (citations omitted).

132. *Puffer's*, 742 F.2d at 16.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 14–15.

num state standards. The language of the statute certainly does not compel such a result. Indeed, since the state remains free to apply its standards, it would strain the statutory language to regard enforcing a federal statute that has more stringent requirements than applicable state law as preventing the state from asserting jurisdiction. Moreover, we cannot imagine that Congress would have created such a major exception from the general duty clause without a single word in the legislative history indicating that this was its intent.¹³⁷

Just as the First Circuit concluded that “compliance with applicable state law does not create an exemption from the general duty clause,”¹³⁸ so too, compliance with the state “Guns-At-Work” law does not mean that an employer no longer has any obligations under the General Duty Clause. This article, therefore, argues that because compliance with the Florida “Guns-At-Work” law could conflict with an employer’s obligations under the General Duty Clause, it is capable of being preempted by the General Duty Clause. It is in that situation that the obligations under the General Duty Clause would trump state law.

In sum, a logical interpretation of section 667(a) leads to the conclusion that where no standard has been promulgated, the OSH Act allows states to “assert jurisdiction;”¹³⁹ however, that simply means that in contrast to those areas where a standard is in effect, the state law is not *automatically* preempted. However, a state occupational safety law or even a “dual impact” law¹⁴⁰ is still capable of being preempted under ordinary principles of preemption, if the state law is in actual conflict with the federal law. Such a conclusion is supported by the Supreme Court’s decision in *Gade* where it wrote: “But under the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’”¹⁴¹

3. THE PRESUMPTION AGAINST PREEMPTION DOES NOT PRECLUDE THE GENERAL DUTY CLAUSE FROM PREEMPTING THE “GUNS-AT-WORK” LAW:

In *Gade*, Justice Kennedy had concurred with the judgment, but disagreed with the type of preemption.¹⁴² Whereas the opinion written by Justice O’Connor classified the case as one of implied preemption,

137. *Id.* at 17 n.8.

138. *Id.* at 17.

139. 29 U.S.C. § 667(a) (2006).

140. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 106 (1992) (“Our precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one.”).

141. *Id.* at 108 (citations omitted).

142. *Id.* at 109.

Justice Kennedy considered it a case of express preemption.¹⁴³ Justice Kennedy felt more comfortable with an express preemption classification because “[a] finding of express pre-emption in this case is not contrary to our longstanding rule that we will not infer pre-emption of the States’ historic police powers absent a clear statement of intent by Congress.”¹⁴⁴ However, the very fact that a plurality of the court was willing to find preemption under the category of implied pre-emption demonstrates that the presumption against preemption should not preclude a finding that the General Duty Clause is capable of preempting the “Guns-At-Work” law. The presumption against preemption is the notion that when presented with a preemption challenge, a court will initially assume that “the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.”¹⁴⁵ However, the fact that the *Gade* Court used implied preemption to preempt areas traditionally regulated by the states—safety and health¹⁴⁶—illustrates that even without an explicit statement from Congress, the OSH Act has pre-emptive powers. This conclusion severely undermines the *Florida Retail* court’s brief analysis of preemption, particularly as it relates to the OSH Act.

Because a plurality of the Supreme Court found that the standards promulgated under the OSH Act impliedly preempt *all* state occupational safety and health regulations, areas that are traditionally regulated by the states, the presumption against preemption should not preclude the General Duty Clause from preempting the “Guns-At-Work” law. Accordingly, this article argues that despite the *Florida Retail* court’s decision, the General Duty Clause is capable of preempting a state law, and thus the “Guns-At-Work” law remains susceptible to further challenges under the Supremacy Clause. This is true even though safety and health are areas traditionally regulated by the states. As the Supreme Court long ago stated: “[A]cts of the State Legislatures . . . though enacted in the execution of acknowledged State powers, [that] interfere with, or are contrary to the laws of Congress . . . must yield.”¹⁴⁷ The Supreme Court also has acknowledged that “[i]t is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States

143. *Id.*

144. *Id.* at 111–12 (Kennedy, J., concurring).

145. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

146. *See Gade*, 505 U.S. at 96. (“Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards . . . and thereby brought the Federal Government into a field that traditionally had been occupied by the States.”).

147. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

undisturbed *except as the state and federal regulations collide*.¹⁴⁸ Such an acknowledgment from the Supreme Court demonstrates that even if the states are not precluded from enacting regulations, this certainly does not mean that in the event of an actual conflict between state and federal law, the state regulation cannot be preempted. Furthermore, other courts have applied this very concept. The District Court for the Northern District of Ohio has finely articulated that “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. And this inference is appropriate even ‘in light of the presumption against the pre-emption of state police power regulations.’”¹⁴⁹

In conclusion, while safety is traditionally in the realm of state regulation, the presumption against preemption did not stop the Supreme Court in *Gade* from finding that where a federal standard has been promulgated, the OSH Act preempts all state occupational safety and health laws,¹⁵⁰ including dual impact laws.¹⁵¹ Thus, the presumption against preemption should not be a bar to finding that the General Duty Clause is capable of preempting the “Guns-At-Work” law.

4. UNDER THE OSH ACT, FEDERAL JURISDICTION IS EXCLUSIVE, WHEREAS STATE JURISDICTION IS NOT EXCLUSIVE:

Finally, the *Gade* Court enunciated that within the OSH Act, there is an “assumption of exclusive federal jurisdiction in the absence of an approved state plan.”¹⁵² The implications of this statement are clear—where a federal standard is in effect and a state plan has not been approved by OSHA, federal jurisdiction is *exclusive*. Therefore, a state is not free to implement its own regulations in the same area, even if such a regulation does not conflict with the federal standard,¹⁵³ and even if the regulation serves another purpose in addition to being an occupational safety regulation.¹⁵⁴ On the other hand, if there is no promulgated standard, then the states may regulate in that area; however, this is not to say that state jurisdiction is *exclusive* in the sense that a federal law could never preempt that state regulation in the event of a conflict. Unlike the assumption of *exclusive* federal jurisdiction, where a standard

148. *Rice*, 331 U.S. at 230–31 (emphasis added).

149. *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 678–79 (N.D. Ohio 2005) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)).

150. *See Gade*, 505 U.S. at 98–99 (opinion of O’Connor, J.).

151. *See id.* at 106 (majority opinion).

152. *Id.* at 101 (opinion of O’Connor, J.).

153. *See id.* at 98–99, 102–03 (opinion of O’Connor, J.).

154. *See id.* at 106 (majority opinion).

has been promulgated, the *Gade* Court did not refer to state jurisdiction as being *exclusive* when a federal standard is not in effect. Thus, *exclusivity* of state jurisdiction should not be read into section 667(a), and should not be assumed, and thus the application of ordinary principles of preemption should not be precluded. Accordingly, the "Guns-At-Work" law should be subject to preemption by the General Duty Clause if the two laws are in actual conflict with each other.

5. CONCLUSION: DESPITE THE *FLORIDA RETAIL* COURT'S REASONING, THE GENERAL DUTY CLAUSE IS NOT PRECLUDED FROM PREEMPTING A CONFLICTING STATE LAW

Although the *Gade* Court was not ruling on the issue of preemption as it relates to the General Duty Clause, the Court certainly did not hold that the General Duty Clause is not capable of preempting a state law, let alone a conflicting state law. Unlike the interpretation of the *Florida Retail* court,¹⁵⁵ there is no finding by the Supreme Court that preemption of a state law by the General Duty Clause is precluded. The implications of the *Florida Retail* court's first reason for not finding preemption are far reaching and would entirely eliminate the possibility that the General Duty Clause could ever preempt a state law. The General Duty Clause by definition is intended to cover those areas in which Congress has not contemplated a precise standard.¹⁵⁶ It is not practical for Congress to contemplate every single scenario in which a worker's health and safety could be threatened. In fact, Congress did not attempt to contemplate every situation, and instead chose to enact the General Duty Clause so that all employers have a general obligation to provide a workplace "free from recognized hazards."¹⁵⁷ Under the *Florida Retail* court's line of reasoning, because Congress did not promulgate a standard relating to workplace violence, Congress, therefore, did not make it clear that it intended for the issue of workplace violence to be covered under the OSH Act, and the states remain free to "assert jurisdiction."¹⁵⁸ The *Florida Retail* court, therefore, reasoned that the OSH Act cannot preempt state law in the area of workplace violence.¹⁵⁹ However, the consequence of this interpretation is that the General Duty Clause can never preempt a state law. There is no precedent for the *Florida Retail* court's interpretation because the Supreme Court has never ruled on this issue. In fact, in *Gade*, when the Court had the opportunity to explain the

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

156. S. REP. NO. 91-1282, at 5185-86 (1970).

157. 29 U.S.C. § 654(a)(1) (2006).

