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Hybrid Federalism and the Employee Right to Disconnect

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Abstract

The federal Occupational Safety and Health Administration (OSHA) administers specific workplace and health standards that generally and expressly preempt the entire field of workplace safety and health law. However, where such federal OSHA standards do not exist or states have developed their own approved OSHA plans, OSHA does not merely set a regulatory floor either. A type of "hybrid federalism" has been established, meaning a strong federal-based field preemption approach to labor and employment law issues, but tied to a conflict preemption approach. Applying this hybrid preemption approach to the employee right to disconnect problem provides the best opportunity to address the growing epidemic of overwork through electronic communications in the United States.

This hybrid approach has two essential characteristics under OSHA. First, as a default standard, a federal general duty clause that requires all covered employers to maintain a workplace free of hazards that may cause serious injury or death and cannot be feasibly abated. Second, OSHA also has promulgated specific workplace safety and health standard over the last five decades that set more detailed and specific requirements for numerous health or safety dangers in the workplace. The specific standards occupy the field and all contrary state or local safety and health regulations are preempted. Yet, employers can still seek a permanent variance from any OSHA standard if they can establish that they have another method to achieve

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the same goal as the permanent standard. Second, the OSHAct also permits states to develop their own plans and submit them for approval to OSHA. Twenty-seven states have taken advantage of this option to one degree or another and have plans approved by OSHA. While these state-approved plans must be "at least as effective" as the federal OSHAct, some states, like California and Virginia, have been more aggressive in regulation and have regulated areas that the federal OSHAct has not. This Article maintains that a combination of general duty clause federal enforcement and individual state enforcement is the most effective way of providing a broad-based right to disconnect standard until a federal permanent OSHA standard can be promulgated.

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I. INTRODUCTION

Employees in the United States have reached the point where many of them have become essentially perpetual "on-call" employees.[1] Texting, social media, and email all make employees reachable, and assumed available, anytime, anywhere.[2] The line between an employee's work life and personal life have become blurred to the point that this "on-call" culture seems normal; technology such as smart phones and laptops makes it impossible for employees to truly disconnect from the workplace.[3] In the United States, many employers and employees seem to value work over personal hobbies, family, and rest.[4] Not only does this overwork lead to less time spent caring for children and family and less time taking vacation or relaxing,[5] but it also leads to workplace injuries and illnesses caused by fatigue and stress.[6] More specifically, overwork causes employees to take more time off work, and increases costs for employers in the form of lower productivity rates and higher health care costs.[7]

A recent and noteworthy example of this dysfunctional dynamic comes from working conditions at electric car-maker, Tesla, and its hard-driving

1. An on-call employee is one who historically wore an electronic paging device or "beeper" during her off-duty hours and could be called back at employment to perform some task (usually one of some urgency). *See, e.g.*, Bright v. Hous. Nw. Med. Ctr. Survivor, Inc., 934 F.2d 671, 678–79 (5th Cir. 1991) (en banc) (finding time emergency room hospital technician spent wearing beeper 24/7 without backup not "compensable time" under Fair Labor Standards Act).

2. *See* Jeffrey Pfeffer, Dying for a Paycheck 122–23 (2018); *see also* Jon Messenger Et Al., Working Anytime, Anywhere: The Effects on the World of Work 3–4 (2017).

3. *See generally* Paul M. Secunda, *The Employee Right to Disconnect*, 9 NOTRE DAME J. INT'L & COMP. L. 1, 1–7 (2019) (setting forth anecdotes and statistics establishing the inescapable nature of modern-day work).

4. *See* Elizabeth Bruenig, *America is Obsessed with the Virtue of Work. What About the Virtue of Rest?*, WASH. POST (Apr. 25, 2018), https://www.washingtonpost.com/opinions/america-is-obsessed-with-the-virtue-of-work-what-about-the-virtue-of-rest/2018/04/25/f829f406-48bf-11e8-8b5a-3b1697adcc2a_story.html ("There's a balance to be struck where it comes to work and rest, but in the United States, values and laws are already slanted drastically in favor of work.").

5. *Id.* ("And in the United States, neither parental leave nor retirement nor vacation is a sure thing: In 2016, for instance, more than half of workers left vacation days unused, either unable to afford time off or unwilling to risk disappointing their employers.").

6. *See Long Work Hours, Extended or Irregular Shifts, and Worker Fatigue*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/SLTC/workerfatigue/hazards.html (last visited Feb. 27, 2019) [hereinafter OSHA] ("Fatigue can cause weariness, sleepiness, irritability, reduced alertness, impaired decision making, and lack of motivation, concentration and memory.").

7. *Id.*

CEO, Elon Musk.[8] According to news reports, Musk was working approximately one-hundred and twenty-hour week, with his last week-long vacation being in 2001 due to illness.[9] According to *The New York Times*, Musk stated that he would not leave the factory for three to four days at a time, which meant he did not see his family or engage in any type of leisure activity or rest.[10] Musk's exhausting work life required him to take Ambien, a well-known sleep aid used now by millions of Americans,[11] or risk not sleeping at all.[12]

Being an employee at Tesla seems to be just as bad, if not worse, than being the CEO.[13] Employees are pressured to meet production goals, which, in turn, requires working up to twelve-hour days, six days per week.[14] As a result of this overwork, ambulances have been called for Tesla employees more than one-hundred times in four years.[15] It is not uncommon for employees to experience dizziness, chest pains, and other ailments, with some even passing out on the production floor, while the company expects other employees to continue work as if nothing happened.[16] This type of workplace is like indentured servitude in that all employees have the time to do is work and sleep; no time exists for family or leisure activities.[17] As recently as

8. *See* David Gelles et al., *Elon Musk Details 'Excruciating' Personal Toll of Tesla Turmoil*, NY TIMES (Aug. 16, 2018), https://www.nytimes.com/2018/08/16/business/elon-musk-interview-tesla.html.

9. *See id*.

10. *Id.*

11. *Id.*; *see also* Nina Burleigh, *Ambien Nation,* HUFFPOST LIFE, https://www.huffpost.com/entry/ambien-nation_b_43573 (last updated Nov. 17, 2011) ("According to the *New York Times*, more than 25 million prescriptions for Ambien were written last year. Added to the dozen or so other commonly used sleep aids, doctors dashed off almost 50 million prescriptions for sleeping pills in 2006.").

12. *See* Gelles et al., *supra* note 8.

13. *See* Julia Carrie Wong, *Tesla Factory Employees Describe Grueling Work Conditions Where People Pass Out 'Like a Pancake*,*'* BUSINESS INSIDER (May 18, 2017, 9:53 AM), https://www.businessinsider.com/tesla-factory-workers-detail-grueling-conditions-fremont-2017-5.

14. *See* Julia Carrie Wong, *Tesla Workers Say They Pay the Price for Elon Musk's Big Promises*, THE GUARDIAN (June 14, 2018, 2:29 AM), https://www.theguardian.com/technology/2018/jun/13/tesla-workers-pay-price-elon-musk-failed-promises ("The army veteran put it another way: 'This company is pumping in aluminum, and the main export is injuries, not cars.'").

15. Wong, *supra* note 13.

16. *Id.*; *see also* Monica Torres, *This is What Happens to Your Body When You Hate Your Job*, HUFFPOST LIFE, https://www.huffpost.com/entry/hate-your-job-body-symptoms_n_5c40a314e4b0a8dbe16e8373 (last updated Jan. 29, 2019) (discussing Pfeffer's work and commenting, "[w]hen you see the workplace as a danger zone, it keeps your muscles wound tight, according to the American Psychological Association").

17. *See* PFEFFER, *supra* note 2, at 122–23.