158. *Id.* § 667(a).

159. See *Fla. Retail*, 576 F. Supp. 2d at 1298.

effects of section 667(a), it did not even mention the General Duty Clause.

As demonstrated by existing case law, the *Florida Retail* court was too dismissive of the notion that the General Duty Clause is capable of preempting a state law. This article, therefore, contends that the “Guns-At-Work” law remains vulnerable to being preempted by the General Duty Clause were the right set of facts present in an as-applied¹⁶⁰ challenge before a court.

B. *An Analysis of the Florida Retail Court’s Second Reason as to Why the “Guns-At-Work” Law is Not Preempted by the General Duty Clause*

The *Florida Retail* court then addressed the plaintiffs’ argument that the General Duty Clause “means a business *must* ban guns from vehicles in the parking lot.”¹⁶¹ The court disposed of this argument by stating that: “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.”¹⁶² In short, the court found this to be an absurd conclusion, and therefore, determined that the OSH Act could not possibly require such action.¹⁶³ This article argues that the court tailored the issue too narrowly and in doing so, overlooked the bigger picture. By tailoring the argument to be that the General Duty Clause mandates that guns *must* be banned by employers, the court oversimplifies the issue. The General Duty Clause mandates that an employer must provide a workplace “free from *recognized* hazards.”¹⁶⁴ The appropriate argument is not that guns *must* be banned in order to comply with the OSH Act, but rather, in prohibiting employers from banning guns, employers who do recognize or should recognize workplace violence to be a hazard in their particular workplace, are not complying with the OSH Act when completely ignoring a preventative measure that could reduce or eliminate the recognized hazard. It is a mistake to oversimplify the issue, when in fact, the only

160. See e.g., *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995) (“[An as-applied challenge is one in which] the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff’s particular circumstances.”).

161. *Fla. Retail*, 576 F. Supp. 2d at 1299 (emphasis added).

162. *Id.* at 1298.

163. With regard to the second reason given for the failure to find pre-emption under the OSH Act, the *Florida Retail* court wrote that “[o]ne doubts that even the plaintiffs really assert this [the failure to ban guns being considered a violation of the general duty clause] is the law.” *Id.* at 1299. The court’s reasoning appears to be conclusory, and is based on the premise that such a conclusion sounds absurd, and therefore, could not possibly be true. The legal justification for this second reason is lacking in the opinion. See *id.* at 1298–99.

164. 29 U.S.C. § 654(a)(1) (emphasis added).

employers who would violate the General Duty Clause by not banning guns would be those who recognized or should have recognized the hazard of gun violence in their workplace and failed to implement the appropriate safety measures. As discussed in Part IV of this article, there are particular industries that are recognized for being at high risk for an incident of workplace violence. The "Guns-At-Work" law could be found to conflict with the OSH Act because the "Guns-At-Work" law is over-inclusive and forces virtually *all* employers, including those employers who have recognized workplace violence as a hazard, to comply, preventing those employers from implementing a crucial method of abating such a hazard. The court's reasoning may have withstood an initial challenge on its face to enjoin the law; however, if an employer, whose state and federal obligations were in actual conflict because of the "Guns-At-Work" law, were to bring a challenge, such reasoning is far too broad and would not survive. Part IV of this article provides a more thorough analysis of the potential conflict between the "Guns-At-Work" law and the General Duty Clause.

IV. THE GENERAL DUTY CLAUSE OF THE OSH ACT IS CAPABLE OF PREEMPTING FLORIDA'S "GUNS-AT-WORK" LAW: SITUATIONS IN WHICH A CONFLICT BETWEEN THE OSH ACT AND THE "GUNS-AT-WORK" LAW COULD EXIST:

The OSH Act's stated purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."¹⁶⁵ In line with this purpose, every private employer in the United States is required under the OSH Act's General Duty Clause 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."¹⁶⁶ Under the General Duty Clause, "a hazard is 'recognized' only when [OSHA] demonstrates that feasible measures can be taken to reduce materially the likelihood of death or serious physical harm resulting to employees."¹⁶⁷

Although OSHA has not promulgated a standard on workplace violence pursuant to section 655 of the OSH Act;¹⁶⁸ nonetheless, the agency has recognized the problem of workplace violence as a potential hazard.¹⁶⁹ In a 1992 OSHA letter of interpretation, the Director of Enforce-

165. *Id.* § 651(b).

166. *Id.* § 654(a)(1).

167. *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1164 (2d Cir. 1980).

168. *See* 29 U.S.C. § 655.

169. *See, e.g.*, OSHA Interpretation Letter from Richard E. Fairfax, Directorate of

ment Programs stated that “[f]ailure of an employer to implement feasible means of abatement of these hazards [where the risk of violence is significant enough to constitute a recognized hazard] could result in the finding of an OSH Act violation.”¹⁷⁰ In addition to acknowledging that workplace violence may be considered a “recognized hazard,” OSHA has in fact issued citations to employers who have or should have recognized violence as a hazard, and yet failed to prevent or abate such a hazard.¹⁷¹ For example, in 1993, Charter Barclay Hospital, a psychiatric hospital, was issued a citation and fined under the General Duty Clause for “failing to protect workers from recognized hazards regarding physical assaults by violent patients.”¹⁷² Not long after Charter Barclay Hospital was cited, OSHA issued a citation to Megawest Financial, Inc. for violating the General Duty Clause because “security measures were not taken to minimize or eliminate employee exposure to assault and battery by tenants of the apartment complex.”¹⁷³ In the written decision in the *Megawest* case, the administrative law judge specifically noted that “[d]uring the decade of the 1980s, homicide became the third leading cause of death in the workplace. OSHA understandably seeks an enforcement role in decreasing these grim statistics.”¹⁷⁴

Ultimately, however, the administrative law judge in the *Megawest* case vacated the citation that was issued because “the hazard was not recognized by Megawest or by its industry within the meaning of [the General Duty Clause].”¹⁷⁵ Nonetheless, the *Megawest* case demonstrates that OSHA considers workplace violence to be a potential “recognized hazard” warranting the issuance of a citation for failure to take necessary steps to protect employees from this hazard. If an employer recognizes or should have recognized that workplace violence is a hazard in its particular establishment or industry, then it may be found to have violated the General Duty Clause, and faces the possibility of being issued a citation.¹⁷⁶ Because the threat of assault was not actually recognized by Megawest or by its industry, the incident did not constitute a “recognized hazard” under the OSH Act, and therefore, the citation was vacated.¹⁷⁷ Thus, the vacating of the citation in the *Megawest* case does

Enforcement Programs, OSHA, Sept. 13, 2006, http://www.osha.gov/pls/oshaweb/owadispl.show_document?p_table=INTERPRETATIONS&p_id=25504.

170. *Id.*

171. *See, e.g.*, *Megawest Fin., Inc.*, 1995 OSHARC LEXIS 80 (May 8, 1995).

172. SHERRI L. SCHORNSTEIN, DOMESTIC VIOLENCE AND HEALTH CARE: WHAT EVERY PROFESSIONAL NEEDS TO KNOW 122 (1997).

173. *Megawest*, 1995 OSHARC LEXIS 80 at *2.

174. *Id.*

175. *Id.* at *32.

176. *See id.* at *28–29, *32.

177. *Id.* at *32.

not undermine the conclusion that it remains possible for OSHA to issue a citation to an employer who actually does recognize workplace violence as a potential hazard in its establishment or within its industry.

Employers within industries that are recognized for high rates of work-related violence are particularly at risk for a citation if they fail to take appropriate measures to protect their employees from the recognized hazard. Unlike the *Megawest* case, the statistics for workplace violence in these high-risk-of-violence industries are known, and therefore, the hazard is likely to be considered as "recognized." For example, the health care and social service industries have an especially high rate of workplace violence,¹⁷⁸ and therefore, an employer within these industries is more likely to be found to have violated the General Duty Clause for a workplace violence incident than is an employer in a statistically safer industry. In fact, OSHA has explicitly recognized that these industries are particularly at risk for an incident of workplace violence, and therefore, has specifically issued guidelines for preventing such violence in these high-risk industries.¹⁷⁹ In issuing the *Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers*, OSHA specifically provided in the notice section that "[f]ailure to implement these guidelines is not in itself a violation of the General Duty Clause. However, employers can be cited for violating the General Duty Clause if there is a recognized hazard of workplace violence in their establishments and they do nothing to prevent or abate it."¹⁸⁰ Significantly,

an employer's statutory responsibility for a hazard [does not] vanish[,], [nor is it] even diminished, because the hazard was directly caused by an employee. The [OSH] Act provides "that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions." An employer has a duty to prevent and suppress hazardous conduct by employees.¹⁸¹

The fact that OSHA has issued citations for workplace violence indicates that such violence is an area that OSHA considers as part of its regulatory authority. Furthermore, OSHA's issuance of guidelines to prevent workplace violence is further evidence that this is an area that OSHA is watching and is regulating. For example, in 2004, OSHA

178. See OSHA, U.S. DEP'T OF LABOR, PUB. NO. 3148-01R, GUIDELINES FOR PREVENTING WORKPLACE VIOLENCE FOR HEALTH CARE AND SOCIAL SERVICES WORKERS (2004), available at <http://www.osha.gov/Publications/osh3148.pdf>.

179. See *id.* at 5 ("For many years, health care and social service workers have faced a significant risk of job-related violence. Assaults represent a serious safety and health hazard within these industries.").

180. *Id.* at 3 (emphasis added).

181. *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973) (citing 29 U.S.C. § 651(b)(2) (2006)).

issued a citation to KSC Services pursuant to the General Duty Clause on the grounds that the “employer had not developed and implemented measures to protect workers from assault or other forms of physical violence in the workplace.”¹⁸² The citation further stated that “[t]his hazard is recognized by the employer and by the industry.”¹⁸³ Another example of OSHA using the General Duty Clause to enforce the OSH Act occurred in 2008 when it issued a citation to a 7-Eleven convenience store for the very same reason it issued the KSC Services citation—workplace violence.¹⁸⁴

Consequently, the “Guns-At-Work” law makes employers in high-risk industries particularly vulnerable to citations for violating the General Duty Clause. Knowing the high statistics of workplace violence in their industry and that an employee may very well have a gun in his nearby vehicle, creates a dangerous work environment that the employer recognizes or should recognize as a hazard. In addition to those individual employers who have actually recognized a particular hazard in their workplace, Florida employers in industries that are recognized for being at high risk for a violent incident are also susceptible to an OSHA citation. Yet, under the Florida “Guns-At-Work” law, the employer is prohibited from taking the necessary security measures to eliminate or reduce the harm. The employer is forbidden from completely banning guns from its property.¹⁸⁵ By not being allowed to ascertain which employees keep a gun in vehicles in the parking lot,¹⁸⁶ and therefore, pose a threat of gun violence in the workplace, the employer is further restricted from implementing many other useful methods of preventing workplace violence.

Regardless of the industry, warning signals do exist as to which individuals are more likely to be perpetrators of workplace violence. The United States Office of Personnel Management includes “bringing a weapon to the workplace, brandishing a weapon in the workplace, making inappropriate references to guns, or fascination with weapons” as potential indicators of individuals more likely to perpetrate workplace violence.¹⁸⁷ However, with the “Guns-At-Work” law, even if an employee talks about guns, or about owning a gun, an employer is pro-

182. Citation KSC Services, Inc., No. 01001 (OSHA Sept. 7, 2004).

183. *Id.*

184. Citation 7-Eleven, Inc. #20638, No. 01001 (OSHA May 1, 2008).

185. *See* FLA. STAT. § 790.251(4)(a) (2009).

186. *Id.* § 790.251(4)(b).

187. OFFICE OF WORKFORCE RELATIONS, U.S. OFFICE OF PERS. MGMT., PUB. NO. OWR-09, DEALING WITH WORKPLACE VIOLENCE: A GUIDE TO AGENCY PLANNERS 17 (1998), available at http://opm.gov/Employment_and_Benefits/WorkLife/OfficialDocuments/handbookguides/WorkplaceViolence/full.pdf.

hibited from taking any action against the employee.¹⁸⁸ The law appears to mandate that the employer simply ignore such alarming warning signs and may not make any further inquiry. At least one employment attorney suggests that in situations where an employee reports to the employer that another employee threatened him or her with a gun, it is best for the employer to contact the police, rather than risk violating the law.¹⁸⁹ However, calling the police appears to be a drastic measure in situations where a simple inquiry might suffice, and may perhaps clear up any misunderstandings. However, under the law, the employer may not confront the employee,¹⁹⁰ and is left with no other choice than to call law enforcement. Involving law enforcement may create an atmosphere of general uneasiness and anxiety among employees and may lead employees to question the safety of the workplace. This is particularly true when repeat calls to law enforcement may occur. An even worse consequence of waiting for the police to intervene is that by the time the police arrive, it may be too late to prevent the violence.

Implementing a workplace-safety program, such as a ban on firearms, not only leads to a safer work environment, but also reduces the likelihood of an employer being issued a citation from OSHA.¹⁹¹ If an employer has a violence-prevention plan in place in order to abate the recognized hazard of workplace violence, then the burden is on OSHA to demonstrate the inadequacy of such a plan.¹⁹² However, the "Guns-At-Work" law interferes with an employer's ability to defend itself against an OSHA citation. Employers are not allowed to implement a safety program to the level necessary to reduce or eliminate the recognized hazard of workplace violence by banning guns from all company property. If the employer had appropriate safety measures in place, then OSHA has the burden of showing such precautions were inadequate.¹⁹³ Instead, employers are left exposed to OSHA citations if workplace violence is a recognized hazard, when banning guns from all company

188. See FLA. STAT. § 790.251(4)(b).

189. Yesenia Salcedo, *Business Groups Challenge Florida "Guns at Work" Law*, INSIDE COUNS. MAG., July 1, 2008, at 73.

190. FLA. STAT. § 790.251(4)(b).

191. See *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973) ("Because employers have a general duty to do virtually everything possible to prevent and repress hazardous conduct by employees, violations exist almost everywhere, and the Secretary has an awesomely broad discretion in selecting defendants and in proposing penalties. To assure that citations issue only upon careful deliberation, the Secretary must be constrained to *specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.*" (emphasis added)).

192. See *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) ("It is [OSHA's] burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred.").

193. See *Nat'l Realty*, 489 F.2d at 1263, 1265.

property is a feasible measure, drastically reducing the occurrence of workplace violence.¹⁹⁴ Additionally, if an employer is issued a citation, OSHA requires that the employer take action to abate the hazard that resulted in a violation of the General Duty Clause.¹⁹⁵ In such a case, the Florida “Guns-At-Work” law stands as a direct obstacle to the employer implementing the best method available for reducing and abating¹⁹⁶ the hazard—completely banning guns from all company property,¹⁹⁷ because it strictly forbids such a ban.¹⁹⁸

Additionally, although difficult to construe the full meaning of the provision, the Florida “Guns-At-Work” law specifically provides that employers have “no duty of care related to the actions prohibited under [the “Guns-At-Work” law].”¹⁹⁹ Abrogating an employer’s duty of care to protect employees from recognized hazards is directly in conflict with the mandates of the General Duty Clause.²⁰⁰ In striking down a similar Oklahoma gun law, the court in *ConocoPhillips Co. v. Henry*, found that such a law conflicts with the purpose of the OSH Act, which Congress specifically intended for employers to actively provide a safe workplace.²⁰¹ Similarly, in abrogating an employer’s duty of care, the Florida “Guns-At-Work” law is circumventing a primary objective of the OSH Act. Not only is it extremely dangerous for the Florida Legislature to require that employers turn a blind eye to potential violence, but it also appears to be a violation of the OSH Act. The “Guns-At-Work” law also specifically prohibits an employer from taking action against an employee “based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a

194. See, e.g., *Champlin Petroleum*, 593 F.2d at 640 (citing *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976)) (“[The General Duty Clause] requires the employer to eliminate only ‘feasibly preventable’ hazards.”).

195. 29 U.S.C. § 658(a) (2006) (“[A citation issued by OSHA] shall fix a reasonable time for the abatement of the violation” (emphasis added)).

196. See *id.*

197. See, e.g., DANA LOOMIS, PREVENTING GUN VIOLENCE IN THE WORKPLACE 3 (2008), available at <http://www.asisonline.org/foundation/guns.pdf> (“[A] comprehensive, written policy prohibiting weapons in the workplace is an essential part of an employer’s violence-prevention plan. Research suggests that workplaces that prohibit weapons are significantly less likely to experience a worker homicide than workplaces that allow guns.”).

198. See FLA. STAT. § 790.251(4)(a) (2009).

199. *Id.* § 790.251(5)(a) (emphasis added).

200. See 29 U.S.C. § 654(a)(1).

201. *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1338 (N.D. Okla. 2007) (“[The Oklahoma gun laws] ‘thwart’ the overarching federal policies of ‘encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards’ and ‘stimulat[ing] employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions.’” (citations omitted)), *rev’d sub nom.* *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

parking lot for lawful purposes.”²⁰² If an employee informs the employer that another employee is brandishing a firearm inside his car, is the employer prohibited from taking action? Is the employer required to simply ignore such a report? Being specifically informed about such a threat would logically transform a hazard into a “recognized” one for purposes of the General Duty Clause.²⁰³ In that situation, not taking action could constitute a violation of the OSH Act.