September 2018, California's Division of Occupational Safety and Health (CalOSHA) initiated two health and safety investigations into Tesla based on injury reports, while other investigations remain open.[18] Of course, in the face of the Tesla example, it is hard not to conclude that the long-hours, fast-pace, and demands of the Tesla workplace, and many similar U.S. workplaces, is directly related to both the number of employee injuries and the number of dissatisfied employees.[19]

Serving to magnify demanding and dangerous workplaces like Tesla's are the use of smartphones and other workplace technology that allows employers to routinely contact employee at all times of the day,[20] including in the middle of the night.[21] Employers use this technology, expecting employees to respond immediately, or at least, promptly.[22] Additionally, workers who want to appear dedicated and ambitious answer the text messages and emails after hours, even though they may not be formally compelled to respond or get paid

18. *See* Mark Matousek, *California Regulators Opened 2 New Investigations into the Safety of Tesla's Factory in September*, BUSINESS INSIDER (Sept. 14, 2018, 3:20 PM), https://www.businessinsider.com/tesla-hit-with-new-osha-investigations-for-safety-conditions-2018-9.

19. *See* Wong, *supra* note 13. With regard to employee dissatisfaction with Tesla workplace conditions, it is not surprising that there is an on-going unionization campaign seeking to organize workers against these brutal and harmful work conditions. *See* Wong, *supra* note 14. Equally unsurprising is that Tesla is fighting the union drive tooth-and-nail and such unhealthy workplaces are more likely to occur in a non-unionized environment where employees have little or no voice over their working conditions and occupational safety and health matters are not part of a formal bargaining process. *See* Michael Sainato, *Tesla Workers Speak Out: 'Anything pro-union is shut down really fast,'* THE GUARDIAN (Sept. 10, 2018, 9:01 AM), https://www.theguardian.com/technology/2018/sep/10/tesla - workers-union-elon-musk.

20. *See* Jena McGregor, *Elon Musk is the 'Poster Boy' of a Culture that Celebrates 'Obsessive Overwork,'* WASH. POST (Aug. 22, 2018), https://www.washingtonpost.com/business/2018/08/22/elon-musk-is-poster-boy-culture-that-celebrates-obsessive-overwork/; *see also* Secunda, *supra* note 3, at 1 (describing obsessive overwork leading to premature death in other countries).

21. *See* Genevieve Douglas, *That 1 A.M. Cell Phone Call to a Worker May Require Overtime Pay*, BLOOMBERG LAW (Jan. 28, 2019), https://www.bna.com/ am-cell-phone-n57982095716/ ("Mobile devices let employers reach workers 24/7, to the point some may expect their people to respond anytime day or night. But that access may come at a price: requiring employers to shell out [overtime] or face potential class litigation over unpaid wages or other costs."). Of course, such overtime requirements would only apply to non-exempt, mostly hourly employees, which is why a wage and hour approach to the right to disconnect problem alone is inadequate to this larger workplace dynamic. *See* Secunda, *supra* note 3, at 24 ("The answer appears to be that the FLSA does little to tamp down the excessive amounts of work that such workplace connectivity increasingly causes. For exempt employees, they can literally be forced to double their work hours without labor cost to their employers.").

22. *See* Press Release, Challenger, Gray & Christmas, Inc., Are You a Digital Dictator? 1 (2017), https://www.challengergray.com/press/press-releases/are-you-digital-dictator (noting employers can now easily contact employees with workplace concerns outside of regular working period on platforms, such as text messaging, e-mail, and social media).

for such responses.[23]

Despite these grueling tails of obsessive work in the United States, there is no law presently that provides U.S. employees with a "right to disconnect"[24] from repetitive and abusive requests for additional work through text, emails and other messages after the work day has formally ended.[25] The Tesla example, and others discussed in previous articles, establish that a U.S. right to disconnect law is badly needed for the U.S. workplace.[26] In a previous article, I proposed a distinctively American version of a right to disconnect law based on fundamental notions of workplace safety and health under OSHA.[27] But any such proposal to a workplace problem leaves unanswered an important, related question: what level of government (federal v. state v. local) should legislate, and then, exclusively or in tandem?[28]

The United States Constitution sets up a system of federalism whereby federal laws are supreme over state laws,[29] and gives rise to what is known as federal preemption.[30] At the same time, the U.S. federal government is one of limited constitutional powers because it only has the powers enumerated in the Constitution,[31] while the remaining powers are reserved for the states and

23. *See* McGregor, *supra* note 20; Challenger, *supra* note 22.

24. The "right to disconnect" loosely refers to a "focus on the safety and health objectives of protecting employees from overwork by significantly minimizing electronic communication requests after work." *See* Secunda, *supra* note 3, at 5.

25. *See* Secunda, *supra* note 3, at 32 (noting lack of right to disconnect laws in the United States, and more specifically, that, "[t]here are currently no enacted or proposed regulations under the OSH Act, which address the scope or timing of workplace related electronic communications between employers and employees").

26. *See* Gelles et al., *supra* note 8.

27. *See* Secunda, *supra* note 3, at 5 ("After considering some of the more pertinent characteristics of the American workplace, this Article embraces a tactical choice to focus on the safety and health objectives of protecting employees from overwork by significantly minimizing electronic communication requests after work.").

28. *See* WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 5 (5th ed. 2011) (discussing one theme of the casebook as "focusing on determining the best level of government to regulate a particular problem").

29. U.S. CONST. art. VI, cl 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

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

31. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533–34 (2012) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that 'the question respecting the extent of the powers actually granted' to the Federal Government 'is perpetually arising, and will probably continue to arise, as long as our system shall exist.'" (quoting McCulloch v. Maryland, 17

people.[32] These constitutional provisions allow Congress to pass laws under one of its enumerated powers and then such federal laws either expressly or impliedly preempt state legislatures from passing laws on that topic or that are in conflict with those laws.[33]

Currently, preemption exists in the field of labor and employment law in a number of different forms.[34] While a detailed analysis of labor and employment law preemption doctrines is beyond the scope of this article,[35] laws like the Employee Retirement Income Security Act (ERISA)[36] preempt or occupy the field of employee benefits law, leaving little to no room for states to enact legislation in that area.[37] Other laws, like the Fair Labor Standards Act (FLSA),[38] set the floor below which state laws may not fall.[39] One easy illustration of this principle involves the federal minimum wage. The FLSA currently sets the minimum wage at $7.25 per hour,[40] leaving states or municipalities (as long as permitted by state law) to set the minimum wage level higher if they wish, and a good many have.[41]

The Occupational Safety and Health Administration (OSHA) administers the Occupational Safety and Health Act (OSH Act).[42] OSHA specific workplace and health standards expressly preempt the entire field of workplace safety and health law,[43] but where such standards do not exist or states

U.S. 316, 405 (1819))).

32. *See* U.S. CONST. art. I, § 8; U.S. CONST. amends. IX, X.

33. *See English*, 496 U.S. at 79 ("[S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, . . .").

34. For an overview of labor and employment law preemption, see generally Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008); Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251 (2009); Gary Minda, *Employment Law*, 42 SYRACUSE L. REV. 491 (1991).

35. *See* Secunda, *supra* note 34.

36. 29 U.S.C. § 1001 *et. seq.* (2018).

37. *See, e.g.*, Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004) ("ERISA civil enforcement mechanism is one . . . provision[] with such 'extraordinary pre-emptive power' . . . .").

38. 29 U.S.C. § 201 *et. seq.* (2018).

39. *See, e.g.*, Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1425 (9th Cir. 1990) ("[T]he purpose behind the FLSA is to establish a national floor under which wage protections cannot drop . . . .").

40. 29 U.S.C. § 206(a)(1)(C).

41. *See Minimum Wage Laws in the States*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/minwage/america.htm (last visited Mar. 1, 2019).

42. 29 U.S.C. § 656 (2018).

43. *See* Indus. Truck Ass'n, v. Henry, 125 F.3d 1305, 1310 (9th Cir. 1997) ("The Supreme Court

developed their own OSHA plans, it does not set a floor, and there is no preemption.[44] A type of "hybrid federalism" has been established. Here, by "modified" or "hybrid" federalism, this article refers to a strong federal-based field preemption approach to labor and employment law issues, that is tied to a conflict preemption approach. Applying this hybrid preemption approach to the employee right to disconnect problem provides the best opportunity to address the growing epidemic of overwork through electronic communications in the United States.