In conclusion, the Supreme Court has recognized that: “Often Congress does not clearly state in its legislation whether it intends to preempt state laws; and in such instances, the courts normally sustain local regulation of the same subject matter *unless it conflicts with federal law or would frustrate the federal scheme.*”²⁰⁴ Because an employer, who does recognize or should recognize workplace violence as a hazard in its workplace or industry, has an obligation under the OSH Act to minimize such a hazard, the Florida “Guns-At-Work” law potentially stands in direct conflict with the standards mandated by the General Duty Clause. Therefore, in such situations, the state law “must yield” to the federal law.²⁰⁵ Additionally, if an OSHA citation is issued, being unable to take the required steps to abate the hazard, which is required by the OSH Act, makes the employer’s ability to comply with the federal law impossible.²⁰⁶ Finally, abrogating the employer’s duty of care is contrary to the OSH Act, which puts the burden on employers to provide a workplace free from recognized hazards,²⁰⁷ and attempts to hold employers accountable for failing to do so.²⁰⁸ The *Florida Retail* court was not conducting a fact-specific inquiry, because the law was only challenged on its face. Because the mandates of the Florida “Guns-At-Work” law create situations where simultaneous compliance with federal law is impossible, the “Guns-At-Work” law “must yield”²⁰⁹ in such situations. For all of these reasons, this article argues that there are situations in which the Florida “Guns-At-Work” law stands in conflict with the OSH Act, and in such situations, simultaneous compliance with both laws is impossible. It is in those situations where the General Duty Clause of the OSH Act could preempt the “Guns-At-Work” law.

202. FLA. STAT. § 790.251(4)(b).

203. See 29 U.S.C. § 654(a)(1).

204. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

205. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992).

206. 29 U.S.C. § 658(a).

207. See *id.* § 654(a)(1).

208. See *id.* § 658(a).

209. See *Gade*, 505 U.S. at 108.

V. PROPERTY RIGHTS AS FUNDAMENTAL RIGHTS?:
THE IMPORTANCE OF PROPERTY

In noticing a developing trend of heavy lobbying for “Guns-At-Work” laws,²¹⁰ the American Bar Association (“ABA”) submitted a report to its House of Delegates with its recommendation relating to this recent wave of “forced entry”²¹¹ legislation. The ABA advocates the position that the right to exclude is a fundamental property right,²¹² and therefore, a “forced entry” law such as the “Guns-At-Work” law should be subjected to strict scrutiny,²¹³ requiring a compelling government purpose and that the law is narrowly tailored. This is in contrast to the rational basis standard employed by the *Florida Retail* court, which requires only a legitimate government purpose in order to uphold the law.²¹⁴ However, it is very likely that the result would have been different had the court subjected the law to a heightened level of scrutiny. As explained by the Florida Supreme Court: “In a strict scrutiny analysis, legislative conclusions are not taken at face value.”²¹⁵ The so-called conceivable legitimate purpose—that having a gun in a car could actually be safer in the event it is needed for self defense²¹⁶—would no longer be taken at face value, and a court may question such a conclusion. Given all of the workplace violence statistics drawing the opposite conclusion,²¹⁷ having guns in the workplace for safety and security purposes is certainly a questionable reason and falls quite short of constituting a compelling government purpose.

In fact, in *ConocoPhillips Co. v. Henry*, a case involving a similar gun law in Oklahoma, the court conceded that should the gun law be subjected to strict scrutiny, it would not pass constitutional muster.²¹⁸ The *ConocoPhillips* court specifically noted that the law compels employers to “allow potentially dangerous weapons on their private

210. See, e.g., Schoultz *supra* note 4 (“[The NRA] took up the cause of guns in parking lots after a 2002 incident in Oklahoma in which workers were fired for having guns in the trunks of their vehicles parked at work.”).

211. As explained in the ABA’s report, “The legislation is characterized by some as ‘forced entry’ legislation because it seeks to override the traditional right of a private property owner to exclude whomever he or she chooses from his or her property and determine the terms on which others may enter on or use that property.” See SPECIAL COMM. ON GUN VIOLENCE, *supra* note 50, at 2.

212. *Id.* at 4.

213. *Id.* at 5.

214. Fla. Retail Fed’n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281, 1291 (N.D. Fla. 2008).

215. Haire v. Fla. Dep’t of Agric. & Consumer Serv., 870 So. 2d 774, 782 (Fla. 2004).

216. See Fla. Retail, 576 F. Supp. 2d at 1291.

217. See, e.g., Loomis et al., *supra* note 41.

218. *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1321 (N.D. Okla. 2007), *rev’d sub nom.* Ramsey Winch, Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009).

property in order to *increase* public safety and deter crime. As a matter of common sense, . . . an increased number of firearms in vehicles on private property would logically lead to an overall decrease in public safety."²¹⁹ The court further conceded that should the law be subjected to strict scrutiny, the law would fail such analysis because it is "not tailored to achieve [the] objectives of promoting safety of Oklahoma citizens."²²⁰

Regardless of these concessions, the *ConocoPhillips* court appropriately subjected the law to the rational basis level of scrutiny.²²¹ The plaintiffs in *ConocoPhillips* had submitted the ABA report to the *ConocoPhillips* court in support of their case.²²² The court concluded that the report "merely discusses the importance of the right to exclude within an analysis under the Takings Clause and does not support the proposition that regulations of property rights are subject to heightened review under the substantive component of the Due Process Clause."²²³ Therefore, the *ConocoPhillips* court did not apply strict scrutiny.²²⁴ The *Florida Retail* and *ConocoPhillips* courts were correct in applying only the rational basis standard, as existing jurisprudence has never recognized that property rights are fundamental rights that should trigger a strict scrutiny analysis. Perhaps the difficulty of advocating that property rights should be considered fundamental explains why the plaintiffs in *ConocoPhillips* failed to adequately follow through with this argument in the Appellate Brief they submitted to the Tenth Circuit Court of Appeals. Rather than furthering the ABA's argument that such gun laws should be subjected to strict scrutiny,²²⁵ the plaintiffs instead contended that the law should fail under any level of scrutiny because the law lacks even a *rational* basis.²²⁶ However, the rational basis standard is highly deferential to the state, and not even meeting minimal rationality would be an exceptional finding.²²⁷ Thus, it is of no surprise that such an argument did not succeed on appeal.²²⁸

Furthermore, applying a strict level of scrutiny to property rights

219. *Id.*

220. *Id.* at 1322.

221. *See id.* at 1319.

222. *See id.* at 1286 n.4.

223. *Id.* at 1319 n.46.

224. *Id.*

225. *See* SPECIAL COMM. ON GUN VIOLENCE, *supra* note 50, at 5.

226. Brief of Plaintiff/Appellee at 41–43, *ConocoPhillips*, 520 F. Supp. 2d 1282 (No. 07-5166).

227. The rational basis standard is highly deferential to the state. *See, e.g.,* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the [legislation] have the burden 'to negative every conceivable basis which might support it.'" (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973))).

228. *See* Ramsey Winch, Inc. v. Henry, 555 F.3d 1199, 1211 (10th Cir. 2009) ("Because we

would have detrimental effects on important legislation, such as those relating to zoning and trespass laws. Additionally, if the right to exclude were considered a fundamental right where strict scrutiny would be applied, then enforcement actions by government agencies would be severely impeded if government actors were not allowed to enter someone's private property against the owner's wishes. For example, the OSH Act includes a provision granting authority for agents of OSHA "to enter, inspect, and investigate places of employment."²²⁹ Without such power, OSHA and other government entities are virtually unable to enforce important laws that benefit society and protect the safety, health and welfare of citizens. Although the current "Guns-At-Work" law seems to be an unjustified excuse to abrogate the right to exclude, the ramifications for classifying property as a fundamental right would be far reaching and would interfere with crucial legislation.

While there is historical evidence that property rights were cherished and viewed as an important right by the Framers of the Constitution, such evidence does not transform this treasured right into a fundamental one for purposes of employing a heightened level of scrutiny. Nonetheless, evidence of the importance of property interests should not have been completely ignored by the Florida Legislature. Such evidence is exhibited in the Third,²³⁰ Fourth,²³¹ Fifth,²³² and Fourteenth²³³ Amendments. Furthermore, historically, the right to vote, which is a recognized fundamental right, was often closely associated with the right to own property.²³⁴

Florida also has recognized that property rights have acquired a special status in our society.²³⁵ The Florida Constitution specifically singles out property rights from other rights by providing that the right to

cannot say the [gun laws] have no reasonably conceivable rational basis, Plaintiffs' due process claim must fail.").

229. 29 U.S.C. § 657(a) (2006).

230. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner." U.S. CONST. amend. III.

231. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Id.* amend. IV.

232. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.* amend. V.

233. Although the Fourteenth Amendment was added later in 1868, making the Due Process Clause applicable to the states shows the continued recognition of the value placed on property rights in the early part of United States' history. *See id.* amend. XIV.

234. POLLY J. PRICE, PROPERTY RIGHTS: RIGHTS AND LIBERTIES UNDER THE LAW 3-4 (2003) ("The link between property and liberty acquired additional importance in the early decades following the Revolution because voting rights were often tied to property ownership. Although voting rights are no longer dependent upon the amount of property the voter owns, it is common today to view the protection of private property to be fundamental for the protection of other civil rights.").

235. *See* FLA. CONST. art. I, § 2.

"acquire, possess, and protect property" are among those rights that are inalienable.²³⁶ Additionally, the Florida Supreme Court acknowledged the sacredness of property rights in *Corn v. State*, when it expressed that "[t]he right of property has been characterized as a sacred right, the protection of which is an important object of government."²³⁷ The *Corn* Court further recognized that the United States Supreme Court "emphasized the importance of the right to private property as basic to the foundation of our democratic system of government in the following language: 'The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.'"²³⁸

Not only has the United States Supreme Court recognized that a property owner's "right to exclude" someone or something from his property is "universally held to be a fundamental element of the property right,"²³⁹ but the Florida Constitution and the Florida Supreme Court have also demonstrated that property rights have historically played an important role in our society, and continue to play such a role today. The Florida "Guns-At-Work" law infringes upon the employer's right to exclude unwanted guns from its property. Although this article does not advocate the notion that property rights are fundamental rights; nonetheless the Florida Legislature should have considered the historical and current significance of property before enacting a Statute that forces property owners to store dangerous weapons on private property, including private residential property, in the case of a home-based business. It is unwise for a legislature to enact legislation that strips property owners of such an important right for a purpose in which the justification remains highly suspect.²⁴⁰ As demonstrated, property rights in this country are greatly valued, and the Florida Legislature failed to fairly balance the interests of gun owners with those of property owners, and in failing to do so, a treasured right has been trampled upon.

236. *Id.*

237. *Corn v. State*, 332 So. 2d 4, 7 (Fla. 1976).

238. *Id.* (citing *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1828)).

239. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

240. Although the *ConocoPhillips* court ultimately found that the challenged gun law amendments passed the rational basis level of scrutiny, the court did concede that "[t]he Court has serious concerns about these criminal laws, which deprive Oklahoma property owners of the right to exclude those individuals carrying and transporting firearms in their vehicles. . . . Although *it is a close question, the Court cannot conclude the Amendments are wholly arbitrary or irrational methods of promoting safety and deterring crime*. It is not this Court's province to invalidate state law because the Court disagrees with the Legislature's chosen method of achieving its objectives." *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1340 (N.D. Okla. 2007) (emphasis added), *rev'd sub nom.* *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

VI. PROBLEMATIC ASPECTS OF FLORIDA'S "GUN-AT-WORK" LAW:

Even though Florida's "Guns-At-Work" law has withstood constitutional challenges, as currently written, the law is nonetheless unwise and ill conceived, and has many problematic aspects to it. Furthermore, the Statute is poorly drafted and leaves many questions unanswered. First, even the Attorney General of Florida acknowledged to the *Florida Retail* court that portions of the Statute are unclear and do not convey what the Florida Legislature in fact intended.²⁴¹ Due to the sloppy drafting, the Statute "imposed limitations on a business's treatment of its customers" only in the situation where at least one of the business's workers has a concealed weapons permit.²⁴² The Attorney General admitted that "the statute should be applied to all businesses, not just to businesses with at least one worker who has a concealed-carry permit."²⁴³ In recognizing the irrational outcome the poor drafting has produced, the Attorney General argued that "a court should rewrite a statute to avoid an absurd result."²⁴⁴ However, the *Florida Retail* court refused to rewrite the Statute on behalf of the Legislature, and stated that "it is not too much to ask the Legislature to say what it means, and it is not to[o] much to ask a court to apply the statute as written."²⁴⁵ Ultimately, because of the irrational distinction that was *unintentionally* drawn between businesses with an employee who possesses a concealed gun permit, and businesses without an employee who possesses such a permit, the *Florida Retail* court determined that the portion of the Statute pertaining to customers was unconstitutional.²⁴⁶ As demonstrated, poor drafting and confusing language has resulted in unintended consequences. Unfortunately for employers in Florida, this was the only portion of the Statute that was struck down, while the rest of the confusing language remains for employers to sift through trying to understand the true consequences of this law.

Not only is the Statute awkwardly drafted, but the Legislature's word choice is also misleading. Although difficult to tell from the wording of the Statute, there is no Second Amendment right to carry a gun on private property against the will of the property owner.²⁴⁷ As recognized

241. See Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281, 1284 (N.D. Fla. 2008).

242. *Id.* at 1300.

243. *Id.* at 1296.

244. *Id.*

245. *Id.* at 1297.

246. *Id.* at 1300.

247. *Id.* at 1295 ("[A] private business's banning of guns on its own property plainly is not unconstitutional; there is no constitutional right to bear arms on private property against the owner's wishes.").

by the *Florida Retail* court, the Second Amendment only applies against the government and not against private individuals.²⁴⁸ Nonetheless, the "Guns-At-Work" law specifies its purpose is

to codify the long-standing legislative policy of the state that individual citizens have a *constitutional* right to keep and bear arms, that they have a *constitutional* right to possess and keep legally owned firearms within their motor vehicles for self-defense and other lawful purposes, and that *these rights are not abrogated by virtue of a citizen becoming a customer, employee, or invitee of a business entity.*²⁴⁹

The Florida Legislature's reliance on the Second Amendment to justify carrying guns on someone else's private property is severely misplaced. The *Florida Retail* court acknowledged this when it stated that:

The entire substantive section of the guns-at-work statute, §790.251(4), prohibits private businesses only from 'violat[ing] the constitutional rights' of workers or customers in the specific respects described in §790.251(4)(a) through (e)—that is, in the specific respects addressed in this opinion. *But a private business's banning of guns on its own property plainly is not unconstitutional; there is no constitutional right to bear arms on private property against the owner's wishes.*²⁵⁰

Calling the choice of wording used by the Florida Legislature "rhetorical flourish," the *Florida Retail* court declared that "when the statute refers to the 'constitutional' right to bear arms, it means the right to bear arms created by [the Florida "Guns-At-Work" law] itself."²⁵¹ It is evident that the entire premise for the "Guns-At-Work" law is misunderstood by its own drafters, and as can be expected, the law is confusing and misleading to its readers.

Furthermore, even the recent United States Supreme Court decision in *District of Columbia v. Heller* does not add support to the argument that the right to carry a gun in a car is protected by the Second Amendment.²⁵² In *Heller*, even though the Supreme Court found that a complete ban on handguns, even in a person's own home, was too restrictive and was found to be unconstitutional under the Second Amendment,²⁵³ the Supreme Court never discussed the right to carry a gun in one's car.

248. *Id.* ("[T]he constitutional right to bear arms restricts the actions of only the federal or state governments. . .not private actors.").

249. FLA. STAT. § 790.251(3) (2009) (emphasis added).

250. *Fla. Retail*, 576 F. Supp. 2d at 1295 (emphasis added).

251. *Id.*

252. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2787–88 (2008) ("We consider whether a . . . prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.").

253. *Id.* at 2821–22.

The Court simply did not address “whether the right of self-defense extends to a person’s car.”²⁵⁴ In any event, *Heller* involved a governmental actor banning guns, and not an individual person, as is the case here.

Even though property rights are not considered to be fundamental for purposes of strict scrutiny, property rights nonetheless play a fundamental role in our society and were highly valued by the Framers of our Constitution. Therefore, property rights should trump gun “rights” in this situation, because the Second Amendment does not apply to private actors. As recognized by the Supreme Court, the right to exclude is a fundamental aspect of our property rights.²⁵⁵ By stripping a property owner of his right to exclude unwanted persons and objects from his property, the Florida Legislature is stripping him of a crucial right acknowledged by the Supreme Court. The Second Amendment is not applicable against private actors, and therefore, there is no constitutional justification to force a property owner to allow guns on his property.²⁵⁶ The Florida Legislature attempted to find constitutional support for the law; however, no such justification exists.