This hybrid approach has two essential characteristics under OSHA. First, as a default standard, a federal general duty clause that requires all covered employers to maintain a workplace free of hazards that may cause serious injury or death and cannot be feasibly abated.[45] Second, OSHA also has promulgated specific workplace safety and health standards over the last five decades that set more detailed and specific requirements for numerous health or safety dangers in the workplace.[46] The specific standards occupy the field and all contrary state or local safety and health regulations are preempted.[47] Yet, employers can still seek a permanent variance from any OSHA standard if they can establish that they have another method to achieve the same goal as the permanent standard.[48] Second, the OSH Act also permits states to develop their own plans and submit them for approval to OSHA.[49] Twenty-seven states have taken advantage of this option to one degree or another and have plans approved by OSHA.[50] While these state-approved plans must be "at least as effective"[51] as the federal OSH Act, some states, like California and Virginia, have been more aggressive in regulation and have regulated

has held that the Occupational Safety and Health Act expresses Congress' clear and manifest intent to preempt state law." (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992))).

44. *See infra* Part IV.

45. 29 U.S.C. § 654(a)(1) (2018).

46. *Id.* If a permanent or interim OSHA standard applies, the General Duty clause does not.

47. *See* Indus. Truck Ass'n v. Henry, 125 F.3d 1305, 1311 (1997) ("[U]nder the Occupational Safety and Health Act, as interpreted by *Gade*, when OSHA promulgates a federal standard, that standard totally occupies the field within the 'issue' of that regulation and preempts all state occupational safety and health laws relating to that issue, conflicting or not, unless they are included in the state plan.").

48. 29 U.S.C. § 655(d) (2018).

49. *Id.*; 29 U.S.C. § 667(b)–(c).

50. *See, e.g.*, *Contact a State Plan*, U.S. DEP'T OF LAB., https://www.osha.gov/dcsp/osp/index.html (last visited Mar. 1, 2019).

51. 29 U.S.C. § 667(c)(2).

areas that the federal OSH Act has not.[52] This Article maintains that a combination of general duty clause federal enforcement and individual state enforcement is the most effective way of providing a broad-based right to disconnect standard until a federal permanent standard can be promulgated.

This Article discusses the importance of using OSHA's unique brand of hybrid federalism to address the employee right to disconnect problem in four parts. Part II gives a brief overview of federalism and preemption in the United States.[53] Part III discusses the role preemption has played historically within different types of labor, employment, and employee benefit law schemes.[54] Part IV explains preemption in the OSHA context and examines OSHA-approved state plans.[55] Finally, Part V recommends a hybrid federalism approach to the right to disconnect problem in the United States, relying initially on the federal general duty clause and on regulatory innovations possible under pre-approved state OSHA plans.[56]

II. BRIEF OVERVIEW OF FEDERALISM AND PREEMPTION

Federalism and preemption stem from the Supremacy Clause of the United States Constitution, which says that the Constitution and laws passed by the federal government are the supreme laws of the land.[57] Additionally, the Tenth Amendment to the Constitution states that any power not expressly granted to the federal government is reserved to the States.[58] Thus, when federal and state law conflict, federal law supersedes state law to the extent that Congress has the enumerated power to regulate that area.[59] While this is easily understood, it is not easily applied; preemption law is murky.[60] To further clarify this area of the law, preemption in this Part is broken down into the

52. *See* FACT SHEET, COMPARISON OF CAL/OSHA AND FEDERAL OSHA PROGRAMS, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/Fact_Sheet.pdf (last visited Mar. 1, 2019); *Virginia State Plan*, U.S. DEP'T OF LAB., https://www.osha.gov/dcsp/osp/stateprogs/virginia.html (last visited Mar. 1, 2019).

53. *See infra* Part II.

54. *See infra* Part III.

55. *See infra* Part IV.

56. *See infra* Part V.

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

58. U.S. CONST. amend. X.

59. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533–34 (2012).

60. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232–33 (2000); Secunda, *supra* note 34, at 230 n.122.

following categories: (1) express preemption and (2) implied preemption, which can be further categorized into (A) field preemption and (B) conflict preemption.[61]

A. Express Preemption

Express preemption exists when Congress includes a section in legislation that withholds law-making authority from the states on that topic.[62] One example of express preemption is found in the Airline Deregulation Act,[63] which says, "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation."[64] This statute provides an example of an express preemption provision that demonstrates Congress' broad purpose and intent to prohibit states from regulating in this area of the law.[65] Because of this broad express exemption, a New York statute that required airlines to provide passengers with food, water, electricity, and restrooms after they boarded the plane was preempted by the federal law because it related to a service provided by an air carrier.[66] Relatedly, in a similar case, the U.S. Supreme Court held that a Texas statute that regulated advertising of airline fares was preempted by the same law.[67] Analogizing to ERISA, the Court found the state statute preempted because it related to prices of an air carrier.[68]

61. *See* Nelson, *supra* note 60, at 232–33. It is important to note that these categories are not rigid and tend to seep into one another as the ensuing discussion on this topic suggests. *See* Indus. Truck Ass'n v. Henry, 125 F.3d 1305, 1309 (9th Cir. 1997) ("Although these categories provide a useful analytic framework, they are not 'rigidly distinct.' Field preemption, for instance, 'may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulations.' It is, however, a more potent species, for under field preemption the state regulation is preempted whether or not it actually conflicts with the federal scheme." (quoting English v. Gen. Elec. Co, 496 U.S. 72, 79 n.5 (1990))).

62. *See* Nelson, *supra* note 60, at 232–33.

63. 49 U.S.C. § 40101 *et seq.* (2015).

64. 49 U.S.C. § 41713(b)(1).

65. *See* EagleMed LLC v. Cox, 868 F.3d 893, 899 (10th Cir. 2017).

66. *See* Air Transp. Ass'n of Am. v. Cuomo, 520 F.3d 218, 222 (2nd Cir. 2008).

67. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388 (1992).

68. *Id.*

B. Implied Field Preemption

In many statutes, express preemption language is absent.[69] In such cases, a court must ascertain whether Congress intended the law to preempt state laws impliedly.[70] Congress may intend for the federal government to exclusively occupy the field to which the law relates.[71] Such "field preemption" may be inferred by looking at the scheme of the law and whether it is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[72]

One area in which Congress has occupied the field leaving no room for states to regulate is immigration.[73] Congress created a complete system for immigrant registration so that when a state made it a misdemeanor for an undocumented individual not to register as the federal law required, the U.S. Supreme Court found that the federal law preempted the state law due to Congress' intent.[74] Even though the state law in question furthered the same purpose as the federal law and was generally consistent with the federal law, the Court still said it was preempted because Congress intended to occupy the entire field of law surrounding immigrant registration.[75] According to the Court, allowing states to enforce penalties in this area would frustrate "the federal government's control over enforcement."[76]

C. Implied Conflict Preemption

Alternatively, if Congress did not intend to occupy the field, it may still impliedly preempt state law by intending to preempt state laws that conflict

69. *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 80 (1990) (finding it "undisputed" that Congress had not expressly preempted state law by enacting several statutes for the nuclear industry).

70. *Id.* at 78–79.

71. *Id.* at 79.

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

73. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 395, 401 (2012) (noting that federal law governing immigration is "extensive and complex," and more specifically, "the Federal Government has occupied the field of alien registration."); *see also* Thomas O. McGarity, *Trumping State Regulators and Juries*, PROSPECT (Apr. 14, 2017), https://prospect.org/article/trumping-state-regulators-and-juries-0 ("Thus, for example, the federal immigration laws preempt all state laws addressing immigration into the United States of persons from other countries.").

74. *See Arizona*, 567 U.S. at 400–01.

75. *Id.* at 400–02.