The importance of property rights should have been recognized by the Florida Legislature, but it was not, and the fact that the “Guns-At-Work” law mentions in its stated purpose that it is codifying the “constitutional” right to bear arms, only proves that the Legislature did not recognize that a private individual may infringe upon another person’s “right” to bear arms.²⁵⁷ From the wording of the Statute, it appears that the Legislature intended to protect a constitutional “right” for gun owners to carry guns on someone else’s private property. However, in actuality the legislature has created a new statutory right for gun owners, rather than codify an existing constitutional right.

Although the *Florida Retail* court stated that the Legislature could have had a rational basis to believe that guns in cars will actually enhance the safety and welfare of citizens, statistics regarding workplace violence and gun violence in general lead to the opposite conclusion.²⁵⁸ Violence is even more likely during downsizing and layoffs,²⁵⁹ and now that the U.S. economy is currently suffering dramatically and many employees are losing their jobs, employers have even greater cause for concern. Moreover, 5.3% of all employers have faced an incident of

254. See, e.g., Perry, *supra* note 35.

255. Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

256. See, e.g., Fla. Retail, 576 F. Supp. 2d at 1295.

257. See, e.g., *id.*

258. See, e.g., Loomis et al., *supra* note 41.

259. Zimmerman, *supra* note 42.

workplace violence.²⁶⁰ An obvious problematic aspect of this law is that employers have been stripped of an important method of preventing gun violence on their premises. The "Guns-At-Work" law prohibits employers from inquiring into which employees have guns in their cars,²⁶¹ so employers have no way of knowing which employees pose a potentially deadly threat, and can therefore do very little to protect other employees and customers from potential injury. Even if an employer has a metal detector inside the premises to detect when an employee is attempting to bring a gun inside the workplace—which an employer may still do even under the new law—the employer has no means of detecting guns in cars, because searching a car²⁶² or even inquiring is strictly prohibited.²⁶³ Therefore, there appears to be no possible method of preventing gun violence from occurring in the parking lot itself.

The Statute also creates a new protected class of employees.²⁶⁴ Employers are now prohibited from conditioning employment on whether a potential employee holds a concealed weapons license or upon an employee agreeing not to keep a gun inside his car.²⁶⁵ Additionally, an employee may not be terminated or discriminated against for "exercising his or her constitutional right to bear arms."²⁶⁶ Providing such protection to employees who are gun owners may lead to increased wrongful termination suits. Furthermore, adding such a protected class trivializes the importance of the other recognized protected classes of employees.²⁶⁷ Not being able to condition employment and not being able to terminate an employee for the reasons listed in the Statute interferes with Florida's at-will employment doctrine, and creates an exception to it.²⁶⁸ Finally, the "Guns-At-Work" law provides that employers will not be liable "in a civil action based on actions or inactions taken in compliance with [the "Guns-At-Work" law]."²⁶⁹ Therefore, if an employee with a lawful firearm properly stored in his vehicle does injure or kill someone, it appears that the employer will be protected from civil liability. The result of this is that the only recourse an injured employee

260. BUREAU OF LABOR STATISTICS, *supra* note 36, tbl. 1.

261. FLA. STAT. § 790.251(4)(b) (2009).

262. *Id.*

263. *Id.*

264. *See* Salcedo, *supra* note 190.

265. FLA. STAT. § 790.251(4)(c).

266. *Id.* § 790.251(4)(e).

267. *See, e.g.*, Schoultz, *supra* note 4.

268. *See, e.g.*, Bruley v. Vill. Green Mgmt. Co., 592 F. Supp. 2d 1381, 1386 (M.D. Fla. 2008) ("[The Guns-At-Work law] creates an exception to at-will employment to prevent an employer from firing an employee for possessing a firearm in the employee's car while on company property." (emphasis omitted)).

269. FLA. STAT. § 790.251(5)(b).

has with respect to monetary compensation, other than suing the aggressor, will be to file a Worker's Compensation claim. Assuming the particular situation is covered by Worker's Compensation, even though the employer is not being sued himself, the end result is that the employer's Worker's Compensation rates may increase due to any injuries that may occur as a result of this new law.

Realistically, Worker's Compensation will not apply to every event of workplace violence. In order to be eligible for Worker's Compensation benefits in Florida, an employee must "suffe[r] an accidental compensable injury or death *arising out of* work performed in the course and the scope of employment."²⁷⁰ The question then becomes whether all cases of workplace violence would be considered to be "arising out of" employment. Is a personal dispute in the company parking lot that turns violent covered? If not, employees now have virtually no monetary recourse for injuries or death caused by gun violence on company property, other than attempting to collect from the aggressor. What also remains unclear is if the employer would be liable if a person without a license to carry a concealed weapon injured or killed someone. The law refers only to a gun that is lawfully owned and locked in a vehicle.²⁷¹ A big gap in immunity coverage seems to exist if employers are not provided with protection from suits for an act of violence that resulted in injury or death due to the use of an unlawfully owned gun or from a gun that was not properly locked inside the vehicle. If such protection is not provided, then employers face potential negligence and tort actions that they are unable to prevent because they have no lawful means of searching for illegal weapons or improperly stored weapons, nor are they permitted to even make an inquiry.²⁷² It seems illogical that the Legislature actually intended to impose such harsh consequences on employers for simply following the law. However, as written, the law seems to create such absurd results.

An even larger gap in immunity coverage exists regarding criminal liability. The Statute only provides for immunity from civil action,²⁷³ but contains no mention of immunity from criminal liability.²⁷⁴ Therefore, it appears that an employer could still be held criminally liable in those extreme circumstances where criminal charges are brought against an employer after a violent episode results in death.²⁷⁵ Although these cru-

270. *Id.* § 440.09(1) (emphasis added).

271. *See, e.g., id.* § 790.251(4)(a)-(c).

272. *Id.* § 790.251(4)(b).

273. *Id.* § 790.251(5)(b).

274. *See, e.g., GA. CODE ANN.* § 16-11-135(e) (2009) (providing employers with civil as well as criminal immunity under Georgia's comparable "Guns-At-Work" law).

275. *See, e.g., 29 U.S.C.* § 666(e) (2006) (The OSH Act provides that: "Any employer who

cial questions remain unanswered regarding the extent of the immunity the law provides to employers, nonetheless, the NRA twists the "Guns-At-Work" law so that it appears to actually benefit employers, because now employers have civil immunity whereas before they did not have such protection.²⁷⁶

Although it may be true that those who are unlawfully carrying guns would do so whether or not their employer has a policy banning it, the new law only complicates matters further, as it now creates an additional hardship for the employer by not allowing the employer to even inquire as to whom has a gun, as well as preventing the employer from searching vehicles.²⁷⁷ Furthermore, instituting a "no guns" policy can be an effective method for terminating a potentially dangerous employee who violates the policy by bringing a gun to work.²⁷⁸ Although not intended by the Legislature, the end result is that unlawfully carried guns and other dangerous weapons are now just as protected as lawfully carried guns. Not being able to inquire or to search vehicles, in essence, provides statutory protection for all employees, even if the employee is harboring an illegal weapon.

Even if employers are immune from civil lawsuits because of the "Guns-At-Work" law; nonetheless, employers could incur other financial costs. A violent episode not only places a financial burden on a business, but also has significant emotional effects as well.²⁷⁹ Physical damage to the premises caused by violence in the workplace can be costly. Either the employer pays out-of-pocket or its insurance company pays to repair such damage. However, in the event that the insurance

willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both.").

276. Letter from Marion P. Hammer, USF Executive Dir., United Sportsmen of Fla., to USF & NRA Members and Friends (July 1, 2008), <http://www.nraila.org/legislation/read.aspx?ID=4060> ("[The new law] provide[s] new benefits for businesses. Yesterday, business owners had no immunity from liability if a firearm stored in a vehicle in its parking lot was used to cause harm on its property. Today, they do have immunity.").

277. FLA. STAT. § 790.251(4)(b).

278. Society for Human Resource Management's, et al. Brief as Amici Curiae in Support of Plaintiffs' Motion for Preliminary Injunction at 15, *Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla.*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008) (No. 4:08-cv-00179-RH-WCS).

279. See JoAnn M. Sullivan, *2004 Workplace Violence Survey & White Paper May 2004*, RM/INSIGHT (Am. Soc'y of Safety Engineers, Des Plaines, Ill.), Spring 2004, at 1, available at http://www.asse.org/newsroom/releases/press394_survey.pdf. ("Workplace violence incidents take more than a financial toll. Employees witnessing violent acts in the workplace report increased level of stress and lower morale, which may lead to decreased productivity and increased absenteeism and turnover.").

company will cover the costs of the repairs, the employer faces a possible increase in its insurance rates; therefore, ultimately the employer will feel a financial effect in either scenario. An even more severe consequence would be if the insurance company cancelled the employer's policy, making it more difficult and more expensive to obtain other insurance, if possible at all. According to the Center to Prevent Handgun Violence, "[i]nsurance companies have already foreseen the increased risks of violence posed by having firearms on business premises, and some have threatened to cancel policies unless firearms are prohibited."²⁸⁰ Furthermore, after employees are exposed to such violence, professional trauma or grief counseling may be necessary which is an additional financial expense.