76. *See id.* at 401–02 (quoting Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282, 288 (1986)).

with the federal law.[77] Conflict preemption comes in two forms: obstacle and impossibility.[78] Obstacle preemption exists "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[79] For a state law to be obstacle-preempted by federal law, the conflict must be "so direct and positive that the two acts cannot be reconciled or consistently stand together."[80] As a way of illustration, a state law claim for mislabeling baby formula as organic was obstacle-preempted by the federal Organic Foods Production Act (OFPA).[81] The state law claim struck "at the very heart" of the OFPA certification process because it alleged that the formula was not actually organic even though it received the organic certification.[82] This type of scenario is the reason Congress passed the OFPA so that a state law claim could not be entertained.[83]

Alternatively, impossibility preemption exists when complying with both state and federal law is impossible; in these cases, federal law preempts state law.[84] Courts must address whether the party may independently do under federal law what the state law requires.[85] For example, the Court held that a federal law preempted a state law requiring more information to be disclosed on a generic drug label.[86] The federal law required generic drugs to have the same labels as brand-name drug labels.[87] Because it was impossible for the manufacturer of the drug to fulfill the requirements of the state law without violating federal law, the Court found the state law preempted.[88]

III. FEDERALISM AND PREEMPTION IN LABOR AND EMPLOYMENT LAW

Preemption exists in labor and employment law just as it does in the other areas of law. Express, implied field preemption, and implied conflict preemption are all part of this area of labor and employment law and statutes to

77. *See* Nelson, *supra* note 60, at 227–28; *English*, 496 U.S. at 79.
78. *See* Nelson, *supra* note 60, at 227–28.
79. *See English*, 496 U.S. at 79 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
80. *E.g.*, Marentette v. Abbott Labs., Inc., 886 F.3d 112, 117 (2d Cir. 2018).
81. *Id.* at 118.
82. *Id.*
83. *Id.* at 119.
84. *See English*, 496 U.S. at 79.
85. *See* Sikkelee v. Precision Airmotive Corp., 907 F.3d 701, 709–10 (3d Cir. 2018).
86. *See* PLIVA, Inc. v. Mensing, 564 U.S. 604, 618 (2011).
87. *Id.*
88. *Id.*

varying degrees. To illustrate the various types of preemption in this area of the law, this Part examines the preemption framework of the ERISA[89] as primarily an example of express preemption,[90] while the National Labor Relations Act (NLRA) provides an example of both implied field preemption and implied conflict preemption.[91]

A. Express Preemption

In ERISA, Congress expressly preempted state laws "relating to" employee benefits by including a provision that says that the ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[92] This express preemption has been interpreted very broadly.[93] However, a state law may nevertheless be saved from ERISA preemption if it regulates insurance, securities, or banking under the savings clause.[94] Finally, even if the state law regulates insurance, it may still be preempted under the deemer clause if it is being applied to a self-insured health plan.[95]

Based on this express statutory language, early preemption cases under Section 514 of ERISA applied a broad preemption approach.[96] For instance,

89. 29 U.S.C. §§ 1001–1461 (2018).

90. To be clear, Section 502(a) of ERISA also provides forms of both implied field and conflict preemption as well. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004). However, these topics are not discussed in this Part, and ERISA is presented here only to give an example of express preemption in labor and employment law.

91. 29 U.S.C. §§ 151–169 (2018).

92. 29 U.S.C. § 1144(a) (2018). Under the original numbering of this legislation, this section is normally referred to as ERISA § 514(a). "ERISA is a complex statute covering an extensive area of law. It 'protects employee pensions and other benefits by providing insurance . . . , specifying certain plan characteristics in detail . . . , and by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefits plans.'" Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 136 (2009) (quoting Varity Corp. v. Howe, 516 U.S. 489, 496 (1996)).

93. *See* Secunda, *supra* note 92.

94. ERISA § 514(b)(2)(A).

95. ERISA § 514(b)(2)(B).

96. So-called "[m]odern preemption cases appear to abandon the broader field preemption approach in favor of a conflict preemption approach under which a state law is preempted only to the extent that it is impossible to comply with both ERISA and state law or where the state law interferes with the purposes and objectives of ERISA." RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 223 (2007). *See generally* Secunda, *supra* note 92, at 139–43, for a discussion of these modern preemption cases. The seminal modern preemption case is *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

in *Shaw v. Delta Air Lines, Inc.*,[97] three employers provided ERISA-covered medical plans to their employees.[98] Of significance, these plans failed to provide benefits to pregnant employees as mandated by New York state laws.[99] In deciding whether the New York laws were preempted by ERISA, the Court interpreted the "related to" language in Section 514(a) to mean that a state law is preempted if it makes "reference to" or has a "connection with" an ERISA plan.[100] The Court concluded that the New York laws requiring pregnancy coverage had a connection with employee benefit laws because the New York laws mandated what the plans had to cover.[101]

Later cases clarified the scope of the meaning of "connected with" an employee benefit plan and thus, preemption by ERISA.[102] In *Pilot Life Insurance Co. v. Dedeaux*,[103] Dedeaux injured his back while working for his employer.[104] He was covered under a long-term disability insurance plan covered by ERISA, and although he initially received coverage for his back ailment, the benefits were terminated by Pilot Life after two years.[105] Thereafter, Dedeaux's benefits were terminated and reinstated a number of times, and Dedeaux sought to bring a number of common-law bad faith insurance claims under Mississippi state law.[106] The Court held that state tort and contracts claims alleging improper processing of a benefits claim were preempted by ERISA because the state law claims were "connected with" the administration of an ERISA plan.[107] More specifically, the Court concluded that the "roots" of Dedeaux's claims were grounded in state tort and contract law and not subject to ERISA's savings clause which provides an exception for state laws regulating insurance.[108]

97. 463 U.S. 85 (1983).
98. *Id.* at 92.
99. *Id.*
100. *Id.* at 96–97.
101. *Id.* at 108.
102. *See, e.g.*, Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).
103. 481 U.S. 41 (1987). *Pilot Life* now stands for the broader proposition that state common law claims having a connection with an employee benefit plan are preempted. *See, e.g.*, Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004).
104. *Pilot Life*, 481 U.S. at 43.
105. *Id.*
106. *Id.*
107. *Id.* at 47.
108. *Id.* at 50.

B. Implied Preemption

As opposed to the express preemption provisions of ERISA, the NLRA[109] is an example of implied preemption, specifically both impossibility-conflict (conflict) preemption and field preemption. Within the field of NLRA law, the Supreme Court has developed three preemption doctrines: (1) *Garmon* preemption; (2) *Machinists* preemption; and (3) Section 301 preemption.[110]

The Supreme Court held in *San Diego Building Trades Council v. Garmon*[111] that the NLRA preempts state laws that Section 7 protects or *arguably* protects or that Section 8 prohibits or *arguably* prohibits.[112] The use of the word "arguably" underscores the breadth of *Garmon* preemption.[113] In other words, it does not matter whether one is considering a specific law that deals with labor relations or just a rule of general application that only incidentally touches on labor relations.[114] This is very much a conflict preemption doctrine based on the idea that it is impossible for parties to abide by both federal and state law in a given area.[115] Indeed, this is exactly what happened in *Garmon* itself when the Court concluded that California state courts lacked jurisdiction to intervene in a picketing dispute between the parties.[116]

Another line of labor preemption law cases exists under *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*.[117] *Machinists* preemption does provide employers

109. 29 U.S.C. §§ 151–69 (2018).

110. *See* Secunda, *supra* note 34, at 232.

111. 359 U.S. 236 (1959).

112. Secunda, *supra* note 34, at 232, 245. "*Garmon* preemption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA." *See* Chamber of Commerce of U.S. v. Lockyer, 463 F.3d 1076, 1090 (9th Cir. 2006) (en banc), *rev'd sub nom.* Chamber of Commerce of U.S. v. Brown, 554 U.S. 60 (2008).

113. *See* Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 378 (1990) ("*Garmon's* 'arguably protected' rule imposes greater restrictions on state courts with respect to labor disputes: so long as the assertion of NLRA protection is not frivolous, the state court is without authority to proceed, *even though ultimately the NLRB might determine that the challenged conduct is not federally protected*.").

114. *See Garmon*, 359 U.S. at 244 ("Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the states to control conduct which is the subject of national regulation would create potential frustration of national purposes.").

115. *Id.* at 246.

116. *Id.*

117. 427 U.S. 132 (1976).

with protection from state law even though employers do not enjoy express rights under the NLRA.[118] In *Machinists*, the Court held that the scheme of the NLRA implicitly left open the availability of economic force to the parties as a way to resolve labor stalemates.[119] State law is preempted when it interferes with lawful economic pressure applied by either party.[120] In many respects, *Machinists* preemption has proven to be just as broad as *Garmon* preemption.[121]

Finally, Section 301 of the Labor Management Relations Act (or Taft-Hartley Amendments of 1947) concerns disputes arising under existing collective bargaining agreements and allows enforcement of their terms in federal court.[122] Although it appears to apply only to jurisdiction, "it has been interpreted as authorizing federal courts to fashion a body of common law for the enforcement of collective bargaining agreements" in order to promote uniformity in this area of labor law.[123] In addition to conferring subject matter jurisdiction, Section 301 also directs the district courts to develop a federal common law of labor agreements.[124] Any state law that is inconsistent with federal common law under Section 301 is deemed preempted.[125] Section 301 preemption is therefore a form of field preemption in which Congress has chosen to completely occupy the field of federal labor law concerning the interpretation of collective bargaining agreements.[126] Interestingly, then, the NLRA is an example of a law that contains doctrines that cover both implied field preemption (Section 301), as well as implied conflict preemption (*Garmon* and *Machinists* doctrines).

118. *See* Gottesman, *supra* note 113, at 380 ("The *Machinists* doctrine depends upon a startling supposition for those familiar with the climate that spawned the Wagner Act: that Congress intended, in passing that Act, to 'protect' employers from state law disarmament.").

119. *Machinists,* 427 U.S. at 140.

120. *Id.* at 143–44.

121. *See* Gottesman, *supra* note 113, at 381.

122. 29 U.S.C. § 185 (2018).

123. *See* Antol v. Esposto, 100 F.3d 1111, 1115 (3d Cir. 1996) (citing Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957)).

124. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985); *see also Lincoln Mills*, 353 U.S. at 456–57.

125. *See Allis-Chalmers*, 471 U.S. at 209; Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 102–03 (1962); *Lincoln Mills*, 353 U.S. at 456–57.

126. *See Teamsters*, 369 U.S. at 102–03.

IV. HYBRID FEDERALISM AND OSHA PREEMPTION

OSHA provides perhaps the most complicated overall approach to preemption based on its statutory structure. On the one hand, OSHA adopts express field preemption: "[t]he Supreme Court has held that the Occupational Safety and Health Act expresses Congress' clear and manifest intent to preempt state law."[127] Moreover, "[a]ll state regulations relating to the 'issue' of a federal standard are preempted even if they do not conflict with the federal scheme."[128] Yet, in addition to this express preemption, OSHA also contains elements of implied field preemption and implied conflict preemption. As described in *The Employee Right to Disconnect*: "OSHA is legislation with some default prohibitions, such as the General Duty Clause[129] . . . but . . . it allows for employers to meet safety and health standards through creating equally effective ones of their own, often called permanent variances."[130] Additionally, OSHA allows states to run their own state plans if approved by OSHA and have at least as generous coverage.[131] In this sense, a type of hybrid or modified federalism has been established that allows federal law to expressly preempt state law through its general duty clause provisions or through a health and safety standard promulgated under the Act.[132] At the same time, forms of implied preemption are permitted by either allowing employers through permanent variances to circumnavigate federal OSHA standards or permit states through pre-approved OSHA plans to cooperate in

127. *See* Indus. Truck Ass'n v. Henry, 125 F.3d 1305, 1310 (9th Cir. 1997) (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992)).

128. *Henry*, 125 F.3d at 1310 (citing *Gade*, 505 U.S. at 103). That being said, OSHA's preemptive effect does have limits. For instance, prosecutions under general state criminal law will normally not be preempted. *See* People v. Chicago Magnet Wire Corp., 534 N.E.2d 962, 965–66 (Ill. 1989).

129. OSH Act of 1970 § 5(a)(1); 29 U.S.C. § 654(a)(1) (2006) ("Each 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."). The General Duty Clause only applies when a safety or health standard is not already on point. *See* SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1207 (D.C. Cir. 2014); Susan Harthill, *The Need For a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1268–70 (2010).

130. Secunda, *supra* note 3, at 6; *see also* 29 U.S.C. § 655(b)(6)(C) (2018) (permanent variance standard).

131. 29 U.S.C. §§ 667(c)(2), 672 (2018). *See* Secunda, *supra* note 3, at 16 ("States are also permitted to create their own occupational health and safety plans, as long as such plans do not provide protections lesser than federal floor and provide coverage for state and local employees.").

132. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 103 (1992).

policing workplace safety and health issues.[133]

To more fully understand this hybrid federalism dynamic, this Part discusses in detail the four essential characteristics of hybrid federalism under OSHA: (1) the federal default standard, known as the general duty clause; (2) promulgated specific safety and health standards under OSHA; (3) employer permanent variance from federal OSHA standards; and (4) pre-approved state OSHA plans. Each of these aspects will be discussed in turn.

A. The General Duty Clause

First, as a default standard, the general duty clause of the federal OSHA statute requires all covered employers to maintain a workplace free of hazards that may cause serious injury or death and that cannot otherwise be feasibly abated.[134] For instance, in *F & H Coatings, LLC v. Acosta*,[135] a 12,000-pound sandblasting vessel elevated on pipe racks fell and crushed an employee to death.[136] In such cases where no extant safety or health standard is on point, OSHA has the burden of establishing a violation of the general duty clause.[137] The elements that OSHA must prove include: "(1) that the employer failed to render its workplace free of an obvious and recognized hazard, (2) the hazard was causing or likely to cause death or serious physical harm, and (3) there was a feasible method by which the employer could have abated the hazard."[138]

In *F&H Coatings*, the court explained that "[a] safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur."[139] Significantly, proximate cause is not required,[140] and a condition is a hazard if it

133. *See* Secunda, *supra* note 3, at 15–16.

134. 29 U.S.C. § 654(a)(1) (2018).

135. 900 F.3d 1214 (10th Cir. 2018).

136. *Id.* at 1218.

137. *Id.* at 1224.

138. *Id.* (quoting Safeway, Inc. v. Occupational Safety & Health Review Comm'n, 382 F.3d 1189, 1195 (10th Cir. 2004)). Successful general duty clause claims can also be said to contain four elements, which are summarized as follows: (1) the employer failed to furnish a workplace free of a hazard, and its employees were exposed to that hazard; (2) the hazard was recognized; (3) the hazard was causing, or was likely to cause, death or serious physical harm; and (4) a feasible method existed to correct the hazard. *See* Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265–67 (D.C. Cir. 1973).

139. 900 F.3d at 1224–25.

140. *Id.* at 1225.

is "'recognized' either by the employer or by the industry, or was so obvious as to put the employer on constructive notice."[141] That being said, a hazard must be preventable to support a violation of a general duty claim and the clause does not impose strict liability on an employer.[142]

Where there was a feasible method to abate the hazard, the court in *F&H Coatings* agreed that using rollers to support the vessel would have been one feasible means of abating the hazard.[143] Taking all these factors into consideration, the court found OSHA proved a violation of the general duty clause because the "likelihood of the vessel falling was exacerbated by the uneven weight of the protruding manway, and [by] the placement of the vessel" which constituted a hazard and created a risk of death or serious bodily harm.[144]

An understanding of the general duty clause's operation still requires an understanding of its preemptive effect in a given safety or health workplace situation.[145] The U.S. Court of Appeals for the D.C. Circuit explained in *General Dynamics Land Systems* that, "section 5(a)(1) [the general duty clause] can no more be denied legal effect on the basis of OSHA's preemption regulations than it can on the basis of its specific standard."[146] Indeed, if an extant safety or health standard does not provide the necessary and effective response to a workplace safety or health issue, the general duty clause comes into play to provide that protection.[147] In this sense, the general duty clause applies even when there is a standard if the standard is ineffective.[148] OSHA "does not . . . absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause."[149]

141. *Id.* at 1226.

142. *See Nat'l Realty*, 489 F.2d at 1268.

143. 900 F.3d at 1229.

144. *Id.* at 1225.

145. *See* Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 376–77 (2000) ("Congress further limits OSHA's coverage through its appropriations power. Since the 1970s, Congress has banned routine inspections of employers with fewer than ten employees or enforcement of the [OSH] Act on small farms without temporary labor camps.").

146. *See* Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Gen. Dynamics Land Sys. Div., 815 F.2d 1570, 1577 (D.C. Cir. 1987).