Even with immunity from civil suit, no employer wants to deal with the multitude of consequences that violence in the workplace causes.²⁸¹ Productivity will clearly be affected by any violent incident.²⁸² Emotionally distraught employees will simply not be as productive.²⁸³ Additionally, absenteeism has been shown to increase after a violent incident.²⁸⁴ Not only will the employees who were physically injured due to the violence be absent from work, but those employees psychologically injured from the episode may also be absent. The additional medical expenses may cause the employer's group health insurance rates to rise as well. Immunity from civil suit is far from being a perfect solution and will do very little to ameliorate the strong detrimental impact the "Guns-At-Work" law will have on businesses. Perhaps the FBI best summed up the effects of workplace violence when it wrote that:

Clearly violence in the workplace affects society as a whole. The economic cost, difficult to measure with any precision, is certainly substantial. There are intangible costs too. Like all violent crime, workplace violence creates ripples that go beyond what is done to a particular victim. It damages trust, community, and the sense of security every worker has a right to feel while on the job. In that sense, everyone loses when a violent act takes place, and everyone

280. CTR. TO PREVENT HANDGUN VIOLENCE, GUNS & BUSINESS DON'T MIX: A GUIDE TO KEEPING YOUR BUSINESS GUN-FREE 21-22, (1997), available at <http://www.bradycenter.org/xshare/pdf/reports/gunsnbusiness.pdf>.

281. "Employers have a legal and ethical obligation to promote a work environment free from threats and violence and, in addition, can face economic loss as the result of violence in the form of lost work time, damaged employee morale and productivity, increased workers' compensation payments, medical expenses, and possible lawsuits and liability costs." See FBI, DEP'T OF JUSTICE, WORKPLACE VIOLENCE: ISSUES IN RESPONSE 15 (Eugene A. Rugala ed. 2004), available at <http://www.fbi.gov/publications/violence.pdf>.

282. See Sullivan, *supra* note 280.

283. *Id.*

284. *Id.*

has a stake in efforts to stop violence from happening.²⁸⁵

VII. AMENDMENT RECOMMENDATIONS:

Despite the strong opposition, it appears that, at least for the time being, the Florida "Guns-At-Work" law is here to stay because no appeal has been filed from the ruling in *Florida Retail Federation, Inc. v. Attorney General of Florida*. However, portions of the Statute are poorly drafted and ill-conceived. Therefore, amendments to the Statute should be considered. This article proposes a variety of amendments that would add clarity and also help resolve the safety conflicts that employers are facing in complying with the "Guns-At-Work" law. Furthermore, as contemplated by this article, there are situations in which an employer's obligations under the General Duty Clause of the OSH Act may be in direct conflict with the "Guns-At-Work" law. In order to survive a preemption challenge in such situations, this article recommends that changes be made to the "Guns-At-Work" law, in order for both sets of laws to coexist.

The most basic of the proposed amendments is for the Florida Legislature to clarify the unclear portions of the Statute and write what it actually intended.²⁸⁶ For example, employers are entitled to know the extent to which the law provides them with immunity, which under the current law is unclear and possibly misleading. From the wording of the Statute, it appears that employers are only provided with civil immunity for injury or death resulting from those guns that are lawfully owned and stored. If this is the case, then the Legislature has not provided much immunity at all, and employers need to be aware of this so that they are not lulled into a false sense of security. On the other hand, if the Legislature actually intended to provide full immunity to employers, even for injuries occurring from the use of the unlawful guns and other weapons that were stored in a vehicle in the company parking lot, then the Statute should be amended to reflect the Legislature's true intent. This is especially critical so that law enforcement and the judiciary have a clear understanding of the extent of the immunity coverage in order to enforce the law properly as well as to adjudicate any potential litigation under the proper framework. Other states with similar gun laws have provided much more clarity as to the extent of immunity provided under the law. For example, Georgia's law specifies that an employer will be immune from *criminal* and *civil* liability even for injuries or death arising from

285. FBI, *supra* note 282, at 14–15.

286. See, e.g., *Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla.*, 576 F. Supp. 2d 1281, 1284 (N.D. Fla. 2008) (explaining that the Attorney General of Florida acknowledged that portions of the statute contain drafting errors and do not say what the Florida Legislature in fact intended).

the use of a gun that was stolen from an employee's car.²⁸⁷ In addition to clarity, another recommendation, which may seem drastic, is to allow employers to have a separate parking area for gun carriers. This is obviously contrary to many portions of the Statute because that would result in an employer knowing who carries a gun. However, this would help accomplish the main goals on both sides of this controversy. In fact, other states with similar gun laws have explicitly exempted compliance with such laws for those employers who provide separate parking lots. For example, Louisiana has explicitly stated that its statute does not apply to:

Any vehicle on property controlled by a . . . private employer . . . if access is restricted or limited through the use of a fence, gate, security station, signage, or other means of restricting or limiting general public access onto the parking area, and . . . [t]he employer provides an alternative parking area reasonably close to the main parking area in which employees and other persons may transport or store firearms in locked, privately-owned motor vehicles.²⁸⁸

Georgia also has carved out a similar exception, specifically exempting employers who provide a separate and secure parking lot from portions of the statute.²⁸⁹

Because it is relatively unrealistic to believe having guns in a company parking lot enhances safety,²⁹⁰ the strongest argument for the proponents of the Statute is that some employees might want to have their guns in their cars for general protection and should not have to leave their guns at home because they are prohibited from parking in the company lot with a gun in the car. They might need to use their guns for protection on their way driving to work or going home from work, and with such a ban, their guns would be unavailable if needed for self-defense during their commute. However, creating separate parking lots allows the employee to store his gun in his car, while the employer knows where the potential danger to its business and employees could

287. See GA. CODE ANN. § 16-11-135(e) (2009) (“No employer . . . shall be held liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm, including, but not limited to, the theft of a firearm from an employee’s automobile.”).

288. LA. REV. STAT. ANN. § 32:292.1(D)(3)(b) (2008).

289. GA. CODE ANN. § 16-11-135(d)(1) (stating that the portions of the statute relating to the prohibition of searching employee vehicles and the prohibition of conditioning employment upon an employee’s agreement not to enter the parking lot with a gun, do not apply to “an employer providing applicable employees with a secure parking area which restricts general public access through the use of a gate, security station, security officers, or other similar means which limit public access into the parking area, provided that any employer policy allowing vehicle searches upon entry shall be applicable to all vehicles entering the property and applied on a uniform and frequent basis”).

290. See, e.g., Loomis et al., *supra* note 41.

come from and can take the necessary protective measures, such as fencing in that area to make guarding those cars with guns inside more efficient. Security guards may be needed to oversee that the gun owner does not retrieve the gun from his car, other than for self-defense. A gun in a parked car not only creates the possibility of a disgruntled employee retrieving his own gun from his car, but also increases the risk of gun violence occurring due to a break-in to the vehicle in the company parking lot, resulting in the stolen gun being used to injure or kill others in the vicinity. This may prove to be a very realistic scenario considering that the Brady Campaign to Prevent Gun Violence has reported that 28% of guns that had been reported stolen were retrieved from parked cars.²⁹¹ Therefore, creating a barrier cutting off access to the general public would help prevent thieves from breaking into cars and stealing guns stored inside, containing a potentially dangerous situation.²⁹²

Although conditioning employment or terminating an employee based on gun ownership could still be prohibited under the Statute, an employer should be allowed to inquire as to which employees store guns in their cars, in order to better protect the workplace. This may require a complete redrafting of the Statute, since key provisions would have to be stricken. Despite the tremendous safety benefits this amendment may provide, opponents to such an amendment could express concern that "open" gun owners would be targets for discrimination. Nevertheless, in adopting this amendment, the Florida Legislature would be more fairly balancing the interests of both sides of the controversy while still providing protection to each side.