147. *Id.* at 1579 ("[T]he larger point [is] that when an employer is aware of a hazard that is not in fact addressed by a specific standard, then of necessity that standard cannot be deemed to have preempted his obligation under the general duty clause.").

148. *Id.* at 1577 ("In sum, if an employer knows that a specific standard will not protect his workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard. Scienter is the key.").

149. *Id.* at 1576.

B. Specific OSHA Safety and Health Standards

If OSHA has promulgated interim or workplace safety and health standards on point, normally the general duty clause, with the ineffectiveness exception noted above, is not applicable.[150] As far as standards, which number in the thousand, they set out more detailed and specific requirements for numerous health or safety dangers in the workplace.[151] In Section 6(b), OSHA sets out procedures for promulgation of such standards, which include: an interested party proposing a rule; announcement of the rule in the Federal Register; comments on the proposed rule; review of the rule by the Office of Management and Budget; promulgation of rule; and review by a federal court of appeals and, perhaps even, the U.S. Supreme Court.[152] These specific standards expressly occupy the field when they apply and all contrary state or local safety and health regulations are expressly preempted.[153]

Consider the Hazard Communication Standard discussed in *Industrial Truck Ass'n. v. Henry*.[154] There, California enacted Proposition 65 in 1986, the California Safe Drinking Water and Toxic Enforcement Act, and its implementing regulations.[155] Proposition 65 requires the State to publish and maintain a list of chemicals known to cause cancer, birth defects or other reproductive harm, among other things.[156] The issue presented to the court was "whether California may enforce these regulations against manufacturers of industrial trucks under the authority of that portion of the state regulations which the state did not incorporate into the state plan it submitted to the federal

150. 29 U.S.C. § 654(a)(2) (2018); *Gen. Dynamics*, 815 F.2d at 1576; Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1261 (D.C. Cir. 1973).

151. 29 U.S.C. § 655(a) ("[T]he Secretary shall . . . promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees."). *See* JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 236 (2d ed. 2013) ("Permanent standards were intended to be the Secretary's primary means of enforcing the OSHAct. The procedures required to promulgate a permanent standard are, like the procedures to promulgate other formal administrative rules, extensive.").

152. *See* HIRSCH ET AL., *supra* note 151, at 236.

153. *See* Indus. Truck Ass'n v. Henry, 125 F.3d 1305, 1311 (9th Cir. 1997) ("[U]nder the Occupational Safety and Health Act, as interpreted by *Gade*, when OSHA promulgates a federal standard, that standard totally occupies the field within the 'issue' of that regulation and preempts all state occupational safety and health laws relating to that issue, conflicting or not, unless they are included in the state plan.").

154. *Id.*

155. CAL. HEALTH & SAFETY CODE, §§ 25249.5–25249.14 (2017) ("Proposition 65").

156. *Id.* § 25249.8.

[OSHA]."[157] After a comprehensive and detailed analysis, the court held "that the parts of the state regulations not submitted to OSHA, insofar as they apply to industrial trucks, are preempted under . . . OSHA's Hazard Communication Standard."[158] This outcome derives from the fact that the state plan preemption provision, OSHA §18(b), "'unquestionably' pre-empts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard," and where the State has not obtained OSHA's approval for its own plan.[159] The problem for California was that it was not clear at all that these standards were part of California's OSHA plan.[160] More specifically, the court found that the Hazard Communication Standard, enacted by OSHA to protect workers from hazardous chemicals in the workplace, was appropriately promulgated under OSHA's standard-making authority and not contained in the state pre-approved plan.[161]

To be clear, if no pre-approved State plan existed at all, that would have been the end of the analysis and OSHA would have expressly preempted the state law.[162] This is because "[t]he scope of preemption in each area in which a federal standard has been promulgated is complete. All state regulations relating to the 'issue' of a federal standard are preempted even if they do not conflict with the federal scheme."[163] In other words, "[f]ederal [OSHA] standards, like the Hazard Communication Standard, preempt more than those state standards directly covering the same 'issue' as the federal standard; rather, they preempt the broader category of state laws 'relating to' the federal issue."[164]

157. *Henry*, 125 F.3d at 1306.
158. *Id.* (citing 29 C.F.R. § 1910.1200).
159. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 97 (1992).
160. *Henry*, 125 F.3d at 1306.
161. *Id.*
162. *Id.* at 1310 ("In *Gade*, the plurality interpreted § 18 of the Act, 29 U.S.C. § 667, and held that unless a state plan is submitted to OSHA, 'the OSH Act pre-empts *all* state occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.'" (internal quotations omitted) (quoting *Gade*, 505 U.S. at 102)).
163. *Henry*, 125 F.3d at 1310.
164. *Id.* at 1314.

C. Variances to Permanent Standards

Yet, employers can still seek a permanent variance from any OSHA standard if they can establish that they have another method to achieve the same goal as the permanent standard.[165] Under Section 655(d) of OSHA: "Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section."[166]

An employer may request two types of variances: temporary or permanent.[167] OSHA will grant a temporary variance only where the employer establishes that: (1) it is unable to comply with the standard on its effective date because of the unavailability of professional or technical workers, the unavailability of needed materials and equipment, or necessary construction to the facility cannot be completed in time; (2) the employer is taking steps to protect employees against the hazards protected by the standard at issue; and (3) the employer will comply with the standard as soon as practicable.[168] Employees must have notice of an employer's application for a temporary variance, which may last for a maximum of two years.[169]

A permanent variance, on the other hand, is appropriate where an employer convinces OSHA that it has an alternative method to ensure the same level of workplace safety or health as the standard at issue.[170] Permanent variances must describe the alternative method of safety or health that is proposed and may be modified or revoked at any point once six months have elapsed since their issuance.[171]

Although a permanent variance is not a preemption concept, it does allow for employers' flexibility when dealing with OSHA field preemption.[172] The variance process thus provides a manner in which to adjust the level of federalism, yet another way that OSHA provides a hybrid preemption approach.

165. 29 U.S.C. § 655(d) (2018).
166. *Id.*
167. 29 U.S.C. § 655(b)(6)(A)–(C)
168. 29 U.S.C. § 655(b)(6)(A).
169. 29 U.S.C. § 655(a).
170. 29 U.S.C. § 655(d).
171. *Id.*
172. *See id.* (giving employers six months to see their change implemented).

D. State Pre-Approved OSHA Plans

As alluded to above, the OSH Act also permits states to develop their own plans and submit them for approval to OSHA.[173] First, Section 18(a) provides that the Act does not "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."[174] This is implied conflict preemption.[175] Second, and according to the Court in *Gade*, "Congress not only reserved certain areas to state regulation, but it also, in § 18(b) of the Act, gave the States the option of pre-empting federal regulation entirely,"[176] or gave the states the opportunity to opt into a type of field preemption.[177]

Twenty-seven states have taken advantage of the Section 18(b) option, at least to some extent, and have plans approved by OSHA.[178] OSHA will grant permission to the state if it finds, among other things, that the plan: (1) designates a state agency to administer it, (2) provides for standards and inspections as effective as federal standards, (3) gives adequate funding and legal authority to administer the plan, and (4) mandates that employers provide the Secretary the same type of reports that would be required if no state plan were in place.[179]

While these state-approved plans must be "at least as effective"[180] as the federal OSH Act, some states, like California and Virginia, have been more

173. *See id.*; 29 U.S.C. § 667(b)–(c).

174. 29 U.S.C. § 667(a). This seems to contemplate that the federal general duty clause and state safety and health regulation can coexist in appropriate circumstances. *See* Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1202 (10th Cir. 2009) (holding general duty clause did not preempt Oklahoma laws holding employers criminally liable for prohibiting their employees from storing firearms in their personal vehicles on company property).

175. *See* 29 U.S.C. § 667(a).

176. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 97 (1992). Section 667(b) reads:

> Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards. Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary under the OSH Act] shall submit a State plan for the development of such standards and their enforcement.

Id.

177. *See id.*

178. *See, e.g.*, *State Plans*, U.S. DEP'T OF LAB., https://www.osha.gov/dcsp/osp/index.html (last visited Mar. 4, 2019).