Another important recommendation relates to the consequences of an employee who brings a gun to work and fails to comply with the requirements for protection under the Statute. Although an employee who exhibits a gun for non self-defense purposes is not protected by the Statute,²⁹³ the consequences of doing so are unclear. Instead of limiting strict penalties to an employer who fails to comply with the law, this article recommends that strict penalties should be imposed on an employee who fails to comply as well. Rather than just being able to fire the employee for removing the gun from the car, the gun owner should be considered to be trespassing under the law. The same should apply to those employees who have illegally owned guns stored in their cars. Perhaps criminal and civil penalties will deter gun owners from exhibiting their stored guns, therefore reducing the chance of an accidental or intentional shooting. An employer, who wishes to prohibit guns in the

291. See, e.g., Brady Campaign To Prevent Gun Violence, *supra* note 39.

292. See, e.g., *id.*

293. FLA. STAT. § 790.251(4)(e) (2009).

workplace, should still post a warning sign to employees indicating that firearms are prohibited on all company property, except as provided by law. Therefore, if an employee is not protected under the Statute, then such an employee has violated the employer's policy and could not only be fired, but could also be considered a trespasser. Harsh consequences are a necessary component that is currently absent from the "Guns-At-Work" law and could help ensure that the gun remains properly locked inside the vehicle.

Finally, when enacting the "Guns-At-Work" law, it appears that the Florida Legislature failed to consider the millions of businesses that operate out of private homes,²⁹⁴ and did not provide an exemption for employers whose offices are located in their own homes. The Legislature's complete disregard of the sanctity of one's own home is very alarming. As a result of the "Guns-At-Work" law, a home-based employer may have small children in his home, and still may not ban guns from employee vehicles parked on his own drive-way. The Legislature has already exempted schools from complying with the "Guns-At-Work" law,²⁹⁵ which demonstrates that the Legislature is aware of a special need to protect children from firearms. In order to protect children and the sanctity of an employer's private residential home, an amendment should be added to exempt a business that is operated out of a residential home. Instinctively, many would acknowledge a distinction between commercial property interests and residential property interests. If a line must be drawn with regard to private property rights, it should be drawn at the home. It seems grossly contrary to the Framers' intentions for the state to prohibit an employer from banning dangerous weapons from a person's private residential property.

This article has outlined the various negative implications that arise from the "Guns-At-Work" law. In addition to those amendments that would provide added safety measures to the workplace, another amendment that should be considered is one that would relieve employers who are caught in the so-called catch-22 situation from being forced to choose between complying with the state law and the federal law. Other states with similar gun laws have included an exemption in order to comply with federal law. For example, a similar gun law in Georgia specifically provides a resolution to a potential conflict between federal law and the state gun law by providing the following provision:

294. Nearly half of the 16.7 million business owners who responded to the Survey of Business Owners collected by the Small Business Administration ran a home-based business, of which 22.1% employed at least one employee. See OFFICE OF ADVOCACY OF THE U.S. SMALL BUSINESS ADMIN., *THE SMALL BUSINESS ECONOMY: A REPORT TO THE PRESIDENT* 81, 83 (2007), available at http://www.sba.gov/advo/research/sb_econ2007.pdf.

295. FLA. STAT. § 790.251(7)(a).

In any action relating to the enforcement of any right or obligation under this Code section, an employer, property owner, or property owner's agent's *efforts to comply with other applicable federal, state, or local safety laws, regulations, guidelines, or ordinances shall be a complete defense to any employer, property owner, or property owner's agent's liability.*²⁹⁶

In other words, Georgia provides employers with a defense for non-compliance with the state law resulting from compliance with a conflicting law. Under the Georgia statute, an employer whose workplace is prone to workplace violence to the extent that it becomes a "recognized hazard,"²⁹⁷ and puts forth "efforts"²⁹⁸ to comply with the General Duty Clause by banning guns, then such efforts would be a defense to any liability for noncompliance with the Georgia gun law. In addition to providing employers with this logical defense, this provision also protects the Georgia law from being preempted by the General Duty Clause in the event of an actual conflict. In essence, the Georgia law provides that a conflict with federal law is an exemption from compliance with the state gun law. With this clever exemption, an employer in Georgia, in whose workplace violence is a recognized hazard, is not caught in the same catch-22 situation as is an employer in Florida. This not only helps employers, but also leaves the Georgia law in a less vulnerable position from being preempted if an actual conflict were to arise between the General Duty Clause and the gun law. Such a provision reconciles a potential conflict with the OSH Act, while at the same time it is also a way to avoid conflict preemption. If the Florida Legislature amends the Statute to include such an exemption, then not only does the law alleviate the employer's simultaneous compliance dilemma, but such an exemption would also save the Statute from preemption under the General Duty Clause. There would no longer be an issue of conflict preemption if the state law voluntarily yielded to the federal law in those situations where the Florida "Guns-At-Work" law is in conflict with an employer's obligations under the General Duty Clause.²⁹⁹

CONCLUSION:

The recommended amendments are not perfect, but they provide employers with an added safety mechanism which may not only prevent workplace violence, but may also protect the employer from an OSHA

296. GA. CODE ANN. § 16-11-135(f) (2009) (emphasis added).

297. 29 U.S.C. § 654(a)(1) (2006).

298. GA. CODE ANN. § 16-11-135(f).

299. For example, where an employer is cited by OSHA for workplace violence and would then be required to abate the hazard. Banning guns from the workplace would be a feasible method of abating such a hazard.

citation. Additionally, having a separate parking area allows gun owners to store guns in their vehicles, while at the same time recognizes the right to exclude from the remainder of the employer's commercial property. Providing an exemption to home-based businesses restores the home owner's right to exclude and is also a means of protecting children just as the school exemption provides protection. The Florida Legislature has already recognized such a need,³⁰⁰ and therefore, extending the protection to homes, where children are commonly found, is not a dramatic step. Finally, providing an exemption in order to comply with federal law not only protects an employer caught in a catch-22 situation, but also saves the "Guns-At-Work" law from possible pre-emption in those situations contemplated in this article.

Regardless of any constitutional arguments, property rights have been recognized to be of utmost importance. Therefore, from a policy perspective, the Florida Legislature, even if not constitutionally required, should be very cautious when depriving property owners of a critical aspect of property ownership—the right to exclude. In enacting the "Guns-At-Work" law, the Legislature failed to strike a fair and logical balance between respecting private property interests and strengthening gun "rights." Such failure is unwise and results in dangerous consequences. The "Guns-At-Work" law needs further clarification from the Legislature to answer the many questions that have been raised in this article.

If the law is left to stand as it is currently written, inevitably, unintended results will occur. As demonstrated by the *Florida Retail* court's ruling, the unintentional distinction drawn between businesses resulted in the portions of the law relating to customers being found unconstitutional.³⁰¹ The Legislature was sloppy in its drafting, and the employers of Florida are left with a law that has a significant number of unanswered questions, which may result in civil and possibly criminal liability for employers. Furthermore, although the *Florida Retail* court found the portions of the law relating to employees to be constitutional,³⁰² the *ConocoPhillips* court found that a similar law was pre-empted by the OSH Act under the Supremacy Clause.³⁰³ Although the Tenth Circuit ultimately reversed the *ConocoPhillips* court's decision on this issue,³⁰⁴ the *ConocoPhillips* case, nevertheless, shows that this issue is not clear

300. See FLA. STAT. § 790.251(7)(a).

301. *Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla.*, 576 F. Supp. 2d 1281, 1300 (N.D. Fla. 2008).

302. *Id.*

303. *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1340 (N.D. Okla. 2007), *rev'd sub nom. Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

304. See *Ramsey*, 555 F.3d at 1208.

cut, and the Tenth Circuit's ruling may not be the final decision on this issue. As demonstrated in this article, not only is the "Guns-At-Work" law capable of being pre-empted in specific situations, but it also places employers in a catch-22 situation—obey the law and risk an occurrence of workplace violence and possibly a citation and penalties from OSHA—or disobey the law and risk a suit brought by the Attorney General of Florida or the aggrieved employee.³⁰⁵ Florida employers are caught in a no-win situation and are left to choose between the lesser of two "evils."

It may appear that the Florida "Guns-At-Work" law has prevailed because the outcome of *Florida Retail Federation, Inc. v. Attorney General of Florida* has not been appealed. However, a declaration of victory is premature, and the future of the "Guns-At-Work" law remains to be seen. The Attorney General of Florida has yet to bring an action against an employer for failure to comply with the law. However, in the future, if an action is brought against an employer for violating the "Guns-At-Work" law or an employer is cited under the General Duty Clause due to compliance with the "Guns-At-Work" law, the employer could bring an as-applied constitutional challenge. Therefore, even though the *Florida Retail* decision has not been appealed, nonetheless, the "Guns-At-Work" law that the NRA plans to spread throughout the United States,³⁰⁶ is a contentious issue that could eventually appear before the United States Supreme Court. This article advocates for legislative reform for precisely the reasons discussed. For now, the political process may be the only means for inducing the Florida Legislature to recognize the extreme detrimental effects of the "Guns-At-Work" law and to amend the law appropriately to better reflect a fair and logical compromise between the interests of employers and gun owners.

305. See FLA. STAT. § 790.251(6).

306. See, e.g., Schoultz *supra* note 4.