179. 29 U.S.C. § 667(c).

180. 29 U.S.C. § 667(c)(2).

aggressive in regulation and have regulated areas that the federal OSH Act has regulated more minimally.[181] In any event, and as the *Henry* court made clear, "when a state submits a state plan on a health and safety issue, the state takes responsibility only for the 'Federal standard' on that issue, not all federal standards."[182] Consider the example of the treatment of second-hand smoke in this regard.[183] The OSHA Air Contaminants standard does not address second-hand tobacco smoke. Consequently, a state law regulating workplace smoking was not found to be preempted by OSHA.[184]

V. OSHA HYBRID FEDERALISM AND THE RIGHT TO DISCONNECT

Having set out the characteristics of both the OSHA statutory structure and its unique preemption provisions, this Article maintains the right to disconnect can be addressed best by a joint federal general duty clause approach, combined with state OSHA plans as a way to address the employee disconnection problem in the short-term. The long-term hope is that OSHA will soon begin the process of promulgating a federal permanent standard which will make general duty enforcement unnecessary and allow the state OSHA plans to play a more complementary role. This part uses the example of workplace violence to illustrate how the hybrid federalism model can be utilized under OSHA and pre-approved state plans to address the safety and health issues surrounding employees' right to disconnect.

A. The Right to Disconnect and the General Duty Clause

In examining the relationship between the right to disconnect and OSHA, it is necessary to start with the proposition that no current specific standards exist under the OSH Act that address the scope or timing of workplace related electronic communications between employers and employees after work.[185] Consequently, the only federal OSHA response possible in the disconnection area would be through the general duty clause. In turn, a general duty clause

181. *See* sources cited *supra* note 52.

182. Indus. Truck Ass'n v. Henry, 125 F.3d 1305, 1311 (9th Cir. 1997).

183. *See, e.g.*, Empire Rest. & Tavern Ass'n v. State, 360 F. Supp. 2d 454, 464 (N.D.N.Y. 2005) (using second-hand smoke as an example).

184. MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 59 (2018) (citing *Empire*, 360 F. Supp. 2d 454).

185. *See* Secunda, *supra* note 3, at 32.

violation would require that the inability to disconnect from the workplace is a "recognized hazard"[186] causing "death or serious physical harm"[187] to employees that could be feasibly abated through plausible alternative methods.[188]

Although it is possible that employees stressed out and physically sick from the constant strain of receiving workplace communications after-hours might file a complaint with OSHA on their own, presently there is no indication that any such complaint has ever been filed with OSHA. Consequently, it would be helpful, through its own publications, to make the lack of employee disconnection from the workplace a "recognized hazard" by highlighting for employers and employees the dangers to safety and health caused by overwork and the inability to disconnect from the workplace.[189] Here, an analogous example exists with regard to how OSHA has approached the workplace violence problem by using the general duty clause.[190]

As with the right to disconnect, OSHA has chosen not to enact specific standards on workplace violence.[191] Instead, OSHA has put out publications to assist its regional offices to bring general duty clause claims where workplace violence has led to substantial injury or death.[192] In a previous article I discussed how such a general duty clause regime might work in the right to disconnect context. My purpose here is not to re-state that proposal, but to illustrate how the unique brand of hybrid federalism under OSHA can be

186. *See* Secunda, *supra* note 3, at 34 ("[W]ith a disconnection problem leading to substantial mental or physical health concerns because of the amount and frequency of work the employees are being required to do after the workday, it would seem that an employer policy of not contacting workers through electronic communications, except in unusual or emergency situations, would go towards whether a hazard in fact existed at the worksite, whether the hazard was recognized by the employer, and whether there were feasible means of abatement.").

187. *Id.* ("As far as injuries that could be caused, overwork stemming from excessive electronic communication requests can cause death, including suicide or cardiac arrest . . . , or serious bodily harm, in the form of extreme stress, depression, and anxiety that functionally debilitate the individual.").

188. *Id.* ("On the factor of feasibility, such a hazard is preventable with proper training of supervisors not to contact employees by text, e-mails or social media after work in normal circumstances.").

189. *See e.g.*, *id.* at 4 n.19 (noting that overwork and stress has led to increased workplace suicides in the United States in recent years).

190. *See generally* U.S. Department of Labor, OSHA Instruction CPL 02-01-058, Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence (2017), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-058.pdf [hereinafter OSHA Enforcement Procedures].

191. *See* Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1205 (10th Cir. 2009) ("Because the absence of *any* specific OSHA standard on workplace violence is undisputed, the district court correctly recognized that the only possible area of OSH Act preemption was under the general duty clause and the OSH Act's overarching purpose.").

192. *See, e.g.*, OSHA ENFORCEMENT PROCEDURES, *supra* note 190.

utilized to promote federal-state cooperation in addressing this relatively new workplace danger.

As described in *The Employee Right to Disconnect*, OSHA has published an "OSHA Instruction" on workplace violence that indicates that OSHA "inspectors should . . . gather evidence to demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees."[193] Needless to say, OSHA should put out a similar directive with regard to the hazards surrounding the inability of workers to disconnect from work because of repeated after-work communications from their employers.[194] Whereas workplace violence is an obvious hazard that has been established to lead to both death or serious physical harm,[195] the hazards surrounding the lack of rest, leisure, privacy, and autonomy for workers are far more insidious. It is harder to make a causal connection between lack of disconnection stresses and injuries and sickness. Instead, the perils of overwork caused by the inescapable nature of work must be brought more forcefully to employers' and employees' attention through anecdotes like the one this article started with regarding Tesla, with statistics regarding missed days or work and falling productivity, and with examples of how other countries—similar in nature to the United States—have dealt with this same disconnection problem.[196]

From a federalism or preemption standpoint, the good news is that an OSHA instruction, which makes it more likely for these disconnection issues to be identified and managed through the general duty clause, does not preclude those states that already have OSHA plans to take more aggressive action. A number of courts have already found that general duty clause regulation does not occupy the field of regulations when it comes to pre-approved

193. *See id*. at 3–4.

194. *See, e.g.*, Yoav Gonen & Ruth Brown, *Behind the Push to Let Employees Unplug Outside Normal Workday*, N.Y. POST (Jan. 13, 2019, 11:19 PM), https://nypost.com/2019/01/13/behind-the-push-to-let-employees-unplug-outside-normal-workday/.

195. *But see Ramsey Winch Inc.*, 555 F.3d at 1206 ("In fact, OSHA *declined* a request to promulgate a standard banning firearms from the workplace. In declining this request, OSHA stressed reliance on its *voluntary* guidelines and deference 'to other federal, state, and local law-enforcement agencies to regulate workplace homicides.'" (quoting Letter from Richard E. Fairfax, Director, Occupational Safety and Health Administration, to Morgan Melekos (September 13, 2006), *available at* 2006 WL 4093048)).

196. In *The Employee Right to Disconnect*, I discussed in detail the regulatory approach taken by France and the self-regulatory approach taken by Germany to the right to disconnect. *See* Secunda, *supra* note 3, at 27–32.

state plans under Section 18(b) of OSHA.[197] Indeed, in the area of workplace violence, even with the increased regulation of workplace violence through the general duty clause based on the OSHA Instruction, states like California continue to push the envelope on what can be further done to address the issue of workplace violence.[198] Thus, the argument here is that an OSHA Instruction on the hazards associated with overwork and the inability to disconnect would not in any way preempt California or other states to act like laboratories of experimentation (consistent with notions of federalism) and come up with their own responses to the disconnection problem.[199]

B. The Right to Disconnect and State OSHA Plans

In an environment where the general duty clause is the main source of regulation, it is incumbent upon states with pre-approved OSHA plans not just to mimic the federal standards, but also to consider additional standards to make the workplace safer and healthier for its employees.[200] The way in which workplace violence issues have been dealt with by CalOSHA provides a useful jumping off point to consider how states could take the lead in the disconnection realm.[201]

As discussed in *The Employee Right to Disconnect*,[202] under its Workplace Violence Regulations for Medical Care Providers, effective April 1, 2017,[203] CalOSHA has required that "healthcare employers implement violent incident logs and record violent incidents in the log."[204] Moreover, effective April 1, 2018, covered California employers must have implemented a workplace violence prevention plan, reviewed the workplace violence prevention

197. *See Ramsey Winch Inc.*, 555 F.3d at 1202 (holding general duty clause did not preempt Oklahoma laws holding employers criminally liable for prohibiting their employees from storing firearms in their personal vehicles on company property).

198. *See supra* Sections IV.B., IV.D.

199. *See* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 97, 100–01 (2009) (discussing using state employment initiatives to promote "the needed new thinking, experimentation, and flexibility [that] will most likely arise from a less centralized labor relations system").

200. *See, e.g.*, Secunda, *supra* note 3, at 36 (explaining the plan that California implemented that went beyond the General Duty Clause to help make the workplace safer).

201. *See id.* at 35.

202. *See id.* at 36.

203. CAL. CODE REGS., tit. 8, § 3342 (2017).

204. Secunda, *supra* note 3, at 38; CAL. CODE REGS., tit. 8, § 3342(d).

plan, and implemented training provisions for this plan for employees.[205]

Needless to say, similar proposals could be implemented by states with regard to employees' right to disconnect. Logs could be required if sickness or injury could be tied to overwork based on after-work communications, and employers could be required to include in their employee handbooks restrictions, and exceptions to those restrictions, on when employees can be contacted after work by electronic communications.[206] Moreover, managers, supervisors, and employees would all be trained on disconnection policies so all involved would be more sensitive to the unwanted consequences of such communication and when the benefits of such communications outweigh their costs in certain industries or at certain times.[207]

As with any OSHA state plan, the advantage of first utilizing state plans is that such plans may be "(1) better adapted to local needs; (2) more efficient; (3) more fairly enforced; and (4) more in keeping with traditional state regulation of safety and health matters."[208] It also seems that states, like California, that take workplace safety and health matters more seriously, have state plans that have more and better qualified personnel, more inspections, better legislative support, and more funding and resources.[209]

C. The Future of OSHA Regulation of the Right to Disconnect

Although the hybrid federalism of OSHA permits an initial regulatory response to the employee disconnection problem through the use of the general duty clause and state initiatives, I have previously concluded that a number of pressing questions remain unanswered and that:

> each of these questions suggests that a General Duty Clause claim

205. CAL. CODE REGS., tit. 8, § 3342(c), (e), (f).

206. *See* Secunda, *supra* note 3, at 37.

207. *See id.* at 36 ("[I]t appears from the workplace violence directives and regulations that it is important for employers to know the risk factors for excessively communicating with workers outside work hours.").

208. *See* ROTHSTEIN, *supra* note 184, at 42.

209. *See* Marion McKnight, *What are the Differences Between Federal vs. State OSHA Regulations?*, PHP SYSTEMS/DESIGNS (Feb. 3, 2016), https://www.phsd.com/blog/what-are-the-differences-between-federal-vs.-state-osha-regulations (explaining that some state programs are even stricter than federal regulations); *Occupational Safety and Health Administration (OSHA)*, INC., https://www.inc.com/encyclopedia/occupational-safety-and-health-administration-osha.html (last visited Mar. 4, 2019) (noting that state plans must include appropriate legislation, qualified personnel and inspectors, and appropriate regulations and procedures).

> alone will be insufficient long term to guard against safety and health concerns associated with after-work electronic communications, and that it will eventually be necessary for OSHA to consider promulgating a permanent standard on contacting workers electronically outside working hours.[210]

Not only does it make sense to have a permanent standard on workplace disconnection issues, but once an appropriate model of regulation is conceived, a single, national, uniform standard would promote predictability, uniformity, and consistency with how employees would be treated throughout the country.[211] For instance, and as discussed in *The Employee Right to Disconnect*:

> [a]though implementing a zero-tolerance policy, as is done with workplace violence, makes little sense in the disconnection context, employers could, nevertheless, develop and implement a well-written after-work electronic communication prevention program and put into place administrative controls, such as analysis of after-work communication practices, training on how to avoid such after-work requests, and create reports of policy violations.[212]

Regardless, because of the newness of this area of the law and the broad, express preemptive effect that such a specific standard would have under OSHA's statutory scheme, it would be important to learn lessons from state OSHA plans, like California's, to provide an effective regulatory model from

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210. *See* Secunda, *supra* note 3, at 34–35. Those questions include:
> [W]hat if the employer, like most employers these days, does not have a policy on after work electronic communications? Can it be said that the hazard is recognized in those circumstances? Additionally, what if electronic communications cause annoyances, stress, and inconveniences, but are not likely to cause death or serious harm? And finally, what if certain types of industries, by their very nature, require employees to be on call or to be in contact often after work with their employer?

Id. at 34.

211. *See generally* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 335 (1987) (noting that OSHA required a single definition of "employer" so that it was uniform throughout all of the states).

212. *See* Secunda, *supra* note 3, at 37 n.307 ("Engineering controls for workplace violence prevention, including alarm systems, panic buttons, metal detectors, mirrors, locks, and lighting, make less sense in the disconnection context. That being said, smartphone and other computer technologies could be utilized to keep track of how often employers are requesting, and employees are receiving, after work requests by texts, e-mail, or social media.").

which to work.[213]

It is also important to keep in mind that even with broad field preemption of an eventual disconnection standard, OSHA would provide another form of hybrid federalism by permitting flexibility for employers who can prove through the OSHA permanent variance process that they have come up with an equally effective model to protect their employees from the dangers of overwork associated with after-work electronic communications.[214] Through the variance process, the harshness of the field preemption approach can be militated against and allow employers to have contact with their employees after hours based on industry demands or the global nature of their businesses.[215]

VI. CONCLUSION

The hybrid federalism of OSHA is perfectly suited to address the privacy issues that derive from employees' inability to disconnect from the workplace because of increasing employer reliance on keeping employees tied to the workplace through smartphones, laptops, and other technological advances. Hybrid federalism is based on either a strong express preemption or implied field preemption on the one hand, combined with a complementary role for states to play in areas of implied conflict preemption or where no federal rule exists at all.

With regard to implementing right to disconnect regulations under OSHA, the hybrid federalism approach proposed here would start with strong federal enforcement through OSHA's general duty clause combined with more specific requirements under a number of state OSHA plans. Eventually,

213. *See id.* at 32 (noting that disconnection safety should be proposed "based on the template established by both OSHA and . . . CALOSHA, with regard to the somewhat related phenomenon of workplace violence").

214. *OSHA's Variance Program*, U.S. DEP'T OF LAB., https://www.osha.gov/dts/otpca/variances/ (follow "Types of Variances") (last visited Mar. 4, 2019) ("A permanent variance authorizes the employer(s) to use an alternative means to comply with the requirements of a standard when they can prove that their proposed methods, conditions, practices, operations, or processes provide workplaces that are at least as safe and healthful as the workplaces provided by the OSHA standards from which they are seeking the permanent variance."); *see also* 29 C.F.R. § 1905.11 (2018) (setting out regulatory requirements for obtaining permanent variance).

215. *See* Secunda, *supra* note 3, at 37. On the other hand, OSHA could target industries where employees' right to disconnect historically have been disregarded. *See id.* at 37 ("Disconnection policies could also be especially targeted for industries where after-work communication tends to be more frequent, such as healthcare, legal, and many retail positions.").

the hope would be that OSHA would promulgate a permanent disconnection standard mostly occupying the field of regulation, but still permitting states to provide even more generous protections under pre-approved State plans not preempted by the federal standard. In this way, not only can employees reclaim a modicum of privacy, autonomy, rest, and leisure, but also ensure that their work is the safest and healthiest it can be by being able to disconnect from it when appropriate and necessary.[216]

216. *See* 29 U.S.C. § 652(8) (noting that Section 3(8) of OSHA defines a safety and health workplace as one "necessary [and] appropriate to provide safe or healthful employment and places of employment"). This requires OSHA to establish that a permanent standard benefits employees' health and safety. *See* Secunda, *supra* note 3, at 19. I borrow the "necessary [and] appropriate" language to provide a guidepost for the proposed OSHA standard to meet in thinking about a future right to disconnect standard.

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